

Items to be discussed for the Civil Code (law of obligations) reform (7)

Part I. General principles on juridical acts

1. General discussion

As general provisions on juridical acts, the current Civil Code has only three provisions of public policy (CC Art.90), manifestation of intention inconsistent with default rules (CC Art. 91), and custom inconsistent with default rules (CC Art.92). It is stated that the meaning of the basic concept of “juridical acts” and scope of applications of general rules of public policy are unclear (see, 2 below). Accordingly, what kind of points should we consider in reviewing these general provisions on juridical acts?

2. Effects of a juridical act

(1) Clarification of the meaning of a juridical act in the text of law

Under the current Civil Code, at the beginning of the general provisions on juridical acts, there is a provision stipulating occasions where a juridical act becomes void as an exception but there is no general provision defining the meaning of a juridical act. Thus, it is pointed out that the basic concept of the juridical act is unclear. On the other hand, it is also pointed out that a juridical act is a concept involving various types of acts and thus it is uneasy to provide the definition precisely, and therefore stipulating a provision defining a juridical act may make the situation confusing.

Accordingly, there is a view that the meaning of a juridical act should be clarified in the text of law through stating simply the general principle that the effect of a juridical act accrues based on manifestation of intention.

(Related issues)

Definition provision and clarification provision of juridical acts

It is pointed out that defining the concept of a juridical act precisely is not easy and stipulating such provision may make the situation confusing. Therefore, a view is proposed that substantial definition or clarification of juridical acts should not be provided in the Civil Code. However, there is another view that, while substantial definition of juridical acts is not necessary, a formalistic definition in a form that “under this Act, a juridical act means a contract, a single act, and a joint act” should be provided.

(2) Concretization of the meaning of “against public policy” (clear statement on acts seeking excessive profits)

Article 90 of the Civil Code has been utilized in various occasions as a general

term applied to cases where the effect of a juridical act should not be affirmed. There is a view that a clear provision should be established about so-called an act seeking excessive profits (*bōri kouī*) (traditionally, acts obtaining excessive profits taking advantages of other person's poverty, carelessness, or non-experience) based on past case law and established theories in order to concretize the meaning of against public-policy.

(Related issues)

Reconsideration of traditional requirements to acknowledge an act seeking excessive profits

Traditional requirements to acknowledge an act seeking excessive profits which were presented by the representative case law (Supreme Court decision May 1, 1934, Minshu vol.13, 875) are (1) taking advantages of other person's poverty, carelessness, or non-experience (subjective requirements), and (2) an act obtaining grossly excessive profits (objective requirements). However, based on awareness of the problem that these requirements are not necessarily suitable to modern transactions, there are concrete legislative proposals which try to modify these requirements.

For example, there is a proposal which adds a condition of subordination, suppression, no knowledge, or lack of knowledge in addition to traditional requirements as to subjective requirements. This view also proposes that it should be clearly stated that these factors for consideration are merely examples and not exclusive.

In addition, as to objective requirements, there are proposals such as deleting "grossly" from "grossly excessive profits" and thereby relaxing this requirement, and adding a new consideration that there is a necessity to grant remedy when the other party's rights are damaged even if the other party does not obtain "unfair interests." Accordingly, how should we reconsider the traditional requirements to acknowledge an act seeking excessive profits?

(3) Deletion of the term "with any purpose" (Art. 90 of the Civil Code)

Article 90 of the Civil Code voids a juridical act "with any purpose" which is against public policy under its term. However, according to general understanding of the current case law and theories, whether an act is void or not is decided based on not whether the purpose of such juridical act is against public policy, but whether that juridical act itself is against public policy, considering its process and other circumstances. Accordingly, there is a view that the term "with any purpose" should be deleted from the text of law in order to clarify that effect.

