

Items to be discussed for the Civil Code (law of obligations) reform (6)

Part I. General principles on contracts

1. General discussion

It is generally understood that there are basic rules on contracts which are recognized by interpretation such as the principle of the freedom of contract, even though the current Civil Code does not explicitly provides provisions on such rules.

Accordingly, the following part (from 2 through 5) deals with the principles on which it is proposed that clarification through putting in a statutory form is necessary. What kind of points should we pay attention in examining basic principles on contracts?

2. Principle of the freedom of contract

It is generally understood that the principle of the freedom of contract contains the freedom to decide whether to form a contract, the freedom to decide contents of the contract, the freedom on the method of the contract. While it is pointed out that this is the most important basic principle on contract, the current Civil Code does not have a provision clearly stating about this principle. Therefore, there is a proposal that the principle of the freedom of contract which is recognized through interpretation even in the current Civil Code should be clearly stated in a statutory form.

(Related issues)

Clarification of the principle of consensual formation (*dakusei keiyaku*)

It is pointed out that, among the contents of the principle of contractual freedom, it is largely different depending on the history and legal policy of the state about the freedom of the method of forming a contract and its regulation. As to Japan, it is understood that under the current Civil Code a contract can be formed only with a consent of the parties as a general rule and no specific method is required (the principle of consensual formation). There is a view that this should be clearly stated in the text of law.

3. General provisions on formation of contract

While a series of provisions on formation of contract under the current Civil Code is composed mainly of an offer of a contract and an acceptance of the offer, there is a type of contract in real transactions which is not suitable to be arranged as one-offer and one-acceptance because an agreement is achieved through continuous negotiations. In addition, there are many cases that become a dispute over formation of contract in such kind of transactions. Accordingly, in order to provide a clue to resolve a dispute over formation of such contract, there is a view that a general

provision on required agreements to form a contract should be stipulated. On the other hand, it is pointed out that, in responding to such a view, it is difficult to stipulate a general provision considering diversity of real transaction forms.

Based on such debate, how do we consider the view that a general provision on formation of a contract should be stipulated?

4. Effect of contracts which are originally impossible

Although there is no specific provision in the current Civil Code on the effect of a contract when the purpose of the contract is objectively impossible at the original time of forming the contract (initial impossibility) such as when the subject matter had been extinguished at the time of forming a sales contract, case law and traditional theory understand that such contract is void. On the other hand, another view is strongly insisted that no differentiation should be made whether impossibility of performance exists initially or not. The reason for this view is that it is not proper to differentiate the obligor's responsibility of nonperformance of the obligation by whether the cause for impossibility of performance occurs before or after forming the contract.

Accordingly, there is a view that the effect of a contract which is initially impossible should be clearly stipulated in the text of the law as one basic rule on effect of contract.

5. Materialization of the principle of faith and trust in the claim-obligation relationship

It is pointed out that the principle of faith and trust (CC Art.1 (2)) has strong effect among the parties in the claim-obligation relationship, especially among the contractual parties who form a special relationship with their own will. For example, it is understood that the obligor owes various incidental duties in addition to the primary duty of payment even if there is no special agreement among the parties, and the obligee also owes duties such as a duty of cooperation at the time of receiving payment. The legal grounds for such duties rest on the principle of faith and trust in general.

Accordingly, there is a view that the principle of faith and trust should be materialized in the claim-obligation relationship so that the legal grounds for these duties become clearer.

Part II. Stage of contract negotiation

1. General discussion

While the current Civil Code has provisions on "formation of contract" from Articles 521-532, it has no provisions regulating rights and obligations of parties in the stage of contract negotiation. It is, however, pointed out that the relationship between the

parties who have entered into contract negotiation is closer than the relationship between the parties who have no contact yet and therefore each party owes an obligation based on the principle of faith and trust not to make the other party suffer from damages. There is also some case decisions which granted responsibility of a party based on the responsibility of the principle of faith and trust at this stage.

Accordingly, taking account of these case laws, the following part deals with issues such as unfair break of contract negotiation. In addition, what kind of points should we consider in deliberating regulation at the stage of contract negotiation?

