Items to be discussed for the Civil Code (law of obligations) reform (8)

Part I. Regulation of Unfair Terms

1. General discussion

With regard to contract relationships, the principle of contractual freedom including freedom to decide contents of contracts is applied and thus parties to the contract can decide the content of the contract freely as a general rule. Accordingly, it is understood that legal intervention toward contents of contracts should be limited to requisite minimum. However, in current society, there is actually a disparity of information or negotiation power between the parties in transaction. Thus, it is pointed that there are occasions where leaving to the principle of contractual freedom is not necessarily appropriate. Based on such point of view, awareness is presented that there is an occasion where it is necessary to intervene to the content of contracts and to deny the binding effect of contract terms which involve unfair contents in order to avoid the situation that an inferior party in information, etc. suffers unfair disadvantages.

Under the current Civil Code, regulation of such unfair terms is based on reasonable interpretation of individual contract terms and interpretation of general provisions such as Article 1 of the Civil Code. Such treatment is not legally stable and thus there is a situation that foreseeability is not secured until case law is sufficiently accumulated. Accordingly, there is a proposal that a provision regulating such unfair terms should be established in the Civil Code.

If such a provision is regarded as necessary, it is considered that we need to deliberate on types of contracts which are subject to unfair term regulation (below 2), general requirements and effect (below 3) as well as a concrete list of terms to be denied its binding effects as unfair terms (below 4). In addition, what kind of point should we consider in deliberating this issue?

2. Subject of unfair term regulation

[Note] In the following discussion, in order to make reference for the future discussion on the necessity to regulate unfair terms under the Civil Code, deliberation is conducted as to what kinds of regulatory contents are necessary in stipulating provisions.

(1) Contracts using general conditions

It is stated that contracts using general conditions involve problems such as that the other party of the user of general conditions cannot substantially participate in formation of contractual contents and may agree with application of general conditions

without recognizing the contents of the general conditions. Thus, it is pointed that the basis for contractual freedom is lost in such contracts from the aspect that guarantee of reasonableness through participation of both parties in formation of contractual contents is not functioning. Based on such indication, there is a view that regulation of unfair terms targeting contracts using general conditions should be introduced.

(2) Regulation of individually negotiated terms

As to terms which have been adopted through individual negotiation between the parties, there is a proposal that such terms should be excluded from the scope of the regulation because it is expected that both parties had an opportunity to participate in forming such terms of the contract through negotiation and thus there is no reason of regulating such terms. On the other hand, there is another view that in order to avoid spoiling the purpose of unfair term regulation by formally conducting individual negotiation, the regulation should cover even those terms which have been formed through individual negotiation.

(3) Terms on the central part of contracts

There is a debate whether the central part of contracts such as major purpose of the contract or balance with the price should be subject to unfair term regulation. There is a view that such part should not be subject to the regulation because it should be left to market decision. On the other hand, there is another view that the central part of contracts should also be subject to unfair term regulation because there are some contracts under modern complex transactions which we cannot expect that the parties make substantial agreement.

3. Contents of general provisions on unfair terms

(1) Standard to decide unfairness

There are several proposals as to what should be the concrete standard or the concrete frame in deciding unfairness of terms of a contract. In addition, there are diverse forms of regulations in foreign countries. In concrete, there are following issues to discuss: ① what are the standard contents which should be compared to the terms at issue (whether limited to discretionary provisions);② whether unfairness should be decided with the relation to particular other party or it should be decided unilaterally as to multiple parties who are expected to adopt the terms at issue;③ what are the elements for consideration in deciding unfairness; and ④ what is the standard for deciding unfairness.

(2) Effects of occasions where one term is regarded as an unfair term

While the binding effect of a term which is found as an unfair term is denied, there is a debate whether the binding effect of one part of the term is denied to the extent that it is found unfair or the binding effect of the whole term which includes unfair part is denied. In addition, as to the part of which the binding effect is denied, there is another debate whether such part should be void or voidable.

4. List of terms falling under unfair terms

(1) Necessity to make a list of unfair terms

There are varieties of terms which should be regulated as unfair terms in practice. Thus, it is unavoidable that a general provision on regulation of unfair terms becomes a provision of abstract conditions in order to cover all these possible terms. Accordingly, it is pointed out that it would be difficult for the users of contract terms and the other parties to decide what kind of terms comes under unfair terms by merely referring to such a general provision. Therefore, it is pointed out that a list of concrete unfair terms should be made and put in the provision for the purpose of facilitating disputes over unfair terms and showing a guideline for interpreting the general provision.

In addition, there is a proposal that, in preparing a list of unfair terms, two kinds of lists should be prepared: a list of terms which are automatically found as unfair and the user is not allowed to claim and establish a reason denying unfairness (so-called “black list”); and a list of terms the user can reverse the evaluation of unfairness through claiming and establishing a reason denying unfairness (so-called “gray list”).

