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Kunihiro Nakata

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Recent Developments in Japanese Consumer Law

Kunihiro Nakata

I. INTRODUCTION

Japanese consumer law faced an important turning point in 2008. First, a Consumer Agency having general jurisdiction over consumer policies emerged.¹ The government prepared several bills for the fall Diet session enabling the establishment of the Agency in 2009. The decision in favor of the Consumer Agency symbolizes the remarkable shift of the administration from favoring the producer's point of view to that of the consumer. This can be regarded as evidence that consumer protection policy is finally becoming a political issue in Japan.

At the same time the movement towards a consumer law reform has surfaced. This paper will introduce the background and the present status of the amendment of three laws: the Consumer Contract Act, the Act on Specified Commercial Transactions ("Specified Transactions Act") and the Installment Sales Act.

II. THE INCREASE OF CONSUMER LAW AND ITS BACKGROUND

In recent years, consumer-related laws have been enacted or amended in an unprecedented quantity and quality. For example, we have seen the transformation of the Consumer Protection Fundamental Act into the Consumer Basic Act (2004); the enactment of the Consumer Contract Act and its amendment introducing the consumer group action system (2000 and 2006); the Product Liability Act (1994); the

1. The Consumer Agency is part of Prime Minister Yasuo Fukuda's policy. The legal provisions defining its organization and jurisdiction were examined in the Consumer Administration Promotion Conference (*Shōhisha gyōsei suishin kaigi*) summoned by the Prime Minister on an ad hoc basis. This Conference published a final report titled *Summary of the Consumer Administration Promotion Conference—Changeover to a consumer and living oriented administration* on June 13, 2008. Based on this report, the Cabinet adopted a "Basic Plan" which is going to be transformed into a bill and presented to the Parliament during the extraordinary session in August. The preparatory works are aimed at establishing the Consumer Agency in April 2009.

amendment of the Consumer Life Product Safety Act (2006); several amendments of the Specified Transactions Act regulating, for example, door-to-door or mail order sales (2000, 2002, 2004 and 2006); several amendments of the Installment Sales Act including the extension of its scope of application and the effects of the amendment of the Specified Transactions Act (from 2000 to 2006); the far-reaching 2006 reform of the Act Concerning the Regulation of Credit Business, the Act Concerning the Control of Receiving Capital Subscription, Deposits and Interest on Deposits and the Interest Rate Restriction Act in connection with the multiple debts problem; the enactment and amendment of the Act on Sales of Financial Products concerning financial transactions (enacted in 2000, amended every year between 2003 and 2006); the important amendment of the Act on Sales of Financial Products by the securities and exchange law reform (2006); and the Insurance Law (Commercial Law) reform movement which began in 2006. And in June 2008, this series of amendments was joined by the amendment of the Specified Transactions Act and the Installment Sales Act. All of these enactments and amendments have been substantial and have significantly changed the legal provisions regarding consumer-related problems.

Japanese consumer law originates from administrative regulations, including state and regional administrative measures against business entities. During the 20th century, private law regulations were added. Therefore, laws such as the Specified Transactions Act, the Installment Sales Act or the Securities and Exchange Act that had originally been enacted as business regulations were supplemented by rules for the benefit of consumers.

Such enactments and amendments occurred during the second half of the 1990s until the beginning of the 21st century, and they contained provisions having civil law consequences on the relationship between business operator and consumer.

The Consumer Contract Act (Sections 4, 8-10), the Product Liability Act (Section 3) and the Act on Sales of Financial Products (Sections 5 and 6) are examples of laws created as special acts of the Civil Code aiming at determining the private law rules between business and consumers. Additional interesting developments can be found in the amendments for the prevention of misrepresentation in the contract-concluding phase that affects the consumers' self-determination right. Business regulation laws focused on administrative norms are equipped with provisions carrying civil law consequences such as avoidance (e.g., Specified Transactions Act Sections 9-2, 40-3, 49-2, 58-2). These rules with civil law consequences have actually positively affected the resolution of consumer disputes.