2. Unfair break of contract negotiation

As a general rule, parties can enter into negotiation freely and decide whether to form a contract freely at the stage of contract negotiation (the principle of contract freedom). It is, however, pointed out that the relationship between the parties who have entered into contract negotiation is closer than the relationship between the parties who have no contact yet and therefore each party owes an obligation based on the principle of faith and trust not to make the other party suffer from damages. In a case of unfair break of contract negotiation, case law imposed liability in damages on a party who unfairly broke contract negotiation based on breach of duty of care under the principle of faith and trust in the stage of contract preparation.

It is also pointed out that, under modern transactions, there are many disputes concerning break of contract negotiation owing to the situation that there are increasing cases which have spent substantial time and money before forming contract according to increasing complexity of content of contract and negotiation process. Therefore, there is a view that a clear provision based on case law should be stipulated about liability in damages on a party who has unfairly broken contract negotiation.

3. Duty of explanation and provision of information in the process of forming a contract

It has been stated that it is a general rule that each party is self-responsible to collect the necessary information for concluding a contract. It is, however, pointed out that the relationship between the parties who have entered into contract negotiation is closer than the relationship between the parties who have no contact yet and therefore each party owes an obligation based on the principle of faith and trust not to make the other party suffer from damages. As a content of such duty, there are case decisions which granted liability in damages on the ground of breach of duty of explanation under the principle of faith and trust at the stage of contract formation.

Today, there are many cases where there is a gap in the amount of information

and the capacity to process information between parties. Considering such condition, there is a view that there should be a regulation on liability in damages based on breach of duty of explanation or information provision under the principle of faith and trust at the stage of contract formation.

4. Responsibility of negotiating parties over acts of a third party participated in contract negotiation

While there are many cases where parties of contract negotiation (negotiating parties) make a third party participate in contract negotiation or formation, the current Civil Code does not have a provision regulating responsibility of negotiating parties when the other party suffers damages owing to a conduct of such a third party. While case law and theory are consistent to the point that, as a conclusion, there is a case where the principal negotiating party becomes liable, there are several different views about the requirement and legal construction to impose such liability on the principal. Thus, the current situation is unclear about when the principal negotiating party owes responsibility of a conduct of the third party participant under what legal reasoning.

Accordingly, there is a view that a clear provision should be stipulated to the effect that a negotiating party owes liability in damages when a third party whom the negotiating party has made participate in contract negotiation or formation breaches the duties under the principle of faith and trust which are imposed in the stage before formation of a contract as prescribed in 2. and 3. In addition, what kind of points should we consider in deliberating regulation in the stage of contract negotiation before forming a contract?

Part III. Offer and acceptance

1. General discussion

As to the series of provisions on an offer and acceptance of contract (Articles 521-528 of CCP), the following part (infra 2.-8.) deals with issues which are pointed that reforms are necessary from the view point of whether they still have reasonableness under the modern society in which transportation measures and communication measures have highly developed. In addition, what kind of points should we consider in reviewing overall provisions on offer and acceptance of contract?

2. Concept of offer and acceptance

While the current Civil Code does not have a definition of an offer and acceptance and the meaning of these concepts are left to interpretation, there is a view that the meaning of an offer and acceptance should be clearly stated in the text of law as a

premise to stipulate a series of provisions on an offer and acceptance of contract.

(Related issues)

1 Necessity of a provision assuming that an offer exists

While it is understood that distinction between an offer and inducement of an offer is made by interpreting the intention of the party in respective case, it is pointed out that it is not necessarily clear whether one is an offer or inducement of an offer in practice.

Accordingly, there is a view that a provision should be stipulated on occasions which are assumed as an offer through extracting certain examples in which, at the time of receiving consent from the other party, it is regarded as unfair to give a choice whether to accept it (for example, exhibition of products and prices or proposals to unidentified persons through mailing catalogues).

