

An Influence of Japanese Civil Code Reform upon the Current Bill of Lading Transactions

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Introduction

In Japan, the Civil Code reform movement has been proceeding. After long discussion at the Japanese law commission (the Legislative Council of the Ministry of Justice), the Civil Code Reform Bill was introduced in Parliament and it is now under the deliberation at the House of Representatives. The Bill, which is expected to be passed in no distant future, covers various issues which can affect businesses, one of which is the law reform relating to standard form contracts. From the shipping industry's perspective, this is related to bill of lading transactions. This paper will argue an influence of the same law reform upon the current bill of lading transactions.

Overview of Japanese Civil Code Reform

Japanese Civil Code¹ was enacted in 1896 and, surprisingly, it has basically remained unchanged to date. It is however obvious that the state of affairs surrounding us has dramatically changed since the enactment of the Code.² Under such circumstances, the Civil Code reform movement has been proceeding. On 28 October 2009, the Minister of Justice consulted with the Legislative Council of the Ministry of Justice (LCMoJ)³ for the revision of the provisions relating to the law of obligations⁴ in the Civil Code.⁵ In response to this consultation, a working group the purpose of which is to study and deliberate this issue was established in the Council, which is called as the 'Working Group on the Civil Code (Law of Obligations)' (WG). On 10 February 2015, after extensive discussions for five and a half years, the WG submitted a consultation paper⁶ to the general meeting of LCMoJ, which was

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¹ The Code is the fundamental legislation governing civil activities including contract law matters and it applies to businesses' commercial activities as well as individuals' activities.

² For example, our daily life has been much influenced by globalisation and the development of information and communication technology.

³ This council is the advisory body to the Minister of Justice and deliberates the necessity of law reform as well as what reform should be upon a request of the Minister.

⁴ The law of obligations is one of the fields of private law under the civil law legal system, which includes contract law.

⁵ Minister of Justice, 'Consultation No. 88' <<http://www.moj.go.jp/content/000005084.pdf>> accessed 18 February 2017; LCMoJ, 'The Minutes of the 160th Meeting' <<http://www.moj.go.jp/content/000005081.pdf>> accessed 18 February 2017.

⁶ WG, 'The Draft Summary of Essential Points regarding the Revision of the Civil Code (Law of Obligations)' <<http://www.moj.go.jp/content/001136445.pdf>> accessed 18 February 2017; WG, 'The

adopted by the general meeting on 24 February 2015 and subsequently submitted to the Minister of Justice.⁷ In response to this, the Civil Code Reform Bill was introduced in Parliament on 31 March 2015⁸ and the deliberation at the House of Representatives started on 16 November 2016.⁹ The reason why such a considerable time has been required to commence the deliberation of the Bill is purely the political schedule and it is considered that the Bill will be passed in the not-too-distant future.

Law Reform regarding Standard Form Contracts

Whereas the Bill covers a wide range of subjects relating to the law of obligations, which is one part of the Civil Code,¹⁰ according to the explanation of the Bill, the following four issues are, among other things, important: (i) the revision to time bar system, (ii) the introduction of the statutory floating interest rate, (iii) the revision to the law of guarantee, and (iv) the establishment of provisions with respect to standard form contracts.¹¹ The forth one, the law reform relating to standard form contracts, will be addressed.

No provisions as to standard form contracts can be found in the current Civil Code. It is however obvious that, in the modern society, standard form contracts are essential legal means in order that a lot of transactions are effectively and reasonably handled.¹² On the other hand, it has been submitted that standard form contracts also involve the problem that there is the possibility that one party who is tendered standard terms and conditions prepared by the other party is put in a weak position and his interests may be harmed as he has no sufficient opportunity to review the contents of the terms and conditions at or before the time of contract. In such circumstances, it is proposed in the Bill that some articles governing standard form contracts should be newly established in the Civil Code.¹³ More

Minutes of the 99th Meeting' <<http://www.moj.go.jp/content/001146440.pdf>> accessed 18 February 2017.

⁷ LCMoJ, 'The Minutes of the 174th Meeting' <<http://www.moj.go.jp/content/001139633.pdf>> accessed 18 February 2017.