Reform of the Consumer Life Product Safety Act and the law regulating the money lending business were expressly aimed at protecting consumer interests including their safety and property rather than business interests.

Traditionally, the political emphasis in Japan has been prioritized industrial development, but in the past few years there has been a turn towards respecting the consumer. This led to more regulations requiring consumer-oriented administrative measures.

This legislation embodies the 21st century consumer policy. It is characterized by the transformation of the Consumer Protection Fundamental Act into the Consumer Basic Act. From a market-administration point of view, the idea behind this transformation has evolved from consumer protection to consumer independence, and the emphasis has been shifted from *ex ante* to *ex post* regulation. Furthermore, the promotion of transparency and compliance management and establishing consumer rights as basic principles have been introduced in the Consumer Basic Act.

In this transformation process two tendencies in the consumer law domain have to be pointed out. The first is the increase of substantive law provisions with civil law consequences (private law rules) and the second is the reinforcement of public regulation expressly favoring consumer interest protection. The on-going reform of the Consumer Contract Act, Specified Transactions Act and the Installment Sales Act is focusing on the former, i.e. the creation and extension of private law rules.

Behind the above-mentioned reinforcement of consumer protection legislation there is a great number of emerging consumer problems. The inability to prevent injury threatens the consumers' trust in the market. For example, there have been cases in which insufficient product safety precaution by manufacturers caused serious harm, including incidents where people died because of defective gas fan heaters or boilers. There are also countless cases of misrepresentation of products or their origin: imported meat is sold as domestic beef or local chicken; products with expired use-by dates are relabeled and sold; Chinese eel with suspected residual agricultural chemicals is sold as a domestic product; and unsold sweets are disguised and sold as fresh ones. Cases of misrepresentation are reported virtually every day. Especially notable is the story of a famous first-class Japanese restaurant rearranging and serving leftovers.

III. THE AMENDMENT OF THE CONSUMER CONTRACT ACT

A. *The Reform Movement*

The Consumer Contract Act was enacted in April 2001 as a law related to consumer contracts intended to reduce the discrepancy in information and bargaining power between business entities and consumers.²

Currently the amendment of its substantive law rules is in discussion. In January 2007 the “Committee for the evaluation and examination of the Consumer Contract Act” was established within the Consumer Policy Committee of the 20th Quality-of-Life Policy Council (Kokumin Seikatsu Shingikai). In August of the same year a report titled “Evaluation of the Consumer Contract Act and the examination of its issues” (in the following referred to as the “Report”) was published. (The author participated in the said Council as expert member from January to August 2007.)

Many issues were discussed in this Report. Most characteristic were the following:

- 1) Whether or not to establish the obligation to inform and to declare a contract concluded and, if violated, to consider the contract avoidable
- 2) Whether or not to introduce the suitability rule and to declare a contract concluded in violation of this rule void or avoidable
- 3) Whether or not to prohibit “unsolicited offers” and to declare a contract concluded in violation of this prohibition avoidable
- 4) The necessity of private law rules governing e-commerce

But the Report has only interim character because the final decisions have been postponed. The following chapter will examine its contents and show the prospective course of discussion.

B. *Review of the Articles of the Present Consumer Contract Act*

(1) The Definition of “Consumer”

According to Section 2 of the Consumer Contract Act, the distinction between “consumer” and “business operator” shall be made by the following criterion: if an individual “becomes a party to a

2. Approved in 2000 and enacted in April 2001, this law has been the basis for case law more than 180 court decisions during the six years of its existence—a number which exceeds the case law regarding other consumer related statutes.

contract as a business or for the purpose of business.” But this law should also apply to side job sales methods or damages caused by the leasing of expensive telephones to sole traders. In fact, the term “business” might be interpreted flexibly and thus covering sole traders. But there needs to be a direct relationship to the “business” so that the criterion must be whether or not becoming a party to the contract is for a purpose directly related to one’s business. In transactions that are merely indirectly related to one’s business the individual will probably not have sufficiently perceived the contents of the respective contract.