2 Crossing offers

It also becomes a problem whether a contract is formed through crossing offers in the same way as when an offer and acceptance are matched. Prevailing theory understands that a contract is formed through crossing offers because the two manifestations of intent possess objectively the same content (objective accord) and both parties have the intent to form a contract involving that content with the other party (subjective accord). On the other hand, there is a view which denies formation of contract through crossing offers on the grounds that: there is no common awareness to the content of the contract as a formation requirement of a contract in crossing offers; parties should not be bound to the contract in which the party has given an offer but not received acceptance; and there would be an occasion where, in case of multiple offers are crossing, it cannot be indentified which pair of offers are matched.

As to this point, one view is proposed that a clear provision should be stipulated in the text of law as to formation of a contract through crossing offer from the stance to support formation of a contract through crossing offers.

3. Offer with a fixed term

(1) When the offeror reserves the right to revoke the offer

It is understood that an offer with a fixed term cannot be revoked until the period for acceptance lapses (binding effect of an offer, CC Art.521(1)) and the effect of an offer is lost when the period for acceptance lapses (CC Art.521(2)). Therefore, it seems that no problem arises as to possibility of revocation of an offer with a fixed term. However, when the offeror reserves the right to revoke the offer at the time of giving an offer of contract, theory understands that the binding effect of an offer does not reach such offeror and thus the offeror is able to revoke the offer.

Accordingly, there is a view that a clear provision should be stipulated in the text of law as to the effect that the binding effect of an offer does not reach the offeror when

the offeror reserves the right to revoke the offer.

(2) Late arrival of acceptance which should have arrived within the term for acceptance

It is a general rule that a contract is not formed even if an acceptance arrives after passage of the term for acceptance because the CCP states that the offer loses its effect if acceptance does not arrive within the fixed term for acceptance (CCP Art.521 (2)). However, when a notice of acceptance which has arrived late was sent at the time in which the notice would have been generally arrived within the term, Article 522 of the Civil Code imposes the duty of notice about the late arrival on the offeror when he or she was able to know that effect and protects trust of the offered through regarding that acceptance reaches in time if the offeror fails to perform such duty. There is, however, a view that there is no necessity to stipulate special provision on late arrival of acceptance (i.e., current provisions should be deleted) on the premise that the principle of dispatch should be changed into the principle of arrival as to the time when the effect of acceptance occurs (see, *infra* 7. "Time of formation of a contract between persons in distance"). On the other hand, there is another view that, adopting a view that the principle of arrival should be taken, Article 522 of the Civil Code should be maintained and it should be regarded that a contract is formed at the time of expiration of the fixed term for acceptance when the offeror fails to send a notice of late arrival.

How should we consider these two views: Article 522 of the Civil Code should be deleted/maintained?

(Related issues)

In case of an offer without a fixed term for acceptance

If we stand on the view that Article 522 should be maintained, there would be a problem that how to treat late acceptance vis-à-vis an offer without a fixed term.

(3) Effect of late acceptance

It is a general rule that an offer loses its effect if acceptance does not arrive within the fixed term for acceptance (Art.521 (2) of the CCP), and a contract is not formed even if acceptance arrives after passage of the fixed term. However, the offeror can regard the late acceptance as a new offer (Art.523 of the CCP) and a contract can be formed through further acceptance for that offer. Thus, there is a view that, in such case, the offeror should be able to treat the late acceptance as effective acceptance, not a new offer, through the offeror gives a notice to the person who sent acceptance without delay.

(Related issues)

In case of an offer without a fixed term for acceptance

While it is understood that Article 523 of the Civil Code can be applied to the case of an offer without a fixed term for acceptance, it is considered that “late acceptance” under such occasion means acceptance which arrives after passage of the effective period of that offer (competency for acceptance). Accordingly, there is a view that such interpretation should be clearly stated in the text of law.

4. Offer without a fixed term for acceptance to a party at a distance

(1) Effect of an offer without a fixed term for acceptance

Article 524 of the Civil Code provides on an offer without a fixed term for acceptance to a party at a distance that such an offer cannot be revoked until the lapse of a reasonable period for the offeror to receive a notice of acceptance. However, there is no specific provision as to the effect of an offer after passage of reasonable period.

While there is a strongly asserted view that the offer does not automatically lose its effect by passing reasonable period, there is a criticism on this view that the view is inappropriate because it enables the offered to give a notice of acceptance at any time otherwise the offer is revoked. Accordingly, there is a view that the time period during which an offer without a fixed term for acceptance is effective (competency for acceptance) should be clearly stated in the text of law.

