大江橋法律事務所
OH-EBASHI

OH-EBASHI LPC & PARTNERS NEWSLETTER

2018 Spring issue

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Amendments to the Civil Code of Japan (Part 3): Formulaic General Conditions

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I. Introduction

Following the articles in the 2017 Autumn Issue and Winter Issue, this article concludes our outline of the amendments to the Civil Code of Japan. This article covers the formulaic general conditions (*teikei yakkan*), which were actively discussed during the amendment process.

II. Formulaic General Conditions

1. Overview

The current Civil Code does not have any provisions relating to standardized conditions (*yakkan*) that apply to contractual transactions. Prior to the amendments, the binding effect of standardized conditions between contractual parties was considered to be purely based on the intention of the parties. Although standardized conditions were frequently used in various types of standardized transactions, their binding effect was not very clear as courts often decided to limit their binding effect to prevent unforeseen disadvantages to the contracting parties, while recognizing that they were binding.

The amended Civil Code introduces a new concept and rules for standardized conditions called the "Formulaic General Conditions" to enhance the legal stability and predictability of transactions that use such standardized conditions, while concurrently balancing the need to protect customers, and the need of companies to swiftly and efficiently deal with numerous standardized transactions.

2. Definition

The term "Formulaic General Conditions" is defined as a set of provisions that satisfy the following requirements:

(i) They are related to standardized transactions (*i.e.,* transactions (a) that are conducted by a specific person with a large number of unspecified persons, and (b) for which it is reasonable for both sides to have uniform contractual provisions, partly or as a whole); and
(ii) they are prepared by such specific person for the purpose of incorporating them in a contract.

Standardized transactions that satisfy the first requirement are those for which it is desirable to execute contracts using the same form with a large number of counterparties due to the nature of the products or services being provided and the manner such transactions are carried out. In such cases, it would be reasonable to execute the relevant contract where one party prepares a set of contractual provisions and the counterparty accepts them without making any changes.

The second requirement, "for the purpose of incorporating them in a contract," means that the provisions of the Formulaic General Conditions are intended to be incorporated in the relevant contract based on an agreement deemed to have been made by the parties as further described in Section 4 below.

3. Examples of Formulaic General Conditions

Examples of Formulaic General Conditions are the general terms and conditions of bank deposits, insurance, credit cards, electronic commerce and software use.

Standardized conditions relating to transactions between business entities may also qualify as Formulaic General Conditions if they satisfy the two requirements described in Section 2 above. On the other hand, if the contract has uniform provisions simply due to the imbalance of the bargaining power between the parties, then it will not be considered reasonable for the counterparty to enter into such uniform contract (i.e., the requirement under item (i)(a) will not be satisfied). Also, if the provisions of the contract are those which are usually examined thoroughly, then it cannot be said that the terms and conditions are intended to be incorporated in a contract (i.e., the requirement under item (ii) will not be satisfied). Presumably, many of

the model basic transaction agreements that are currently being used between business entities will not qualify as Formulaic General Conditions.

4. Deemed agreement to the Formulaic General Conditions

Under the amended Civil Code, each provision of the Formulaic General Conditions will be deemed to have been agreed to by the parties if the following requirements are satisfied:

(i) The relevant parties have agreed to conduct the standardized transaction; and
(ii) (a) such parties have agreed to incorporate the Formulaic General Conditions in the contract, or (b) the party that prepared the Formulaic General Conditions (the "Preparing Party") has indicated to the counterparty in advance that the Formulaic General Conditions will be incorporated in the contract.

One important point to note here is that, even if the requirement under item (ii)(a) is not satisfied, the parties may still be deemed to have agreed to incorporate the Formulaic General Conditions in the contract if the Preparing Party had so indicated to the counterparty in advance (item (ii)(b)).

The first requirement of an agreement "to conduct the standardized transaction" does not require the parties to have understood all of the provisions of the Formulaic General Conditions, rather, it is sufficient that they have agreed to conduct such transaction.