(2) The Business Operator’s “Duty to Inform”

In Section 3, a business operator’s “duty to inform” is laid down as a duty to endeavor. The question has arisen whether the providing of information should be mandatory and even entitling to avoidance. The Report does not give a clear answer. But if deregulation asks for more self-responsibility of consumers for their decisions, the providing of accurate information will be the major premise. The recent cases of misrepresentation regarding food demonstrate that the business operator must actively give correct information related to consumer contracts. The absence of information concerning important issues as the prerequisite for the consumer’s self-responsibility constitutes a violation of his self-determination. In such cases, the contractual ties should not prevail. Thus the duty to inform should explicitly be laid down as a legal duty entitling to avoidance whenever important elements usually affecting the decision whether or not to conclude the contract have been withheld.

(3) Section 4 is a Provision Concerning the Contracting Process, Extending the Provisions Regarding Defects of Manifestation

- i. Subsection 1 entitles the consumer to avoidance if the business operator’s indication has been contrary to the facts (misrepresentation).
- ii. Subsequently subsection 2 provides that, in cases where the business operator provides advantageous facts while omitting the disadvantageous (i.e. in cases of non-notification of disadvantageous facts), that avoidance shall be allowed if the omission has been intentional. Although intent is required in the present law, there are convincing arguments for replacing it with negligence.
- iii. The Consumer Contract Act only acknowledges two types of confusion cases which are the subject of subsection 3. This includes consumer-confusing invitations: intimidation by phone, repeated visits or calls, invitations using romantic

feelings (lover sales method) or the mental insufficiency of elderly people. Such solicitation acts are against the principle of good faith and are continuously devised. Similar to Section 10 of Consumer Contract Act, the creation of a general clause allowing avoidance of solicitations against good faith is strongly urged. The Report shows the tendency to expand the subject of confusion types and to examine additional types of solicitations to be covered in the future.

- iv. Although it is possible to include motives in the important issues laid down in subsection 4 by means of interpretation, it would be preferable to eliminate any doubts by an explicit wording similar to Section 9-2, Section 6 subsections 1 and 2. The Report also asks for the extension of the notion of the "important issues" to include those related to the motives for concluding the contract.

(4) In regard with Section 9, which declares void any undue anticipated reparation clause, there was a discussion about the meaning of "average damage" in paragraph 1 and the burden of proof. If the business operator asks for damages exceeding the average damages as proved by the consumer the stipulation can be voided as far as the difference is concerned. But in court proceedings generally the burden of proof lies with the consumer. The Report, therefore, states that "somehow the difficulties of the consumer's burden of proof should be softened."

(5) The present law only has two Sections (Sections 8 and 9) listing undue clauses. Clauses that have been declared void by courts in the past or will be voided in consumer group actions in the future should be added. Such lists will make clear the scope of undue clauses and thus contribute to the enhancement of fair trade with consumers. The Report examines clauses limiting the right to contract cancellation or dissolution as well as exclusive jurisdiction and arbitration clauses.³

C. The Suitability Rule as a Private Law Rule

The suitability rule had been discussed and enacted as part of administrative regulation concerning financial transactions such as

3. Moreover, it is necessary to extend list of inadmissible contract clauses to rental contract clauses which have repeatedly been dealt with by court decisions. These include restitution clauses including natural wear and ordinary use or clauses withholding a part from the deposit without any reason.

futures contracts or contracts regarding financial products.⁴ From a comparative law perspective there are not many examples in the private law sector. But in Japanese case law decisions have accumulated in which damages were awarded on the grounds of tort law or breach of contract in cases where there has been a significant breach of the suitability rule by solicitation. This is especially true in financial transactions. Recently the suitability rule is becoming more and more recognized as a rule binding business operators not only in financial transactions but in consumer transactions in general.⁵

The suitability rule should not be limited to administrative regulations. Given the growing damages by excessive selling of high price products to elderly, young people or housewives and the extended sales of sophisticated and expensive products and services due to deregulation, there is a greater need for private law rules providing a remedy in civil procedures. In these cases the definition of the suitability rule and the legal effect of its breach come into question. The suitability rule in the broad sense—that the business operator must conduct his solicitation and sales in a manner that suits the consumer's knowledge, experience and fortune etc.—must be laid down as a general obligation leading to liability under tort law.