(2) Example of a list (black list)

In examining a form of regulating unfair terms, taking a contract using general conditions into account, what should be included in the black list of unfair term regulation? A view illustrating the following types of terms as unfair terms is proposed:

a. A term which denies binding effect of the contract to the term user such as through allowing the user of the term not to perform his or her obligation at will.
b. A term which makes the purpose to form the contract of the other party unachievable through limiting the liability of non-performance of the obligation of the term user or setting the ceiling of damages.
c. A term which exempting the whole or a part of liability for damages from non-performance or tort of the term user.
d. A term excluding the other party from exercising his or her defense right.
e. A term making the term drafter possible to transfer the contractual status to a third party without obtaining consent of the other party.

(3) Example of a list (gray list)

In examining a form of regulating unfair terms, taking a contract using general conditions into account, what should be included in the gray list of unfair term regulation? A view illustrating the following types of terms as unfair terms is proposed:

a. A term limiting the responsibility of the term user over a third party whom the term user uses for the purpose of performing his or her obligation.
b. A term granting the term user the authority to change the contents of the contract unilaterally.
c. A term making cancellation of the contract from the term user easy.
d. A term limiting the right of cancellation of the other party compared to adopting discretionally provision.
e. A term adopting legal fiction of manifestation of intention or arrival of manifestation of intention from the business upon the other party's certain action or non-action.
f. A term limiting the right to court of the other party through designating exclusive jurisdiction of a court which is different from statutorial jurisdiction or imposing heavier burden of proof on the other party.

Part II. Voidance and Recession

1. General discussion

As to voidance of juridical acts, it is pointed out that it is unclear how voidance is affected to the rest part of the juridical act when there is a ground for voidance in a part of a juridical act (*see* 2), and what is the legal relationship when a whole juridical act is void (*see* 3). In addition, as to rescission of juridical acts, it is pointed out that there are issues in the scope of persons who has the right to rescind in cases the scope of rescindable juridical act is expanded (*see* 4), and what is the period of exercising the right of rescission (*see* 5). Based on such indication, we will discuss the problems listed from 2. to 7. In addition, what else should we need to give consideration?

2. Partial voidance

(1) Partial voidance of specific term included in a juridical act

There is an issue, when there is a ground for voidance as to a part of specific term included in a juridical act, whether the effect of the rest part of the term is maintained or the whole term becomes void. Under the current Civil Code, there is no general provision as to this point except that there are several provisions applied to specific individual occasions. In theory, there are a view that the effect of the term is denied

to the extent it conflicts with laws and regulations, and a view that the whole term becomes void.

Based on this debate in theory, on the premise that the effect of the rest part of the term other than the part involving a void ground is maintained as a general rule, there is a view that as an exception the whole term becomes void when the term at issue is a part of general conditions or it is regarded that it is inappropriate to maintain the effect of the rest part of the term other than a part involving a void ground.

(2) Partial voidance of a juridical act

There is an issue, when a specific term included in a juridical act becomes void, whether the effect of the rest part of the juridical act is maintained or the whole juridical act becomes void. While there is no specific provision in the current Civil Code, in theory there is no objection that there are possible occasions where the whole juridical act becomes void and in case law there is a case which was ruled that the whole juridical act became void on the ground that several terms within the juridical act were void. However, it is pointed out that a clear standard for decision has not yet established as to what kind of occasion makes the whole juridical act void in concrete.

Accordingly, on the premise that the effect of the rest part of a juridical act is maintained as a general rule even if a specific term included in the juridical act becomes void, there is a view that the whole juridical act at issue becomes void as an exception when it is reasonably regarded that the party would not make the juridical act if the party had recognized voidance of that part.

(Related issue)

Supplementation of rules when a specific term becomes void

When a specific term included in a juridical act becomes void but the effect of the rest part of the juridical act is maintained, it may be necessary to supplement rules in lieu of the term which has become void. It is pointed out that a provision should be stipulated as to how to supplement the rule in lieu of the void term.

As to this point, there is a view that, considering what kind of agreement the party would have made if the party had recognized the partial voidance, the first preference should be supplementation by the assumed intention, if possibly recognized, and if such intention is unclear, supplementation should be made by the order of custom, discretionary provisions, and the principle of good faith.

(3) Voidance of multiple juridical acts

While even when one juridical act becomes void, as a matter of principle such voidance would not affect to the effect of other juridical acts, it is pointed out that when

there is a close relationship among multiple juridical acts, voidance of one juridical act among them makes other juridical acts void. There is a case decision that as to multiple contracts between the same parties the court granted cancellation of the whole contracts based on non-performance of one contract.

Based on such case law, there is a view that it should be clearly stated in the text of law that the effect of other juridical acts also becomes void when one of multiple juridical acts which have close relationship becomes void, if it is reasonably considered that the party would not engage in other juridical acts if the juridical act in question is void.

3. Effects of void juridical acts

(1) Consequence of a juridical act being void

When a juridical act is void, the effect of such act does not arise and thus the party cannot demand the other party to perform an obligation based on the juridical act at issue. In addition, when payment has been already made based on the juridical act, the party who made such payment can request the person who received the payment to return it. While the issues stated above are not disputed, the current Civil Code does not have provisions clearly stating that effect. Accordingly, there is a view that the following points should be clearly stated in the text of law: ① a party cannot demand the other party to perform an obligation based on a juridical act which is void; and ② a party can request the other party to return the thing which has been provided if the party has made performance based on a void juridical act.