In addition, the situation where "the Preparing Party has indicated to the counterparty in advance that the Formulaic General Conditions will be incorporated in the contract" (item (ii)(b)) includes cases where the Preparing Party has presented or delivered to the counterparty a document, or electric or magnetic record describing the Formulaic General Conditions to be incorporated in the contract. In this regard, no clear rule has been established on the proper method to "indicate" the incorporation of such conditions, and one question is how the Preparing Party should indicate the same on its website to be considered as having "indicated [it] to the counterparty." For example, if on an electronic commerce website, customers are able to proceed to the webpage of the contract execution without passing any

webpage that states that the Formulaic General Conditions will be incorporated in the contract, then there may be a risk that this requirement will be considered as not having been satisfied.

5. Restrictions on unjust provisions

Under the amended Civil Code, unjust provisions in the Formulaic General Conditions will be excluded from the scope of those deemed agreed to by the parties as described in Section 4 above. More specifically, any provision that falls within the conditions described below will not be deemed agreed to by the parties. It should be noted that this rule also applies to transactions between business entities.

(i) The provision restricts the rights or increases the obligations of the counterparty; and
(ii) the provision is considered to be contrary to the principle of good faith and unilaterally harms the interests of the counterparty in light of the manner and actual circumstances of the standardized transaction, and of the social norms relating to the relevant transaction.

6. Obligation to show the provisions of the Formulaic General Conditions

Under the amended Civil Code, if the counterparty makes a request prior to agreeing to the standardized transaction or within an adequate period thereafter, the Preparing Party must, in principle, show the provisions of the Formulaic General Conditions without delay and in an adequate manner. One adequate way of showing such provisions would be for the Preparing Party to advise the counterparty to visit the website on which such Formulaic General Conditions are posted.

7. Requirements for amending the Formulaic General Conditions

If it becomes necessary to amend the provisions of the Formulaic General Conditions that were effective at the time of the conclusion of the contracts, it would be practically impossible to obtain the individual consents thereto from all of the counterparties. On the other hand, if a business entity is simply permitted to make such an amendment unilaterally, then the interests of a number of counterparties may be harmed.

Under the amended Civil Code, the Preparing Party may validly amend the provisions of such contracts by amending the Formulaic General Conditions without obtaining the individual consents from the counterparties, and the individual provisions in the amended Formulaic General Conditions may be effectively deemed to have been agreed to by all of the parties, if either of the following requirements is satisfied:

(i) The amendment of the Formulaic General Conditions serves the general interests of the counterparties (a favorable amendment); or
(ii) the amendment of the Formulaic General Conditions is not contrary to the purpose of entering into the contracts, and is reasonable in light of the circumstances relating to the amendment, including the need for the amendment, adequacy of the amended provisions, existence and contents of any provision stipulating possible amendments of the Formulaic General Conditions in accordance with the relevant provisions of the Civil Code (an unfavorable amendment).

It is important to note that even if the first requirement is not satisfied, the amendment can still be implemented by satisfying the second requirement. The factors to be considered in determining reasonableness under the second requirement include whether or not any compensatory measure is offered to the counterparty, such as the right to cancel the contract, and whether or not the Formulaic General Conditions have an amendment clause.

With respect to the procedure for implementing an amendment, it is necessary to establish when the amendment of the Formulaic General Conditions will take effect, and to give notice of the intended amendment, the provisions of the amended Formulaic General Conditions and the time when they will take effect, through an appropriate method, including through the use of the Internet.

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Virtual Currency Regulation in Japan

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I. Introduction

Despite recent controversies involving virtual currencies, 2017 was a great year for them. The price of Bitcoin was 20 times higher than its price at the end of 2016. The value of some other virtual currencies, such as Litecoin and XRP, soared the same way. Financing via initial coin offerings ("ICOs"), a method by which companies issue their original tokens, also attracted a lot of attention.

As virtual currencies became more and more popular, their regulation came under increased scrutiny. In this article, I will briefly explain the regulation of virtual currencies in Japan.

The Payment Services Act of Japan[1](the "Act") was amended to regulate virtual currencies upon the proposal of the Financial System Council of the Japanese Financial Services Agency. This proposal was made in response to the guidance announced in June 2015 by the Financial Action Task Force ("FATF")[2] following the reaffirmation by the G7 members of their commitment against financing terrorism and ensuring "an effective implementation of FATF standards, including through a robust follow-up process."[3] The amended Act came into effect on April 1, 2017.