At the same time, the violation of the suitability rule in the narrow sense (the business operator must not conduct sales or solicitation activities regarding specified consumers and specific products, not even with exhaustive explanations) can be interpreted as a solicitation violating the public order and the standards of decency. In this case, the effect should not be avoidance but the unilateral nullity to be claimed by the consumer.⁶ The amended Specified Transactions Act, which will be referred to later, allows cancellation in excessive sales cases.

D. The Prohibition of Unsolicited Offers as a Private Law Rule

The prohibition and limitation of unsolicited offers to consumers who do not wish to contract exist within administrative regulations such as the prohibition of repeated offers to those who have expressed their

4. See, e.g., Commodity Exchange Act, Section 215; Act on Sales of Financial Products, Section 40 para. 1. It is a prerequisite of the disclosure duty entitling to damages provided for in Act on Sales of Financial Products, Section 3 subsection 2.

5. Cf. Consumer Basic Act, Section 5 subsection 1 para. 3; Specified Transactions Act, Section 7 para. 3; Specified Transactions Act's Implementing Regulation, Section 7 paras. 2, 3; Tokyo Regional Ordinance For Consumer Life, Section 25 subsection 1; Tokyo Regional Ordinance For Consumer Life's Implementing Regulation, Section 5-2 para. 3.

6. The Report shows a tendency to comply with the suitability rule by extending the irritation provision to other types of irritating acts, thereby allowing cancellation.

rejection.⁷ As a private law rule, however, there is only Section 4 subsection 3 of the Consumer Contract Act, which applies to a very restricted number of unsolicited offers. Unsolicited offers are the source of a large number of injuries to consumers.⁸ Such offers menace the consumer's private life and the smooth arranging of his affairs. It is a solicitation method disturbing the calmness and freedom of decision. In addition, there are solicitation methods constituting unfair surprise. These kinds of unsolicited offers should basically be forbidden by administrative regulations and regarded as avoidable irritating acts according to Consumer Contract Act.⁹

IV. THE AMENDMENT OF THE SPECIFIED TRANSACTIONS ACT AND THE INSTALLMENT SALES ACT

A. Reform Movement

A large number of the injuries to consumers have occurred in connection with commercial transactions within the scope of the Specified Transactions Act. A good example is door-to-door sales. Credit transactions such as the closed-end sales finance transactions (*Kobetsu kappu kōnyū assen torihiki*) have encouraged malicious and aggressive solicitation acts.¹⁰ Two subcommittees have been working simultaneously and by mutual communication on the amendment of the two laws. On June 18, 2008 the amendments were promulgated and thus concluded. (The enactment will be within one and a half years from promulgation.) I will refer to the major issues of the amendment *infra*¹¹.

7. The number of prohibitions of unsolicited offers included in recently amended ordinances, *e.g.*, Kyoto Municipal Ordinance for Consumer Life, is growing. Other administrative rules exist such as Specified Transactions Act, Sections 12-3, 17; Commodity Exchange Act, Section 214 para. 5; Act on Sales of Financial Products, Section 38 para. 5.

8. Among the complaints received by PIONET, those concerning door-to-door sales, mail order sales, phone solicitation sales and negative option sales occupied 78.6% in 2004, 60.1% in 2005 and 51.8% in 2006.

9. According to the Report, unsolicited offers are subjected to further examination along with the extension of the irritation provision.

10. There is a mutual link between the transactions subjected to the Specified Transactions Act and those regulated by the Installment Sales Act. Therefore, the amendment of the former has been discussed in the Specified Transactions Subcommittee of the Consumer Economy Subcommittee within the Industrial Structure Council. The Installment Sales Act, however, was examined in the Basic Problems Subcommittee of the Installment Sales Subcommittee of the Industrial Structure Council. Both Subcommittees publish their results on the website of the Ministry of Economy, Trade and Industry (<http://www.meti.go.jp/committee/index.html#c2>).