3. Manifestation of intention which is inconsistent with default rules (Art. 91 of the Civil Code)

While Article 91 of the Civil Code provides that manifestation of intention prevails

over laws and regulations “not related to public policy”(default rules), there is no clear regulation as to the relationship between enforcement rules and manifestation of intention in that article nor Article 90. In addition, it is pointed out that the relationship between the term “public policy” under Article 91 and the term “public policy or good public moral” under Article 90 are unclear because Article 91 mentions “public policy” only. Furthermore, it is pointed out that the current law is problematic in relation to the principle of self-autonomy because Article 91 can be understood as it involves the principle that “manifestation of intention which is inconsistent from any laws and regulations has no effect” from the form of its provision. Accordingly, there is a view that, based on these indications, Article 91 should be revised in a way such as clarifying the effect of a juridical act which contradicts with enforcement rules.

4. When there is a custom inconsistent with default rules (Art. 92 of the Civil Code)

As to cases where there is a custom inconsistent with default rules, Article 92 of the Civil Code provides that the custom prevails when it is acknowledged that the parties of juridical acts have an intention to follow the custom. There is a theoretical debate over understanding of the relationship between the custom and the default rule. In addition, it is pointed out that there is contradiction among legislation because the expression under Article 3 of the Act on General Rules of Application of Laws seems that a default rule subordinates a custom.

Accordingly, there is a view that Article 92 and related provisions should be reformed in a direction to resolve such contradiction through legislation. On the other hand, there is another view that current situation should not be largely altered through reform as to this issue.

Part II. Mental Capacity

The view that the effect of a juridical act which is conducted with lack of mental capacity is not effective is undisputed both in the case law and theories and sometimes stated as one of the basic legal theory in the Civil Code. However, the current Civil Code does not have a provision clearly stating that effect.

1. Requirements (Definition of mental capacity)

It is understood that under the current Civil Code the term “constantly lacks the capacity to discern right and wrong” in the provision on capacity to act means the condition of lacking mental capacity (CC Article 7). Thus, it is proposed that mental capacity should be defined using the term “the capacity to discern right and wrong”. On the other hand, there is another view that mental capacity should be defined as “the capacity to discern the meaning to conduct a juridical act,” pointing out that

employing the term in Article 7 is inappropriate because this term has been employed to show the capacity required to the person injured in deciding comparative negligence of the tort under case law.

(Related issues)

Special provisions on acts concerning daily life

There is a view that, even if manifestation of intention is made with lack of mental capacity, when such an act falls under “acts concerning daily life,” that act should be definitely effective and that effect should be clearly stated in the text of law. The reason for this view is that if “acts concerning daily life” is voidable on the ground of mental incapacity, the effect of juridical acts becomes unstable for the other party in transaction and adult guardians may become unable to correspond to the necessity to conduct daily acts for the principal. On the other hand, it is pointed out that if manifestation of intention concerning daily life is effective regardless of mental incapacity of the person who manifested such intention, there is a thread that sufficient protection of the person with lack of mental capacity may not be achieved.

2. Effects

While the case law understands that the effect of a juridical act which is made with lack of mental capacity is void, it is generally understood that this ineffectiveness can be asserted only from the side of the party with mental incapacity (relative ineffectiveness). Based on this understanding, there is a view that it should be stipulated that the effect of a juridical act with mental incapacity is avoidable by the party with mental incapacity, pointing out that the effect of relative ineffectiveness is almost same as the effect of avoidance. On the other hand, there is another view that the effect should be void based on general interpretive understanding of the current law (the fact that this effect is relative ineffectiveness should be left to interpretation).

Part III. Manifestation of intention

1. General discussion

As to provisions on manifestation of intention under the current Civil Code, there are accumulations of various case law theories since its legislation, and the situation has been largely changed such as important special provisions are established in the Consumer Contract Act. Accordingly, the following problems (2.-7.) are stated in order to clarify and modernize related provisions based on practice and achievements of theories to date. In addition to these issues, what kind of points should we pay attention in reviewing provisions on manifestation of intention?

2. Mental reservation (Art. 93 of the Civil Code)

(1) Requirements to make an act void

While Article 93 of the Civil Code provides on manifestation of intention “the person who makes the manifestation knows that it does not reflect his/her true intention,” there is a view that this includes cases where the person expects that the other party becomes aware of his/her true intention (manifestation of untrue intention) and cases where the person conceals his or her true intention in order to make the other party misunderstand (mental reservation in a narrow sense) and these occasions should be differentiated. This view insists that in case of mental reservation in a narrow sense the person conceals the true intention for the purpose of making the other party misunderstand, and thus there is no necessity to make that manifestation of intention void merely because the other party could have known the true intention (proviso in Article 93) and that manifestation should be void only when the other party knew that it was not the true intention. Based on this view, there is a proposal that the requirements for making manifestation of intention void owing to mental reservation should be reviewed.