⁸ MoJ, 'The Civil Code Reform Bill' <http://www.moj.go.jp/MINJI/minji07_00175.html> accessed 18 February 2017.

⁹ Nikkei Inc. 'The Civil Code Reform Bill is now under the deliberation' *The Nikkei* (Tokyo, 16 November 2016) <http://www.nikkei.com/article/DGXLASFS16H22_W6A111C1PP8000/> accessed 18 February 2017.

¹⁰ The number of articles of the Code which is revised, newly established or deleted by the Bill exceeds 300.

¹¹ MoJ, 'The explanation of the Civil Code Reform Bill' <<http://www.moj.go.jp/content/001142183.pdf>> accessed 18 February 2017.

¹² In our jurisdiction, generally speaking, standard form contracts tend to be used in carriage, insurance or bank transactions.

¹³ It should be noted, however, that the Bill specifically defines the standard form contracts governed in the Bill and therefore it does not intend to cover all types of standard form contracts. More detailed discussion in this regard will follow later in this section.

specifically, the Bill proposes the establishment of three articles in this respect, namely Arts. 548-2, 548-3 and 548-4. The first one provides the requirements for the formation of standard form contracts. The second one governs the duty of the parties who prepare and tender standard terms and conditions to disclose the contents of such terms and conditions upon a request of the other parties (i.e. the parties who are tendered the terms and conditions.). The last one governs the requirements for amendment of standard terms and conditions. Although it is considered that all of the three articles embrace interesting issues, only the first one, Art. 548-2, will be discussed hereafter.

Article 548-2 (1) provides, *inter alia*, that:

The parties who mutually agreed to enter a Standard Transaction (*Teikei Torihiki*) (This means a transaction (i) which a particular person or corporate body carries out with a large number of unspecified persons or corporate bodies, and (ii) the whole or part of the contents of which is standardised, and also (iii) such standardisation of which is reasonable for the both parties.) are deemed that they also agreed to the individual terms and conditions stipulated in a Standard Terms and Conditions (*Teikei Yakkan*) (This means the aggregated terms and conditions which are prepared by the person or corporate body carrying out a transaction with a large number of unspecified persons or corporate bodies for the purpose of incorporating those into their contract in respect of a Standard Transaction (*Teikei Torihiki*).), provided that:

- a. Where the parties agreed that the Standard Terms and Conditions (*Teikei Yakkan*) will be incorporated into their contract; or
- b. Where the party who prepared the Standard Terms and Conditions (*Teikei Yakkan*) has represented to the other party, in advance, that such terms and conditions will be incorporated into their contract.

Honestly speaking, the contents and construction of this Article are by no means straightforward, especially about the concept of Standard Transaction (*Teikei Torihiki*), which will be elaborated below. As mentioned earlier, the concept of Standard Transaction (*Teikei Torihiki*) consists of three parts, namely the above (i) to (iii). The purpose of the first part is to clarify that Standard Transaction (*Teikei Torihiki*) must be a transaction which does NOT focus on the individuality of the unspecified persons or corporate bodies. In this context, it is explained in the WG's paper that, for example, labour contracts do not fall within the scope of Standard Transaction (*Teikei Torihiki*) since they are

transactions focusing on labourers' individuality.¹⁴ The purpose of the second and third parts is to test (a) whether, under the transaction, it is usual for one party to make a contract with a large number of unspecified persons or corporate bodies on the same terms and conditions, and (b) whether, under the transaction, it is commonly considered to be reasonable that one party enters into the contract with the other, accepting the whole of the terms and conditions prepared by such other party without negotiation.¹⁵

Impact of the Law Reform on the Current Bill of Lading Transactions

As discussed earlier, businesses' commercial activities are generally governed by the Civil Code (as well as the other relevant legislation such as the Commercial Code),¹⁶ which means the maritime transport business may also be affected by the present law reform. In these circumstances, the question arises as to whether bills of lading are deemed to be valid as a contract of carriage between the parties under Article 548-2 (1); in other words whether the current bill of lading transactions will fulfil the requirements of the Article should be considered.