11. After the "Interim Summary" and the "Classification of issues," the guideline reports for both Subcommittees were published in November and December 2007. The trend is reinforcing consumer interests by 1) extending the private law rules and their

B. *The Reform Trend of the Specified Transactions Act*

1. Establishing and Extending Private Law Rules

i. Cancellation of Excessive Sales Enabled

Consider this hypothetical: a pensioner and mother living alone is visited by a salesman and persuaded to buy kimonos worth 10 million yen. Owing money to several credit companies, her savings have drained away. Her ability to judge has declined and most of the purchased kimonos have not even been unsealed.

In order to provide a remedy in such cases a new private law rule was established allowing *inter alia* the cancellation of contracts within one year after conclusion if the consumer has purchased products in a door-to-door sale in a quantity significantly exceeding his needs (Section 9-2 of the revised Specified Transactions Act). There is an exception, of course, for those cases where special circumstances substantiate the consumer's special need for these products.

It might have been possible to reach these situations by liberally applying principles governing profiteering or legal competence. But the revision bill only provides for a rule limited to door-to-door sales. According to the wording, subjective or procedural factors like the decline of judgment, mindlessness, imprudence, pressure, exploitation of lack of experience or the abuse of circumstances are not required. The high quantity of the purchased goods is the only objective factor allowing release from the contract, which admittedly implies a high degree of intervention.

The legal structure of this release from the contract is withdrawal instead of avoidance. This consequence of withdrawal is peculiar since it is neither cancellation because of nonperformance nor can be justified by the withdrawal based on the "cooling-off" principle.

But the introduction of this private law rule affects the door-to-door sales business in the sense that aimless selling of goods or services to people whose needs are uncertain will end up in a disadvantage. The Door-to-door Sales Business Association established a fund for the remedy of door-to-door sales victims which will hopefully lead up to mutual control of business operators themselves.

scope of application and 2) extending administrative regulation reflecting the actual damage. The discussions directly led to the amendment law.

ii. The Rule Concerning Mail Order Sales Contract Dissolution and Returning of Goods Defined

In the absence of plain instructions in mail order sales regarding the exclusion of goods from being returned or the conditions for returning the purchased goods, the return of goods is now explicitly admitted in principle (Section 15-2 of the revised Specified Transactions Act). The return of goods is the consequence of the withdrawal from the mail order sales contract.

iii. Specification of Products and Services Abolished

So far only specified products and services had been subject to the regulations governing door-to-door sales, phone solicitation sales and mail order sales. Since this kind of legislation would always have stayed behind, it was replaced by principles applying to all kinds of products and services.¹²

2. Amendments Reinforcing Administrative Regulation

i. Prohibition of Repeated Solicitation of Persons Rejecting Door-to-Door Sales Established

In the case of door-to-door sales there is a duty to disclose the sales purpose and to verify the consumer's willingness. Further solicitation of people who have expressed their will not to conclude a contract is forbidden by Section 3-2 of the revised Specified Transactions Act. Offenses are subject to administrative measures. This regulation of unsolicited offers was not augmented by rules having civil law consequences like withdrawal.

ii. The Opt-In regulation Concerning Spam Emails

The number of spam emails is increasing. The amendment is changing the law from (a) the prohibition of sending emails to refusing recipients (so-called "opt-out regulation") to (b) the opt-in regulation which forbids the sending of advertising emails to other recipients than those who have previously asked for advertisements by email (*inter alia* Section 12-3 of the revised Specified Transactions Act).

12. In order to prevent consumer problems, the voluntary self control of the Door-to-door Sales Business Association is strengthened in Section 27-2 of the revised Specified Transactions Act.

C. *The Reform Trend of the Installment Sales Act*

1. Amendment Establishing and Extending Private Law Rules

i. Avoidance of Credit Contracts with Mandatory Repayment of Received Installments Established

The present law only entitles the consumer to refuse payment to the intermediary agent of the installment sale by means of connected defense. But even if the damage had increased because of the continuing credit contract, the paid money was not returned and thus no remedy for the consumer's material damage was provided.