(Related issues)

When an offer without a fixed term is given to unspecified persons

As to the effect of an offer (competency for acceptance) in cases where the offer does not have a fixed term for acceptance and given to unspecified persons, it is pointed out that special consideration is necessary. There is a view that, from the viewpoint of legal stability, a special provision should be stipulated such as the effect of the offer is uniformly lost upon passage of reasonable period.

(2) When an offeror reserves the right to revoke the offer

Article 524 of the Civil Code merely provides that, as to an offer without a fixed term for acceptance, the offeror cannot revoke the offer until the lapse of a reasonable period for the offeror to receive a notice of acceptance, and does not provide whether the offeror can reserve the right to revoke the offer. Theory understands this point that, similar to cases of an offer with a fixed term for acceptance, if an offer reserves the right to revoke the offer at the time of offering a contract, the binding effect of an offer does not reach such offer and the offeror can revoke the offer even within the period of reasonable period for the offeror to receive a notice of acceptance.

Accordingly, there is a view that a clear provision should be stipulated that as to an offer without a fixed term for acceptance, an offeror can also reserve the right to revoke the offer, and if the offeror does so, the offeror can revoke the offer even within the period of reasonable time period.

(Related issues)

Effective period of an offer when the right to revoke the offer is reserved

As to the period during which an offer without a fixed term for acceptance is effective (competency for acceptance), if we adopt the view that competency for acceptance remains for certain period even after the binding effect of an offer is extinguished upon the lapse of “reasonable period” and stand on the view that an offeror can reserve the right to revoke the offer even during the period during which the binding effect of an offer is effective (reasonable period for the offeror to receive a notice of acceptance), there is a view that, if such reservation is made, it is necessary to promptly stabilize legal relations and thus it should be considered that the effect of offer is lost upon the lapse of the reasonable period.

How should we consider the above stated view that the effect of an offer without a fixed term for acceptance (competency for acceptance) should be treated differently if the right to revoke an offer is reserved?

5. Offer between persons engaging in a dialogue

It is pointed out that the importance of provisions on contract between persons engaging in a dialogue is increasing owing to the rapid development of telecommunication methods. As to the effect of an offer without a fixed term for acceptance among persons engaging in a dialogue, for instance, while there is a provision in the Commercial Code Article 507 that the effect is lost if the other party does not accept immediately as a special provision between merchants, the current Civil Code does not have a provision corresponding to this.

Accordingly, there is a view that, referring to such provisions in the Commercial Code, regulations of effects of an offer between persons engaging in a dialogue should be clarified.

6. Death or loss of capacity to act of the offeror

While Article 525 of the Civil Code provides exceptions in which Article 97 (2) of the Civil Code is not applied, there is a view that among the terms, “where the offeror expresses his/her intention to the contrary” is natural provision and thus should be deleted.

In addition, as to the concrete scope of application of “other party has come to know the fact of the offeror’s death or loss of capacity to act,” while the general understanding is that this provision is applied to the case of offeror’s death or loss of

capacity to act after dispatching and before arriving the offer, there is another view that the provision is applied to offeror's death or loss of capacity to act until dispatching a notice of acceptance from the offered. A view is proposed that legislation should be made based on the latter view.

7. Time of formation of a contract between persons at a distance

Article 526 (1) of the Civil Code on the time of formation of a contract between persons at a distance provides that a contract is formed when a notice of acceptance is dispatched and thus adopts the principle of dispatch, which is exception of the principle of arrival of manifestation of intent (Art.97 (1) of CC).

It has been previously doubted on how to consistently understand this provision with regard to the relationship with Article 521 (2) which regulates the occasion when a notice of acceptance does not arrive within a fixed term for acceptance. In addition, it is pointed out that today there is little necessity to establish exception of the principle of arrival because there is low possibility that a notice of acceptance arrives with delay. Accordingly, there is a view that the principle of arrival should be adopted to acceptance as well.