(2) Scope of the right to claim return

While a party can request the other party to return the thing provided if the party has made performance based on a void juridical act, there are various opinions asserted in theory as to the concrete scope of the right to demand for return and the case law theory has not yet established. Accordingly, a view is proposed that in order to clarify legal relationship, concrete regulation on the scope of the right to demand for return when a party has already made payment based on a void contract should be clearly stated in the text of law. On the other hand, there is a negative view in stipulating a provision on concrete scope of the right to demand for return on the ground that, in the situation of having various views in theory on unjust enrichment law, adopting one position at this moment may hinder future development of the discussion on unjust enrichment law.

In addition, as one legislative proposal, the following views are proposed in case of stipulating concrete provisions on the scope of the right to demand for return.

a. When the other party can return a thing which has been received, the other party must return the thing.

b. When the other party cannot return the received benefits itself, the other party must return its value.
c. As an exception of the principles stated (a) and (b), when the void juridical act is a juridical act other than a bilateral contract or a contract for value, if the other party received a thing without knowing that the voidance of the juridical act, it is enough if the other party returns the existing benefits.
d. The value to be returned under (b), when the void juridical act is a bilateral contract or a contract for value, should be within the value which the received party was supposed to pay to the other party based on the juridical act.

(3) Transformation of a void act

As to the issue of transformation of a void act, which means that even if a juridical act is void, such an act may be effective as another juridical act if the act satisfies requirements of another juridical act, there is no general provision in the Civil Code even though Article 971 of the Civil Code provides that there is an occasion that a will which fails to satisfy the formalities as a will by sealed and notarized document has an effect as a will made by holograph document. There is case law which granted the effect of affiliation which was made by a father as to a child out of wedlock, and there is a strongly supported theory which grants some occasions of admitting transformation of a void act although opinions are divided as to concrete cases.

Based on these case law and theory, there is a view that a provision should be established so that, when a juridical act is void but such an act satisfies requirements of another juridical act creating similar legal effect, such an act becomes effective as another juridical act. On the other hand, there is another view that such provision is not necessary.

(4) Ratification

Article 119 of the Civil Code provides that an act which is void does not become effective by ratification. However, there is a proposal that if a juridical act becomes void in order to protect one party such as void by mistake or mental incapacity, the effect of such a juridical act should be granted through ratification of that party because there are various grounds which make a juridical act void.

On the other hand, there is another proposal that a provision on granting effect of a juridical act through ratification by certain party is not necessary because practical benefit of the discussion is small if we adopt a view that a juridical act made by mistake or in a condition of mental incapacity should not be void but rescindable.

(Related issues)

Clarification of the actor of ratification

Although Article 119 of the Civil Code provides that an act which is void does not become effective by ratification, it does not necessarily clarify who ratifies the act. Theory understands that, different from ratification of rescindable juridical acts, here both parties' ratification becomes an issue. Accordingly, there is a view that this point should be clearly stated in the text of law.

4. Parties with the right to rescind acts

Article 120 of the Civil Code provides the scope of the parties with the right to rescind acts based on the ground of rescission. While there is a proposal that an act by a person with mental incapacity or an act based on mistake or misrepresentation should be rescindable, if we adopt this view, there will be a necessity to clarify the scope of the parties with the right to rescind acts.

As to this issue, there is a proposal that an act made with mental incapacity should be rescindable by its agent, successor, or a person who has the authority to give consent, and an act based on mistake or misrepresentation should be rescindable by the person who made manifestation of intent based on such rescindable ground or its agent or successor.

(Related issues)

Scope of the parties who can claim nullity of juridical acts

Traditionally, it has been understood that any person can claim nullity of a juridical acts if the juridical act is void. However, a dominant view today is that when a juridical act becomes void in order to protect certain parties, such protected parties can claim nullity of the act, and therefore, as to juridical acts made by mistake or by a party with mental incapacity, the party who made mistake or was mental incapacity can claim nullity.

If current law which nullifies the effect of juridical acts based on mistake or made by a party with mental incapacity is maintained, there may be a view that there is a necessity to establish a provision which clarifies the scope of the parties who can claim nullity of juridical acts based on certain grounds. On the other hand, there may be a fundamental criticism that whether there is practical benefit to classify rescindable nullity and rescission.

5. Effect of rescission

While a party who received delivery must return the delivered thing if a juridical act is rescinded after delivery is made, proviso of Article 121 of the Civil Code provides that a person with limited capacity to act shall have the obligation to reimburse to the extent that he/she is actually enriched as a result of such act. However it is pointed out that this provision mitigates the obligation of reimbursement too much and it may

facilitates a situation that a person with limited capacity would deliberately cause damages to the other party.

Accordingly, there is a proposal that defense of extinction of benefits should be barred if a person with limited capacity used the received benefit with the knowledge that the person has the duty to reimburse the benefit to a party who provided the benefit after making rescission.