The revised law permits the consumer to avoid the credit contract and to claim the paid money provided that the affiliated entity (selling business operator) 1) has misrepresented important issues concerning the credit contract or 2) has misrepresented circumstances concerning either the necessity of the credit contract or important issues influencing the decision to conclude the contract (*inter alia* Section 35-3-3-23 of the revised Installment Sales Act).

By this provision, a mechanism was introduced which causes disadvantages to the intermediary credit agent if he keeps or neglects a relationship with inappropriate affiliates. The repayment rule creates a strong incentive and motivation for the credit agent to control the affiliates and thus realizes the socially desirable control function.

ii. Scope of Application Revised Regarding Preconditions and Limitation to Specific Sales

The scope of application of the Installment Sales Act that had been limited to installment sales with more than two months payment term and more than three installments was extended to contracts with more than two months payment term and either one or two installments. Similar to the Specified Transactions Act, the subject of this law is no longer limited to specific products or services but now applies to all kinds of products and services (with several exceptions). Thus private law rules—not the administrative regulations alone—have a larger scope of application.

iii. Introduction of Consumer Group Action in the Specified Transactions Act

In order to prevent consumer trouble cases, the consumer group action system will also be introduced in the Specified Transactions Act.¹³ By this amendment the entitled consumer associations can seek injunctive relief not only against acts of business operators violating the Consumer Contract Act but also against those constituting unlawful solicitation, advertisement or contract clauses offending the Specified Transactions Act.

2. Amendments Reinforcing Administrative Regulation

i. Reinforcement of Administrative Regulation Against Intermediary Agents Regarding Installment Sales of Individual Goods

Administrative regulation against intermediary agents regarding installment sales of individual goods which is often applied in cases of damages to consumers has been reinforced by introducing a registration system and strengthening the authority for administrative measures (*inter alia* Section 35-3-23 of the revised Installment Sales Act).

ii. Fair Credit Duty Established

Business operators offering individual credit are required to examine affiliated entities conducting door-to-door sales and are forbidden from authorizing credits to consumers in cases of undue solicitation (Sections 35-3-5 to 7 of the revised Installment Sales Act). Penalties have been stiffened and thus urge better control of affiliated entities.

iii. Excessive Credit Prevention Duty Reinforced

A general duty to prevent excessive credits was provided along with the mandatory use of credit information institutions, the duty regarding the making and keeping of credit examination documentation and the duty of individual examination (Sections 30-2, 30-2-2, 35-3-3 to 4 of the revised Installment Sales Act).

13. The Cabinet adopted a "Bill amending a part of the Consumer Contract Act and other laws," which will amend the Specified Transactions Act and the Consumer Contract Act and will be presented to the Parliament. By this law, the group action system will not only be extended to the Specified Transactions Act but also to the Act Against Unjustifiable Premiums and Misleading Representations (*Keihihin hyôji hô*).

V. CONCLUSION

Japanese consumer law significantly tends towards the prevention of damages to consumers by extending private law rules. On the other hand, this increase of private law rules outside the Civil Code will require a review of their relation with the Civil Code.

Currently the revision of the Civil Code is hurriedly being advanced. Especially the question how to modernize the contract law is the subject of discussions. In terms of the appropriate system, the question arises if consumer law should be incorporated into the Civil Code as in Germany or if it should be laid down in a special law as it is the case in France. Furthermore there are particular issues to be examined such as the relationship between the “person” as defined in the Civil Code and the term “consumer”; the problem of conformity between the theory of declaration of intent in the Civil Code and the “avoidance” or withdrawal determined in the respective consumer laws; and the applicability of the theory of damages to typical collective consumer damages consisting of a multitude of small claims against the development of new forms of remedy.

In any case the discussion about consumer law and consumer policy is not limited to the mere protection of consumer interests but must rather be seen in the context of administrative regulation aimed at operating a sound market system and at answering the question of how the protection of consumer interests can best be justified. Moreover, it will be linked to the policy development and realization by the “Consumer Agency” as an administrative body. It will undoubtedly be the major task of the Japanese private law to define the role and scope of the Civil Code as the fundamental market governing law. This is also a responsible mission for the Japanese consumer law.