(2) Provisions to protect a third party

While Article 93 of the Civil Code does not have a special provision to protect a third party who newly had interests premising manifestation of intention through mental reservation, there is a strongly supported view in the theory that such third party can be protected through analogical application of the provision of fictitious manifestation (CC Article 94 (2)).

Accordingly, there is a view that a provision to protect a third party which is similar to that of fictitious manifestation should be established.

3. Fictitious manifestation of intention

Case law has expanded various theories which analogically applies the provision of protecting a third party without knowledge in fictitious manifestation (CC Article 94 (2)) based on understanding that this provision stipulates protection of a person without knowledge on the ground of apparent legal theory. Thus, there is a view that the contents of expanded theories should be clearly stated in the text of law. On the other hand, it is pointed out that the requirements and limitations of analogical application of that provision have not yet established. In addition, this theory of analogical application is considered that it substantially modifies the rule which denies protection of a person who peacefully and openly entered into real property transaction and possessed real property. Therefore, it is pointed out that establishing an express provision on this theory would bring serious impact on the law of property as a whole, achieving the same result as newly establishing a provision to

protect a third party concerning transfer of property rights. Based on these indications, how should we consider the view that the theory of analogical application of Article 94(2) of the Civil Code should be stipulated in the text of law?

4. Mistakes (Art.95 of the Civil Code)

(1) Mistakes in motivation

It seems that “mistakes” under Article 95 of the Civil Code is not applied to mistakes in motivation which involve mistakes in the process of forming intention based on traditional interpretation that “mistakes” in that provision means inconsistency with internal intention to bring an effect. However, case law understands that Article 95 is applied even to mistakes in motivation when the motivation becomes a content of a juridical act expressly or impliedly and also becomes an element of a juridical act. Accordingly, there is a view that such case law theory should be clearly stated in the text of law.

(2) Clarification on mistakes of elements of a juristic act

Article 95 of the Civil Code provides “there is a mistake in any element of the juristic act in question” as occasions when manifestation of intention becomes void due to mistake. However, concrete content of this “element” is not clear from the text of law. Case law understands this element as major part of the content of manifestation of intention in question and the person would not make the manifestation if he/she had not made such a mistake, and not doing so is also socially justified considering general concept of transactions. The theories generally accept this case law. Accordingly, there is a view that this content of “element” should be clearly stated in the text of law based on understanding of the case law.

(3) When a person who makes manifestation of intention is grossly negligent (Art. 95, proviso, of the Civil Code)

Proviso of Article 95 of the Civil Code provides that the person who made the manifestation of intention may not assert such nullity by himself/herself if he/she was grossly negligent. However, it is understood that, for example, when the other party knows that manifestation of intention by the said person is based on mistake, the said person can assert that the manifestation is void due to mistake even if the said person was grossly negligent in making that mistake because it is not necessary to protect trust by the other party. Accordingly, there is a view that occasions where the person can assert nullity of the manifestation due to mistake even if the person was grossly negligent should be concretely listed and clarified in the text of law.

(4) Effects

When manifestation of intention was made based on mistake, the effect of that manifestation is void under the text of law (CC Art.95). It is pointed out that there is an established case law theory that persons other than who made manifestation of intention cannot assert nullity as a general rule and thus its effect is almost same as avoidance. Based on this, there is a view that the effect of mistake should be merely avoidable.

(Related issues)

Liability in damages of the person who made manifestation of intention based on mistake

There is a view that an express provision should be established as to liability in damages of the person who made mistake including the meaning that the person can be liable in damages even if the person was not negligent in making mistake. On the other hand, there is another view that the liability of the person who made mistake should be left to general rules of tort and there is no necessity to stipulate special provisions.