(Related issue)

1 Scope of a duty of return of a party with mental incapacity

While proviso of Article 121 of the Civil Code grants special mitigation of the duty of reimbursement of a person with limited capacity, there is a proposal that, if manifestation of intention by a person with mental incapacity is made as rescindable, it is appropriate to grant similar mitigation of the duty of reimbursement of a person with mental incapacity when manifestation of intention is rescinded.

In addition, there is another proposal that, similar to the interpretive theory under the current law, even if it is clarified in the text of law that a juridical act made by a person with mental incapacity is void, it is appropriate to mitigate the duty of reimbursement when the person received benefit based on the void juridical act to the scope of proviso of Article 121.

2 Duty of return of a person who temporarily lacked mental capacity due to reasons attributable to the person

It is pointed out that, while it may be appropriate to mitigate the duty of reimbursement of a person who consecutively lacks mental capacity similar to a person with limited capacity, there is no necessity to mitigate the duty of reimbursement of a person who lacks mental capacity due to reasons attributable to that person.

Accordingly, there is a proposal that when a person temporarily lacks mental capacity due to his or her negligence and makes manifestation of intention, a special provision of mitigating the duty of reimbursement should not be applied.

6. Ratification of rescindable act

(1) Requirements of ratification

Article 124 of the Civil Code provides that ratification shall not be effective unless it is made after the circumstances that made the act rescindable ceases to exist and ratification by an adult ward is effective only when he or she recognizes his or her act after he or she becomes a person with capacity to act. As to this requirements of ratification, there is dominant theory that, in addition that grounds for rescission ceases to exist, a person who makes rescission should know that he or she can exercise the right of rescission for the concerned act because ratification is abandonment of the right to rescission. Further, there is another dominant view that

a person with limited capacity (except adult wards) can ratify the act by oneself with consent of the statutory agent.

Accordingly, there is a proposal that, in addition to clarifying that a person with the right of ratification can exercise the right only after he or she knows about the right of rescission, it should be clearly stated in the text of law that when a person with limited capacity (except adult wards) ratifies the act by oneself with consent of the statutory agent, a similar requirement should be satisfied.

(Related issues)

Necessity of proviso of Article 122 of the Civil Code

Proviso of Article 122 of the Civil Code provides that ratification may not prejudice the rights of third parties. However, there is a consensus among theory that there is no occasion where this proviso is actually applied because ratification merely makes a juridical act which is indeterminately effective certainly effective and thus cannot prejudice rights of third parties.

Based on this view, there is a proposal that proviso of this article should be deleted.

(2) Statutory ratification

While Article 125 of the Civil Code lists the actions which presume that the person with the right of ratification has an intention to ratify and provides legal fiction that if the person conducts these actions after the time ratification can be made, it is unclear from the text whether application of such legal fiction is limited to only when the person with the right of ratification conducts these actions by oneself or includes the occasion where the other party conducts these actions.

Accordingly, there is a proposal that in order to clarify this point in the text of law receiving all or part of obligation of the other party and receiving security should be added as a ground of statutory ratification.

7. Period to exercise the right to rescind act

(1) Necessity to review period

Article 126 of the Civil Code provides that the right to rescind an act shall be extinguished by the operation of the prescription if it is not exercised within five years from the time when it becomes possible to ratify the act or twenty years from the time of the act. The object of this time limitation is debated. While there is a view that a person must exercise not only the right of rescission but also the right to claim reimbursement which arises as a result of rescission within the period, case law adopts a view that this time limitation is merely for exercising the right of rescission and thus the right to claim reimbursement which arises as a result of rescission comes down to another independent prescription period. Based on this understanding by

case law, it is pointed out that five years from the time when it becomes possible to ratify the act and twenty years from the time of act are too long.

Accordingly, there is a proposal that the period of exercising the right of rescission should be, for example, two or three years from the time when it becomes possible to ratify the act or ten years from the time of the act.

(2) Durability of the right of defense

Exercise of the right to recess an act is used as a defense against a request of performance by the other party when the act is not yet performed as well as in order to generate the right to claim reimbursement against the other party concerning delivery which the person has already made. As to the former case, there is a view that the time limitation is not applied to cases where the right of recession is exercised as a defense because there is little necessity to limit exercise of the right in order to protect the other party if the limited period has elapsed without exercising the rescission right and the other party requests performance of the obligation.

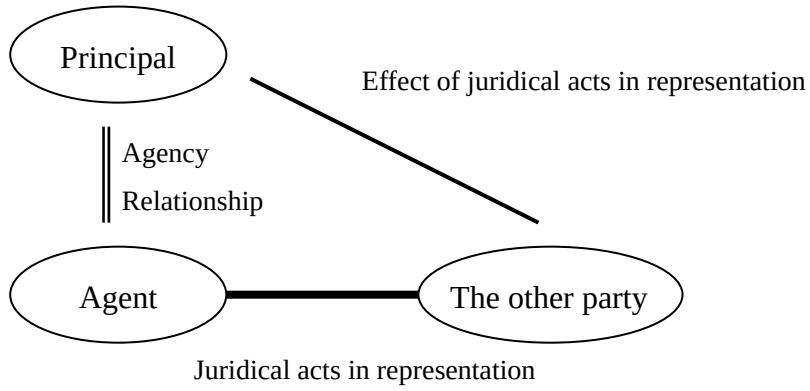
Based on this view, there is a proposal that a provision which states that the person with the rescission right can exercise the right without limitation of time period when he or she exercises the right as a defense against a claim of performance from the other party.