(Related issues)

1 Review of Article 526 (2) of the Civil Code (formation of contract through an act realizing an intention of acceptance)

There is a view that, upon proposing to adopt the principle of arrival as to acceptance, Article 526 (2) should be maintained as to formation of contract through an act realizing intention.

2 Deletion of Article 527 of the Civil Code (late arrival of the notice to revoke an offer)

There is a view that, apart from the current Civil Code, if the principle of arrival is adopted as to acceptance, special provisions such as Article 527 of the Civil Code should be deleted and formation of contract should be decided, following general principle, based on which manifestation of intention becomes effective first.

8. Acceptance with modification of the offer

Article 528 of the Civil Code provides that acceptance with modification of an offer is regarded as refusal of the original offer and making a new offer, and if the original offeror accepts this renewed offer, a contract is formed. There is an interpretation that the modification here requires, even though its concrete content is unclear from the text of law, importance to the extent relating to formation of the contract considering the whole contract, and if the modification involves only alteration of slight incidental content, that acceptance with modification is effective as acceptance.

Based on this interpretation, there is a view that, maintaining basic regulation of

Article 528 which regards acceptance with modification of an offer as refusal of the original offer and making a new offer, the standard to decide whether acceptance with modification is still effective as acceptance of the original offer should be clearly stipulated in the text of law.

Part IV. Advertisements offering prizes

1. General discussion

As to the series of provisions on advertisements offering prizes (CCP Arts.529-532), the following problems are pointed out as stated through 2 to 4. In addition, what kind of point should we consider in reviewing the provisions on advertisements offering prizes?

2. When the designated act is performed without the knowledge about the advertisement offering prizes

It is not clear under the text of law whether a person who conducted the designated act without knowledge of the advertisement offering prizes has the claim for the set reward vis-à-vis the offeror of the prizes (CCP Art. 529). While there are theoretical debates over the legal nature of the advertisement offering prizes, it is pointed out that as a conclusion it is reasonable to grant the claim for the reward to such person. Accordingly, there is a view that, premising that the legal nature of the advertisement offering prizes is left to interpretation, it should be clearly stated in the text of law that a person who has performed the designated act without knowledge of the advertisement also obtains the claim for the reward.

3. Effect and revocation of advertisements offering prizes

(1) Effects of advertisements offering prizes

While the current Civil Code has the provision on revocation of the advertisements offering prizes (CCP Art.530), there is no clear provision on by when the effect of such advertisements lasts. As to this point, there is a view that: it is reasonable to make distinction between the advertisements offering prizes by whether the fixed term for performing the designated act is set or not; in case of the advertisements with a fixed term, the effect of the advertisement loses when the fixed term passes, whereas in case of the advertisements without a fixed term, the effect of the advertisements loses after passage of reasonable period for performing the designated act; and this shall be clearly stated in the text of law.

(2) Period in which an advertisement is revocable

It is pointed out that the regulation under Article 530 (1) and (3) of the Civil Code

that provides the period in which an advertisement is revocable should be reformed from the viewpoint that expectation of third parties who have initiated to perform the designated act should be protected. It is proposed that, in case where a fixed term for performing the designated act is set by the offeror, for example, a provision should be stipulated which makes an advertisement irrevocable for that fixed time period.

(3) Method of revocation

Article 530 (1) and (2) of the Civil Code provides that the method of revocation should be primarily a method identical to that used for the original advertisement, and if such method is impossible, another method is available. However, when another method is taken for revocation, such revocation is only effective to the persons with knowledge of the revocation (Art.530 (2) of CCP). It is pointed out that there is no reasonable ground to prohibit or restrict the method of revocation because the limitation is already imposed on the method other than the method identical to that used for the original advertisement. Accordingly, based on such indication, there is a view that the provisions on the method of revocation should be reformed.

4. Rights to receive rewards of advertisements offering prizes

Article 531 of the Civil Code provides the method to decide the person who has the right to receive the reward when more than one person have performed an act designated in the advertisement assuming the intention of the advertiser. There is, however, criticism that there is no ground to stipulate such method as provided in Article 531 (1) as a general rule because who entitles to the reward can be decided solely based on the intention of the advertiser. In addition, there is a view that Article 531 (3) should be deleted because it is not a mandatory rule and thus unnecessary.