What is Virtual Currency?

Virtual currency has various meanings, but in Japan, the Act defines it as:

(i) Financial value that may be used to pay an unspecified person for the price of any goods purchased or leased, or any services provided and may be sold to or purchased from an unspecified person (limited to that recorded on electronic or other devices by electronic means, and excluding Japanese and foreign legal currencies and currency denominated assets; the same applies to the following item) and that may be transferred using an electronic data processing system ("Type 1 VC"); and

(ii) financial value that may be exchanged reciprocally for the financial value specified in the preceding item with an unspecified person and that may be transferred using an electronic data processing system ("Type 2 VC").[4]

A virtual currency that can be swapped for legal currency in exchanges, such as Bitcoin and Ether, corresponds to a Type 1 VC. In comparison, traditional electronic money, such as Suica (a rechargeable smart card) and in-game money, are not considered virtual currencies because people use it to pay, not an unspecified person, but only those persons and shops specified under the relevant contract.

On the other hand, what typically corresponds to a Type 2 VC is a virtual currency that can be swapped in exchanges, not for legal currency, but for a Type 1 VC. It should be noted, however, that there is still a possibility that the Japanese government may regard a virtual currency that is technically capable of being exchanged for a Type 1 VC as being a Type 2 VC though the said currency currently has not been exchanged for a Type 1 VC in any exchange. Therefore, if companies issue such type of tokens when they carry out an ICO, such tokens may be deemed as a Type 2 VC.

What is a Virtual Currency Exchange Service?

The Act defines a virtual currency exchange service ("VCES") as the act of carrying out as a business any of the following:

(i) Sale and purchase of virtual currency or the exchange thereof for another virtual currency;
(ii) intermediary, brokerage or agency service for the acts described in item (i); and
(iii) management of the funds or virtual currency of a user in relation to the acts described in items (i) and (ii).[5]

Under the Act, no person may engage in a VCES unless such person is a corporation registered with the Prime Minister of Japan (such registered person, the "VCES Provider"). To obtain registration, such person must submit an application which includes various information, such as the names of the virtual currencies that it will be handling, and meet all the other requirements of the Act. In addition, once

registered, the VCES Provider must comply with the regulations of the Act. Any person who engages in a VCES without proper registration shall be punished by imprisonment with required labor for not more than three years or a fine of not more than three million yen, or both.

Consequently, if any person intends to carry out a business that involves virtual currencies in Japan, that person should carefully consider whether or not such business is a VCES. For example, if that person plans to issue tokens that are classified as a Type 2 VC in carrying out an ICO, then that person would be considered selling a Type 2 VC. Because such activity is considered a VCES, that person must be registered as a VCES Provider, or must first ask a VCES Provider to act as an agent therefor, before carrying out such activity in Japan.

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1. Act No. 59 of June 24, 2009, as last amended by Law No. 62 of June 3, 2016.
2. The FATF was established in 1989 to "promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system." (http://www.fatf-gafi.org/about/)
3. See https://www.env.go.jp/water/marine_litter/06_mat13_1_%EF%BC%93-1LD.pdf, p. 9.
4. The Act, art. 2, para. 5 nos. 1 and 2.
5. The Act, art. 2, para. 7 nos. 1, 2 and 3.

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The Problem of Unknown Land Owners and the Japanese Real Estate Registration System

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According to a recent statistic, Japan has 4.1 million hectares of land the owners of which cannot be identified from the registration records alone, and even in cases where the owners can be identified, the properties are in such a state that the owners are unreachable. It is estimated that, by 2040, the size of parcels of land in Japan with unknown owners will have reached almost the size of Hokkaido, the second largest of the four main islands of Japan (about 7.8 million hectares). It is said that one of the major reasons for this situation is the current Japanese real estate registration system.