(5) Provisions to protect a third party

In Article 95 of the Civil Code, there is no term protecting a third party who started having interests in the legal relationship premising the existence of manifestation of intention made with mistake. However, there is an opinion that Article 96(3) of the Civil Code should be analogically applied to assertion of nullity due to mistake because it is unreasonable that, in case of mistake due to fraud, whether the third party can be protected depends on whether he or she asserts fraud or mistake.

However, there is another opinion that in case of fraud, the person who made manifestation of intention is protected even if the mistake occurred not in element of the juridical act and even if the person was grossly negligent, and the provision protecting a third party was established considering the balance with such provision protecting the person made the manifestation, and thus analogical application should not be made to mistakes.

Under such a theoretical debate, there is a view from the former stance that a provision to protect a third party should be stipulated for mistake as well.

5. Fraud or dress (Art. 96 of the Civil Code)

(1) Fraud by silent

The theory understands that certain circumstances can acknowledge fraud under Article 96 of the Civil Code even when a person does not positively make fraudulent conduct but making the other person manifest intention based on mistake through not notifying the facts that should be represented (fraud by silent). There is a judicial decision that silent can constitute fraudulent act when a person did not represent facts

which the person had the duty to notify based on the principle of good faith. Accordingly, there is a view that an express provision should be stipulated on fraud by silent.

(2) Fraud through a third party

In cases any third party commits any fraud inducing any person to make a manifestation of intention to the other party, such manifestation of intention may be avoided only if the other party knew such fact (CC Art. 96(2)). However, there is a strongly supported view in theories that manifestation of intention may be avoided not only when the other party knew that fact but also was able to know.

Accordingly, there is a view that the law should be clarified in the way that in cases a third party commits fraud the person made the manifestation of intention can avoid the manifestation when the other party was able to know about such fact.

(Related issue)

When the third party who committed fraud was the person over whom the other party was responsible such as representative or others

There is a view that when a person over whom the other party shall be responsible committed fraud, such as an employee of the legal corporation, avoidance should be admitted regardless of whether the other party knew the fact because it is unavoidable to be regarded as the other party itself had committed that fraud.

(3) Provisions to protect a third party

Article 96 (3) of the Civil Code provides that rescission of manifestation of intention due to fraud cannot be asserted against “a third party without knowledge,” not requiring without negligence. However, there is a strongly supported theory that the ground of this provision is the theory to protect appearance and thus such a third party should be without negligent because the trust must be legitimate in order to be protected.

Accordingly, there is a view that in a provision to protect a third party in case of manifestation of intention due to fraud the law should expressly state that the third party should be without negligence and knowledge in order to be protected.

6. Expansion of provisions on manifestation of intention

In the midst of social and economic change and increasing complex and diversification of transactions, it is pointed out that the current provisions on manifestation of intention under the Civil Code cannot sufficiently meet with the real condition of transactions. In concrete, there is a view that, referring provisions on misrepresentation or non-representation of disadvantageous facts, the similar

provisions should be established in the Civil Code as general rule not limited to consumer contracts.

Accordingly, we discuss this view in the following (1) and (2). In addition, what kind of points should we consider in deliberating the necessity of establishing new regulatory provisions as to general rule on manifestation of intention in the Civil Code based on the real conditions of modern transactions?

(Note) As stated above, this part discusses the necessity of new regulatory provisions as to general rule on manifestation of intention in the Civil Code based on the real condition of modern transactions, and we do not deal with the opinions on establishing special rules targeting only consumer contracts (for example, the same rule as Article 4 (1)(ii) of the Consumer Contract Act) in the Civil Code.

In addition, this part neither deal with how the provisions of the Consumer Contract Act should be, which could be a problem in case of establishing general rules involving the purpose of provisions in the Consumer Contract Act.

(1) Misrepresentation

Even under the current law, the Consumer Contract Act stipulates the consumer's right to rescind a contract when a business operator represents what is not true as to an important matter at the time of solicitation and thereby the consumer has manifested intention making mistakes as to the said matter even if such mistakes come under fraud or mistake under the Civil Code (Art.4(1)(i) of the Consumer Contract Act).