Accordingly, based on such awareness, a view is proposed that the provision stipulating the method to decide the person who has the right to receive the reward when more than one person have performed the designated act should be reformed.

Part V. General Conditions (Definition and Requirements)

1. General discussion

The current Civil Code does not have special provisions on general conditions. In the modern society, general conditions are, however, used in a variety of transactions which affect citizens' life such as transportation agreements of trains, buses, or airplanes, various kinds of insurance agreements, or bank transaction agreements, and thus have significant meaning as a method to process mass amount of transactions reasonably and efficiently. On the other hand, it is pointed out that there are problems in transactions with general conditions because there are insufficient opportunities for the other party to know the content and the interest of the other party

may be infringed.

Accordingly, dealing with the problems raised on general conditions, there is a view that provisions regulating general conditions should be stipulated in the Civil Code from the viewpoint to secure stability of transactions with general conditions. In discussing about such view, we need to consider definition of general conditions (infra. 2), requirements to include general conditions into a contract (infra. 3), and related problems. In addition, what kind of point should we consider?

[Note] Although there is an issue, as an issue on general conditions, regarding the effect of those terms which has become a content of the contract by general conditions and are disadvantageous to one party, this issue will be discussed in another opportunity.

2. Definition of general conditions

In setting forth new provisions on general conditions, there is an issue on how to define general conditions. For example, there is a legislative proposal that general conditions mean the whole body of contract terms which are preformulated in order to use for large amount of contracts. On the other hand, it is pointed out that such definition would expand the scope of regulation to the subject which is not expected to be regulated under the regulation of general conditions under the current contract practice. Considering these indications, how should we consider definition of general conditions which will be the subject of regulation?

(Related issues)

1 Terms adopted through individual negotiation

There is a view that, when a contract is formed based on substantial negotiation as to individual terms, such terms should be outside of the regulation of general conditions because it is considered that the problems which arise from the use of general conditions have been resolved through that negotiation. However, as to this view, it is pointed out that it is rarely expected that general conditions take the process of truly substantial individual negotiation, and it is difficult to decide the subject of regulation through the standard of existence of substantial individual negotiation. Based on this discussion, how should we consider treatment of terms which are adopted through individual negotiation?

2 Contract terms relating to the central part of the contract

Whether the terms providing primary contents of payment of a contract (contract terms on the central part) should be subject to the regulation of general conditions is an issue in relating to the definition of general conditions in a form whether such terms are within the scope of application of regulatory provisions on unfair terms. Conclusions of theories are inconsistent and the views are split to date.

There are following legislative proposals on this issue: whether the terms are subject to regulation of general conditions should be left to interpretation and no explicit provision is necessary; and while it is a form of general provision regulating unfair terms, contract terms on the central part should be excluded from the scope of application of regulatory provisions on unfair terms.

Based on these proposals, how should we consider about the treatment of contract terms on the central part of the contract?

3. Requirements to make general conditions contents of a contract (Requirements for incorporation of general conditions)

A problem is pointed out that in a contract using general conditions, there are many cases that a contract is formed remaining the other party not sufficiently recognizing the content of the general conditions. Accordingly, it is pointed out that, paying attention to the requirements of reasonable and efficient processing of mass transaction business, it is necessary to harmonize the interest of the other party as to recognizing the content of the contract.

Accordingly, as to the requirements to make general conditions contents of individual contract (requirements for incorporation of general conditions), a view is proposed that, for instance, requiring disclosure of the general conditions to the other party as a general rule, exceptional requirements should be established for an occasion where disclosure of the general conditions are practically difficult.

(Related issues)

Surprise terms

There is a view that even if the requirements for incorporation of general conditions are satisfied, those terms which the other party cannot reasonably expect (surprise terms) do not become a content of the contract. This view excludes surprise terms from incorporation of general conditions as a prior issue of regulating unfair contents of contract terms. On the other hand, there is another view that the problem of surprise terms is the issue of regulating the content of contract terms. Accordingly, how should we consider the view that regulation of surprise terms should be stipulated if provisions on general terms are set forth in the Civil Code?