Applicability of the new law to bill of lading transactions

The first issue to be discussed here is whether Article 548-2 (1) shall apply to bill of lading transactions. In the light of the contents and construction of the same paragraph of the Article, which was discussed before, such question can be divided into two sub-questions: (a) whether bill of lading transactions are considered to be Standard Transaction (*Teikei Torihiki*) and (b) whether the terms and conditions on the reverse side of bills of lading are considered to be Standard Terms and Conditions (*Teikei Yakkan*).

As to the first sub-question, it is necessary to consider whether bill of lading transactions satisfy three conditions of Standard Transaction (*Teikei Torihiki*) provided in Article 548-2 (1), the specific meaning of which was discussed in the last paragraph of the previous section. The first test to be considered here is therefore whether bill of lading transactions are transactions which do NOT focus on the individuality of the unspecified persons or corporate bodies. It seems that the answer to this test is positive as, under usual maritime transport services in respect of which bills of lading are issued, no carriers focus on the individuality of the shippers or consignees. The second test is whether, under bill of lading transactions, it is usual for one party to make a contract with a large number of unspecified persons or corporate bodies on the same terms and conditions. The answer to this is obviously positive.

¹⁴ WG, 'The materials of discussion No. 86-2' <<http://www.moj.go.jp/content/001131467.pdf>> accessed 18 February 2017.

¹⁵ WG, 'The materials of discussion No. 83-2' <<http://www.moj.go.jp/content/000126620.pdf>> accessed 18 February 2017.

¹⁶ See n 1.

The third test is whether, under bill of lading transactions, it is commonly considered to be reasonable that the shipper enters into the contract with the carrier, accepting the whole of the terms and conditions prepared by the carrier without negotiation. It can be said that the answer to this is also not negative taking into consideration the fact that (a) such procedure can contribute to efficiently managing a large number of carriage, from which the both parties enjoy the benefit, and therefore that (b) the same procedure is well established in the maritime transport industry.

The second sub-question is more straightforward. Given that bill of lading transactions are considered to be Standard Transaction (*Teikei Torihiki*), it is obvious from its definition¹⁷ that the terms and conditions on the reverse side of bills of lading are considered to be Standard Terms and Conditions (*Teikei Yakkan*).¹⁸

In sum, Article 548-2 (1) shall apply to bills of lading transactions.

“Representation” requirement and the current booking operation in liner services

Under Article 548-2 (1), which, as discussed previously, shall be applicable to bills of lading transactions, the terms and conditions on the reverse side of bills of lading shall constitute a contract of carriage between the parties, provided that:

- a. Where the parties agreed that the terms and conditions on the reverse side of the relevant bill of lading will be incorporated into their contract;
or
- b. Where the carrier has represented to the shipper, in advance, that the terms and conditions on the reverse side of the relevant bill of lading will be incorporated into their contract.

From the practical point of view, it is arguably quite rare that the parties to the contract of carriage of goods by sea expressly agree that the terms and conditions printed on the reverse side of the relevant bill of lading will be incorporated into their contract. In these circumstances, whether the above second requirement, namely the prior representation with respect to the incorporation of the terms and conditions on the reverse side of the relevant bill of lading into the contract of carriage, is fulfilled or not will be significant in order that such bill of lading can be considered to be valid as a contract of

¹⁷ Standard Terms and Conditions (*Teikei Yakkan*) is defined as the aggregated terms and conditions which are prepared by the person or corporate body carrying out a transaction with a large number of unspecified persons or corporate bodies for the purpose of incorporating those into their contract in respect of a Standard Transaction (*Teikei Torihiki*).

¹⁸ In this respect, although, in the course of discussion at the WG, some opined that no standard form contracts utilising between businesses should fall within the ambit of Standard Terms and Conditions (*Teikei Yakkan*), such opinion was not accepted in the WG. See WG (n 14).

carriage between the parties.