Part III. Agency

1. General discussion

In reviewing provisions on agency, it is regarded that there is a necessity to clarify provisions based on trend of case law and practice as to Articles 99 to 118 of the Civil Code (*see,* 2.). In addition, what kind of points should we take consideration?

2. Authorized agent



(1) Defect of juridical acts in representation – general principle (Article 101 (1) of the Civil Code)

Article 101 (1) of the Civil Code provides that in cases the validity of manifestation of intention is affected by parties' subjective circumstances, whether or not such fact exists should be determined with reference to the agent. However, there is a debate whether this provision is applied not only when an agent is suffered by fraud or dress but also when the agent commits fraud or dress.

While there is an old case decision that Article 101 (1) of the Civil Code is also applied as to manifestation of intention by the other party when an agent commits fraud or dress, there is strongly supported theory that Article 101(1) is not applied to such occasion because it is enough to apply Article 96 (1) of the Civil Code to such occasion. Accordingly, there is a proposal that this should be clearly stated in the text of law.

(2) Defect of juridical acts in representation – exception (Article 101(2) of the Civil Code)

Article 101 (2) of the Civil Code provides that in cases an agent is entrusted to perform any specific juridical act, if the agent performs such act in accordance with the instructions of the principal, the principal may not assert that the agent did not know a particular circumstance which the principal knew, and the same shall apply to any circumstance which the principal did not know due to his or her negligence.

There is a strong theory that the scope of application of this provision should be expanded because in cases of voluntary agency the principal's subjective condition should be considered as long as there is a possibility that the principal controls conduct of the agent even if it is not the case where an agent is entrusted to perform a specific juridical act and the agent performs such act in accordance with the instructions of the principal. Accordingly, there is a proposal that this should be clearly stated in the text of law.

(3) Capacity to act of the representative (Article 102 of the Civil Code)

Article 102 of the Civil Code provides that an agent need not be a person with the capacity to act. It is pointed out on this provision that if a person with limited capacity becomes a statutory agent who is for protection of the person with limited capacity, the purpose of statutory agency system – protection of the principal – may not be achieved. Accordingly, there is a proposal that in case of statutory agency, while a person with limited capacity can become a statutory agent, the scope of the right to represent the principal should be limited to conducts which a person with limited capacity can exercise alone. However, there is another proposal that it is unnecessary to reform the regulation under the current law because the current

regulatory system such as statutory grounds for ineligibility and procedures of appointment and discharge by public agencies can systematically secure screening of statutory agents with an appropriate ability of judgment.

(4) Scope of the authority of representation (Article 103 of the Civil Code)

Article 103 of the Civil Code provides that “an agent who has no specified authority” has the authority to do acts of preservation and other certain acts only. However the scope of the authority of representation is decided by interpretation of law and regulations which are the ground of representation in cases of statutory representation and by interpretation of conduct to grant the authority of representation in cases of voluntary representation. Therefore, it is understood that this provision is a supplemental provision which is applied to occasions where the scope of the authority of representation is still unclear after employing such interpretation.

Accordingly, there is a proposal that the general principle to decide the scope of the authority of representation should be clearly stated in the text of law as well as supplementary provision such as the stated article.

(5) Appointment of a sub-agent by an agent (Article 104 of the Civil Code)

Article 104 of the Civil Code provides that a privately appointed agent can appoint its subagent only when there is an unavoidable reason to do so. As to the language of “there is an unavoidable reason,” it is pointed out that this language limits the occasion where a voluntary agent can appoint its subagent too narrowly. Accordingly, there is a proposal that this limitation should be relaxed in a direction to granting the agent to appoint its subagent when it is inappropriate to expect exercising of the authority of representation by oneself.

(6) Acts of conflicts of interest (Article 108 of the Civil Code)

While Article 108 of the Civil Code prohibits self-contract and representation of both parties, there is a case decision that when the circumstances were not self-contract or representation of both parties as a matter of form but in reality the interests of the principal and the agent conflicted with each other, the purport of this article was invoked.

Accordingly, there is a view that this article should be reformed on the lines of making a provision which prohibits an agent’s act of conflicts of interest in general, not limited to self-contract and representation of both parties.

(Related issues) Effects of acts of conflicts of interest

Case law and generally accepted theory understand that the acts which conflict with Article 108 of the Civil Code are unauthorized agency. Accordingly, such acts do not impute

to the principal unless the principal ratifies them (Article 113 (1) of the Civil Code).