It is pointed out that, when a person is notified a wrong fact as to matters which would affect the decision whether a contract should be concluded, the person who has manifested intention based on such a wrong fact should be protected whether or not he or she is a consumer because that decision making becomes necessarily improper.

Accordingly, there is a view that a provision to protect a person who manifests intention based on misrepresentation as a general rule not limited to consumer contracts should be established, referring to the above provision in the Consumer Contract Act.

(Related issues)

Misrepresentation by a third party and a provision to protect a third party

It is pointed out that misrepresentation is an extension of fraud in a point that it focuses on incompleteness of a person's decision making and manifestation of intention caused by unfair solicitation by the other party.

Based on such indication, there is a view that, when a third party makes misrepresentation, it should be regarded similarly as a third party commits fraud and a similar provision should

be stipulated.

In addition, from the same perspective, there is a view that a provision to protect a third party should be stipulated as to protection of a third party who has become to have interests in the legal relationship on the premise of manifestation of intention through misrepresentation similarly as cases of manifestation of intention through fraud.

(2) Failure to represent disadvantageous facts

Under the Consumer Contract Act, consumers are entitled to the right to rescind a contract if a business operator represents to the consumers advantages of the consumers as to important matters or matters relevant to such important matters but intentionally fails to represent disadvantageous facts (non-representation of disadvantageous facts), and said consumers thereby mistakenly believe the non-existence of such facts (disadvantageous facts) and manifest intention (Art.4(2) of the Consumer Contract Act). Similar to above (1), it is pointed out that there is necessity to protect a person who manifests intention generally not limited to consumers in such cases.

Accordingly, there is a view that a provision to protect a person who manifests intention through non-representation of disadvantageous facts as a general rule not limited to consumer contracts should be established, referring to above provision in the Consumer Contract Act.

7. Arrival of manifestation of intention and capacity to receive it

(1) Time when the effect of manifestation of intention accrues (Art. 97 of the Civil Code)

While Article 97 (1) provides “at time of arrival” as to the time when the effect of manifestation of intention accrues, it is generally explained today based on accumulation of case law that this “time of arrival” means the time when it is recognized that based on social notion objective conditions have accrued under which the other party could have known the existence of manifestation of intention.

There is a view that a standard for deciding arrival of manifestation of intention which is as concrete as possible should be stipulated in the text of law because the issue of when manifestation of intention is arrived is one of the most important problems in practice.

(2) Object of the principle of arrival for manifestation of intention

While the object of Article 97 (1) of the Civil Code, which provides for the principle of arrival for manifestation of intention, is “manifestation of intention to a person at a distance,” it is understood that this regulation is applicable to manifestation of intention

between parties in dialogue.

Accordingly, there is a view that the object of the principle of arrival for manifestation of intention should be clearly stated in the text of law, including that effect.

(3) When acceptance of manifestation of intention is refused

It is pointed out that arrival or non-arrival of manifestation of intention and its time often become an issue in litigation when the other party becomes delayed to know or does not know manifestation of intention because of the other party's refusal of manifestation of intention which should have been commonly arrived to the other party in time. In such a case, there is a view that based on accumulation of case law, if a person who manifests intention has completed what the person's side should have done in order to make the other party know the content of manifestation of intention, it should be regarded that the risk of loss or damages of manifestation of intention is shifted to the other party, and manifestation of intention has been arrived at the time when the other party refuses to receive it without justifiable ground.

Accordingly, based on such opinion, it is proposed that when manifestation of intention is made in a method which should be generally reach to the other party and the other party fails to perform necessary conduct for arrival without justifiable ground and thereby such manifestation of intention fails to reach to the other party, as a legal fiction it should be regarded that such manifestation of intention has been arrived.

(4) Effect of manifestation of intention which is arrived or accepted after the parties become lack of mental capacity

Under the current Civil Code, there is no provision as to effect of manifestation of intention when a person who makes manifestation of intention became lack of mental capacity after dispatching manifestation and before it is arrived to the other party, or when a person receives manifestation of intention of the other party with the condition lacking mental capacity. Accordingly, premising that a new set of basic provisions on mental capacity is established, there is a view that the effect of manifestation of intention under such occasion should also be stipulated.