In this regard, based on the limited information gathered from the internet, it appears that Japanese liner service operators do not represent to the shipper, prior to the shipper's booking, that the terms and conditions printed on the reverse side of their bills of lading will be incorporated into the contract of carriage. For example, no description or representation which satisfies the above second requirement can be found on the booking web page of NYK Container Line Ltd.¹⁹ The same²⁰ or similar²¹ situation can also be found for Mitsui O.S.K. Lines (Japan), Ltd.²² and "K" Line (Japan) Ltd.²³

Considering the above, it cannot be denied that there is the possibility that the current booking operation in Japanese liner services is held to be in conformity with the requirements of Article 548-2 (1).

Possible counterargument of making public terms and conditions on website

There might be a counterargument against the above discussion to the effect that the carriers have made public their terms and conditions via their website and therefore it should be considered that they do not have to make an individual representation at each time of booking. Whereas such argument seems to be apparently reasonable, it arguably cannot be supported by the courts.

Indeed it had been proposed, in the process of the discussion at the WG, that the above-mentioned prior representation requirement should not be imposed where the party who prepared Standard Terms and Conditions (*Teikei Yakkan*) publicly announces that such Standard Terms and Conditions (*Teikei Yakkan*) will be incorporated into the contract between the parties.²⁴ However it is considered that there are two reasons that the same counterargument can be dismissed. First, as far as we can ascertain from the information gathered through the internet, presumably Japanese liner service operators merely disclose their terms and conditions on their website and do not expressly announce that such terms and conditions will be incorporated into the contract between the parties. Second, the purpose of the above discussion at the WG was to exclude transactions which have a highly public nature, such as carriage of passengers by rail, postal service and telecommunications service, from the ambit of Article 548-2 (1). This is because it has been considered that, in such transactions, it would be in the

¹⁹ <http://www.nykcontainerline.com/html/AP02_1.html> accessed 18 February 2017.

²⁰ No description or representation which satisfies the above second requirement can be found on the booking web page of MOL Lines (Japan).

²¹ No description or representation which satisfies the above second requirement can be found on the web pages of "K" Line (Japan).

²² <<https://www.moljapan.co.jp/charge/inquiry/booking/ex.html>> accessed 18 February 2017.

²³ <<https://www.klj.kline.com>> accessed 18 February 2017.

²⁴ WG, 'The materials of discussion No. 81-B' <<http://www.moj.go.jp/content/000125160.pdf>> accessed 18 February 2017; WG, 'The materials of discussion No. 83-2' <<http://www.moj.go.jp/content/000126620.pdf>> accessed 18 February 2017.

consumers' interest to incorporate terms and conditions prepared by the service providers into the contract between the parties without requiring strict prior representations.²⁵ It should be noted that transactions discussed here are those which are carried out between businesses and consumers, which is unusual in bill of lading transactions.

It is therefore considered that the above counterargument cannot be accepted by the courts.

Conclusion

Once the Civil Code Reform Bill is enacted, the carriers issuing bills of lading governed by Japanese law have to fulfil one of the following two requirements in accordance with Article 548-2 (1):

- a. To agree with the shipper that the terms and conditions printed on the reverse side of the carrier's bill of lading will be incorporated into their contract; or
- b. To represent to the shipper, in advance, that the terms and conditions printed on the reverse side of the carrier's bill of lading will be incorporated into their contract.

Supposedly, it is, and will be, uncommon that the parties to the contract of carriage of goods by sea expressly agree that the terms and conditions printed on the reverse side of the relevant bill of lading will be incorporated into their contract. Hence, whether the second requirement, the prior representation with respect to the incorporation of the carrier's terms and conditions into the contract of carriage, is fulfilled or not will be significant in order that the relevant bill of lading can be considered to be valid as a contract of carriage between the parties under the new law. It is however conceivable that as matters stand Japanese liner service operators do not represent to the shipper, prior to the shipper's booking, that the terms and conditions printed on the reverse side of the relevant bill of lading will be incorporated into the contract of carriage. Considering the above, it can be said that one of the pressing issues for the carriers issuing bills of lading governed by Japanese law is to take appropriate measures to obey the new law, which will arguably be done by reviewing the current booking operation in liner services.

²⁵ WG, 'The materials of discussion No. 86-2' <<http://www.moj.go.jp/content/001131467.pdf>> accessed 18 February 2017.