There is a proposal that an act of conflicts of interest should impute to the principal as a general rule and the principal should be able to claim non-imputation of the effect because such an act is merely an internal issue that the agent has violated the duty to conduct for the interest of the principal and thus it is only necessary that the principal has the right to claim non-imputation of the effect only when the principal judges that his or her interest is actually prejudiced.

While protection of reliance of the other party is treated by provisions on apparent agency according to case law and generally accepted theory that an act which violates Article 108 of the Civil Code is unauthorized agency, when the above view is adopted, there is a necessity to consider whether a provision to protect the other party is necessary when the principal claims non-imputation of the effect because provisions on apparent agency are not applied. (In addition, it may be necessary to consider necessity of a provision to protect a third party such as a person who is transferred a thing from the other party.) With the above proposal, a view is also proposed that the principal cannot claim non-imputation of the effect to the other party (and a third party) who has no knowledge that the agent conducted an act of conflicts of interest without gross negligence.

(7) Abuse of the authority of representation

There is no direct regulation in the current Civil Code concerning occasions where an agent abuses the right of representation and benefits himself or herself or another person. However, case law protects interests of the betrayed principal by analogically applying proviso of Article 93 of the Civil Code on concealment of true intention and granting the principal to claim nullity of the effect against the other party who has the knowledge about the true purpose of the agent's conduct or is negligent in not knowing that effect.

Accordingly, it is possible to newly stipulate a provision on abuse of the authority of representation based on this case law. On the other hand, there is a strong theory that imputation of the represented conduct can be barred only when the other party has the knowledge about the true purpose of the agent's conduct or is grossly negligent in not knowing that effect because security of transaction is prejudiced if the other party who is merely negligent is be protected. There is a proposal to stipulate a provision based on this view.

(Related issue) Effect of abuse of the authority of representation

According to case law, the act which abuses the authority of representation is void when the other party has the knowledge or is negligent because proviso of Article 93 is analogically applied. On the other hand, there is a proposal that on the premise that the act which abuses the authority of representation is the act within the scope of the authority of representation as

a matter of formality, the effect of such act imputes to the principal as a general rule and the principal should be able to claim non-imputation of the effect because it is only necessary that the principal can claim non-imputation of the effect only when the principal judges that his or her interest is actually prejudiced.

In addition, case law rules that even if an act which abuses the authority of representation is regarded as void through analogical application of proviso of Article 93, a third party who has no knowledge about such act may be protected through analogical application of Article 94(2). As to this point of protecting a third party, there is another proposal that the principal should not be able to claim non-imputation of the effect against a third party who has no knowledge about the act without gross negligence based on above view that the principal can claim non-imputation of the effect only when the other party has the knowledge or is grossly negligent.

3. Apparent authority

(1) Apparent authority due to manifestation of grant of authority of agency (Article 109 of the Civil Code)

a. Application to statutory agency

While Article 109 of the Civil Code provides apparent authority due to manifestation of grant of authority of agency, it is pointed out that it is unclear from the text whether this article is also applied to statutory representation.

Case law and generally accepted theory understand this issue that Article 109 is not applied to statutory representation. Accordingly, there is a proposal that this should be clearly stated in the text of law.

b. Analogical application of the provision on manifestation of intention to manifestation of grant of authority of agency

While manifestation of grant of authority under Article 109 of the Civil Code is taken its legal nature not as manifestation of intention but as notification of notion, a view is asserted that provisions on manifestation of intention are analogically applied to manifestation of grant of authority.

Accordingly, there is a view that concrete regulation of cases where provisions on manifestation of intention are analogically applied should be clearly stated in the text of law. For example, there is a proposal that when a person makes a conduct which is interpreted as manifestation of grant of authority without knowing its meaning, such an occasion analogizes to mistake and thus a similar provision to mistake should be stipulated.

c. Carte blanche

It is stated that occasions to which Article 109 of the Civil Code is applied are when

a carte blanche is provided. Namely, when a carte blanche is abused and an unexpected act of agent is conducted, there arises an issue whether presentation of the carte blanche to the other party constitutes manifestation of grant of authority under Article 109.

There is a view as to this issue that a new provision should be established to the effect that a person who provides a carte blanche to the other party is assumed as making manifestation of grant of authority to the party presented the carte blanche, if the blank part of the carte blanche is filled up, regardless of whether the person presented the carte blanche is the person who provided it or who is transferred it.

d. When use of the principal's name is authorized

While Article 109 of the Civil Code provides apparent authority through manifestation of grant of authority, case law grants responsibility of the principal due to apparent authority not only when manifestation of grant of authority is made but also when the principal authorizes the other person to use the principal's name referring to legal principle under the Article 109.

Accordingly, there is a view that this effect should be clearly stated in the text of law.

e. Cumulative application of Article 110 of the Civil Code

When a third party receives manifestation of grant of authority and conducts a juridical act which exceeds the scope of granted authority manifested, case law tries to protect the other party who has a justifiable ground to believe that the third party has the authority as to that juridical act through cumulative application of Articles 109 and 110 of the Civil Code.