The Japanese real estate registration system and registration offices were created and are being managed by the Legal Affairs Bureau of the Ministry of Justice. The real estate registration system is a paid service provided by the said Ministry, which allows a person to access registration information either through the Internet or by manual search, to confirm real estate registration information or obtain certificates of registered matters from the registration office. One of the features of the real estate registration system in Japan is that the registry creates a registration record for each individual property, and not for each person. Also, under the registration system, real estate registration records are created separately for land and buildings, which are treated as separate and distinct real estate because the buildings are not considered attached to the land. This is in contrast to other jurisdictions where rights cannot be established, and registration and transactions cannot be made, solely for buildings. This separate treatment of land and buildings is a major characteristic of the Japanese real estate system that has given rise to very complex legal problems; however, a discussion of these legal problems is beyond the scope of this article and would have to be discussed at another occasion.

Another characteristic of the Japanese real estate system is that registration is only a requirement to bind third parties, but it is not a requirement to transfer ownership between the parties.[1] Real estate ownership is acquired by contract, etc. However, unless a person registers such ownership, that person cannot assert it against third parties. In other jurisdictions, registration is a requirement to make a transfer of rights effective and no right will transfer unless the registration is made. In Japan, however, a transfer of property is deemed effective between the parties even without its registration.[2]

The same policy discussed above applies to land ownership rights acquired by inheritance. So whether or not the heirs register their ownership of the inherited properties is left to their judgment. There are various reasons why the heirs may choose not to register such ownership, for example, to not be burdened with having to pay property taxes, or to avoid the duties of managing the properties. Other reasons, such as unwillingness to shoulder the costs of the registration procedures and the psychological distress of erasing the name of the deceased ancestor from the registry, have also been given as reasons for their refusal to register their ownership of inherited properties.

There has even been an instance where the registered owner of a property has remained unchanged for nearly 100 years. In such a case, the land may have been handed down by automatic succession from the registered holder to his or her heirs multiple times, and has thus, resulted in the property being shared by over 100 legal heirs. Hence, the owners of such property have become completely anonymous.

Under the existing Compulsory Purchase of Land Act,[3] there is a system that allows the government to take ownership of lands whose owners are unknown. In addition, the Civil Code provides for an absentee property management system[4] and an inheritance management system.[5] However, these existing systems have not been easy to use or implement and, therefore, they have not led to a solution that would allow the use of lands with unknown owners.

To resolve the shortcomings of the current systems, a bill is scheduled to be submitted to the diet this year to simplify the procedure that will allow the state or local government to take ownership of lands whose owners are unknown and convert them into public lands as well as make vacant lots with unknown owners temporarily available for public purposes, such as by using them as parks or venues for holding events. In addition, it appears that the introduction of a system that will encourage the registration of properties is being considered as a new mechanism to address inherited properties the ownership of which has not been properly registered for a long time. Under this proposed system, a registration officer will prepare a list of legal heirs, who will then be contacted and asked to undergo registration procedures. In addition, as a mid to long-term plan, the mandatory registration of

inherited properties and the imposition of penalties for the violation thereof are being considered.

With the establishment of these new systems, the current situation involving numerous lands with unknown owners is expected to drastically change in the near future, and the rate of use of lands will greatly improve.

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1. Acquisitions of, losses of and changes in real rights concerning immovable properties may not be asserted against third parties, unless the same are registered pursuant to the applicable provisions of the Real Property Registration Act (Act No. 123 of 2004) and other laws regarding registration (Civil Code, art. 177). The order of priority of rights registered in relation to the same real property shall, unless otherwise provided for in laws and regulations, follow the chronological order of registration (Real Property Registration Act, art. 4).
2. A party who has engaged in a real estate transaction having trusted the description in the registration is entitled to acquire such rights under certain requirements even if the registered right holder does not seem to be the true right holder. However, indefeasibility does not apply to registration in Japan. Thus, even if real property is purchased from a registered right holder thinking that such registered right holder is the true owner, the real property cannot be taken away from the true owner if there is a true owner. (Real Property Registration System, Ministry of Land, Infrastructure, Transport and Tourism at http://www.mlit.go.jp/common/001050449.pdf.)
3. Act No. 219 of 1951.
4. Civil Code, arts. 25 to 29.
5. *Ibid.*, arts. 951 to 959.

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