Accordingly, there is a view that this effect should be clearly stated in the text of law.

(2) Apparent authority of act exceeding authority (Article 110 of the Civil Code)

a. Application to statutory agency

While Article 110 provides apparent authority of act exceeding authority, there is a debate whether this article is applied to statutory representation or not.

Case law applies this article to statutory representation. On the other hand, there is a strong theory that this article does not applied to statutory representation on the stance that formation of apparent authority requires culpability of the principal. Based on this theory, there is a proposal that this effect should be clearly stated in the text of law.

b. "Authority" of the agent

While Article 110 of the Civil Code provides apparent authority of act exceeding authority, there is a debate whether the “authority” under this article is limited to legal power of representation.

Case law understands that while the “authority” under this article is limited to legal power of representation regarding acts of private law, even if the granted act is representation of conduct of public law, such an act can be understood as within the “authority” under this article if the act is conducted as part of transactional conduct under specific private law. On the other hand, there is a strong theory that the “authority” under this article is not limited to legal power of representation but includes the power of representation which forms external relationship including factual acts. Based on this theory, there is a view that this effect should be clearly stated in the text of law.

c. Reasonable ground

While Article 110 of the Civil Code provides that apparent authority is applied where an agent performs any act exceeding its authority and a third party has “reasonable grounds” for believing that the agent has the authority, it is pointed out that the text is unclear about the meaning of “reasonable ground” and in what circumstances “reasonable ground” is granted.

Accordingly, there is a proposal that it should be clearly stated in the text of law that “reasonable ground” in this article means, based on understanding of case law, no knowledge about the circumstances without negligence. There is another proposal that the meaning of “reasonable ground” should be left to interpretation but factors to consider existence of “reasonable ground” should be clarified as much as possible in the text of law.

(3) Apparent authority after termination of authority of agency (Article 112 of the Civil Code)

a. Application to statutory agency

While Article 112 provides apparent authority after termination of authority, there is a debate whether this article is applied to statutory representation.

While case law applies this article to statutory representation, there is a strong theory that this article does not applied to statutory representation on the stance that formation of apparent authority requires culpability of the principal. Based on this theory, there is a proposal that this effect should be clearly stated in the text of law.

b. Object of “without knowledge”

While Article 112 provides that “termination of the authority of agency may not be asserted vis-à-vis a third party without knowledge” there is a debate over the object of

“without knowledge.”

While case law understands this point that it is enough that the third party did not know about non-existence of the authority at the time of conduct at issue, there is a strong theory that the third part needs to have known existence of the authority in the past at the time of conduct as well as to have had no knowledge about termination of the authority. Based on this theory, there is a proposal that this effect should be clearly stated in the text of law.

c. Cumulative application of Article 110 of the Civil Code

When a third party who was given the authority by the principal conducts a juridical act which exceeds the scope of the authority which is already terminated, case law tries to protect the other party who has a justifiable ground to believe that the third party has the authority as to that juridical act through cumulative application of Articles 110 and 112 of the Civil Code.

Accordingly, there is a view that this effect should be clearly stated in the text of law.

4. Unauthorized agency

(1) Responsibility of unauthorized agent (Article 117 of the Civil Code)

Article 117 (1) imposes on unauthorized agents the responsibility of performance or damages over unauthorized acts under curtain circumstances.

While it is understood that this responsibility is statutorial strict liability, a view is asserted that if the unauthorized agent did not know the fact that he or she did not have the authority, his or her responsibility as unauthorized agent should be exempted pursuant to mistake.

In addition, while the paragraph (2) of this article provides that the other party who knew, or was negligent in not knowing, that the person conducting the act of representation was not authorized to do so cannot pursue the responsibility of the unauthorized agent, a view is asserted that if the unauthorized agent deliberately conducted the unauthorized act of representation, such unauthorized agent should not be exempted from the responsibility under the paragraph (1) even in the other party was negligent in not knowing that the act was unauthorized based on the principle of faith and trust.

(2) Unauthorized agency and inheritance

When the same person becomes to have the legal status of both the principal and the unauthorized agent, such as when either of the unauthorized agent or the principal dies and the rest inherits the legal status of the person died, there arises a problem in the legal relationship of such person and the other party. However, there is no

provision regulating such situation under the current Civil Code.

Accordingly, based on developments of case law and theory, there is a view that concrete provisions should be stipulated concerning the situations stated below.

a. When the unauthorized agent inherits the status of the principal

When the principal dies before giving or refusing ratification and the unauthorized agent inherits the principal's status, case law rules that the unauthorized agent cannot refuse ratification. Accordingly, there is a view that this effect should be clearly stated in the text of law.

b. When the principal inherits the status of the unauthorized agent

When the principal inherits the status of the unauthorized agent, case law rules that the principal can refuse ratification. Accordingly, there is a view that this effect should be clearly stated in the text of law.

(Related issue) Succession of responsibility of the unauthorized agent

When the principal inherits the status of the unauthorized agent, the principal may have to owe responsibility of performance to the other party who did not know that the represented act was unauthorized without negligence because the principal also inherits the responsibility of the unauthorized agent (Article 117 of the Civil Code).

However, as to such conclusion, it is pointed out that it is inappropriate that the other party becomes able to receive performance due to accidental event of inheritance and the significance that the principal can refuse ratification of the represented act is lost.

By the way, case law rules that in a case of sales of property of a third party, when the owner of the property inherits the status of the buyer, the owner can refuse to perform the obligation as the buyer unless special circumstances which violate the principle of fair and trust exist. Accordingly, based on that it is stated there is little difference between sales of property of a third party and unauthorized agency in terms of fact finding, a view is asserted that when the principal inherits the status of the unauthorized agent, the principal can refuse the responsibility of performance (i.e., the principal only owes the responsibility of damages as the unauthorized agent) through analogical understanding with the case of sales of a third party property. There is a proposal that this effect should be clearly stated in the text of law.

c. When a third party inherits the status of both the unauthorized agent and the principal

As to cases where a third party inherits the status of the unauthorized agent and then the status of the principal in this order, case law rules that the third party cannot refuse ratification because the third party first inherits the status of the unauthorized agent and this can be seen as the unauthorized agent inherits the status of the

principal.

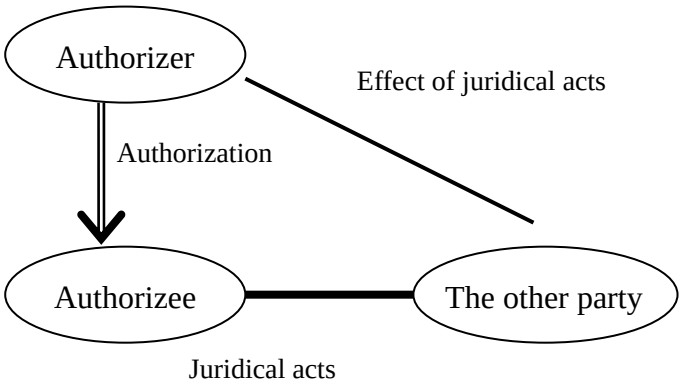
However, as to this conclusion, it is criticized that it is inappropriate that the third party cannot refuse ratification even though he or she did not conduct unauthorized act of representation by himself or herself. In theory it is strongly asserted that, when a third party inherits the status of both the unauthorized agent and the principal, regardless of the order of inheritance, the third party can refuse ratification. Accordingly, there is a view that this effect should be clearly stated in the text of law.

5. Authorization

As a system which is similar to agency, there is a system of authorization in which a person conducts a juridical act with his or her own name and imputes its legal effect to other person. While it is pointed out that authorization of disposition is practically important as legal constituent of commissioned sale and it is understood that case law also recognizes this, there is no provision on authorization under the current Civil Code.

Accordingly, there is a proposal that a clear provision should be established on authorization (authorization of disposition). If a necessity of having a provision is recognized, what should we consider in deliberating a concrete provision?

[Note] In addition to authorization, there is indirect agency as a system similar to agency. Indirect agency is a system that a person conducts a juridical act with his or her own name and imputes only its economic effects to a third party. It is regarded that a warehouse dealer (Article 551 of the Commercial Code) is an example of this system. Here, we do not discuss indirect agency because it has a largely different character from agency in a point that legal effect is imputed to the person who conducted the juridical act. We treat indirect agency as a special type of mandate and discuss it when we deliberate provisions on mandate contracts as necessary.



Part IV. Conditions and Time Period

1. General discussion

As to conditions and due date, the following issues are pointed out. In addition, what kind of point should we give consideration in reviewing provisions on conditions and due date?

2. Meaning of the condition precedent and the condition subsequent

While the current Civil Code provide a provision on a condition precedent (*teishi jyoken*) and a condition subsequent (*kaijyo jyoken*), there is a proposal that the meaning of these conditions should be clearly stated in the text of law because the term “condition” has various meanings in general and current provision does not state any specific meaning.

3. Legal relations during the fulfillment of the condition is uncertain

Articles 128-130 of the Civil Code provide legal relations during fulfillment of a condition pending. There is a view that, while the provision on prevention of fulfillment of conditions by a party who will suffer detriments as a result of fulfillment of a condition (Art.130) is analogically applied to an occasion where a condition is intentionally fulfilled by a party who will enjoy benefits as a result of fulfillment of a condition as a case law, that effect should be clearly stated in the text of law.

4. Meaning of time period

There are two kinds of time period: time of commencement and time of expiration (Art.135). In addition, there are specified time period and unspecified time period (Art.412). It is pointed out that the meanings of these terms are not necessarily clear from the provisions. Accordingly, there is a view that it should be clearly stated in the text of law that, for example, arrival of a time period means a fact which is certain to occur in the future does actually occur.

5. Benefit of time

There is a view that among the grounds for forfeiture of benefits of time period provided in Article 137 of the Civil Code, when the obligor has become subject to the ruling of the commencement of bankruptcy procedures (item 1) should be deleted and left to the Bankruptcy Act.