

ABSTRACTS

Draft Proposal of New Civil Code : Paradigm shift from “*caveat emptor* (let the buyer beware)” to “let the seller disclose”

Yasumi OCHI

The purpose of this essay is to promote to convert the old regime of “*caveat emptor* (let the buyer beware)” to the modern contract theory which has been adopted in most of the major countries and from such viewpoint, support and propose further modernization of the related clauses of proposal (*kihonhoshin*) of amendment of Civil Code (hereinafter called “Draft Proposal”)

This essay shall constitute of following five sections.

Section 1: Fraudulent solicitation of financial products and the doctrinal development of the remedy therefor

Section 2: Comparative analysis of modern “contract” theory with regard to remedy for fraudulent solicitation

Section 3: Representation & Warranty clauses in sophisticated agreements and impact thereon

Section 4: Review of and comment on contract related provisions of Draft Proposal

Section 5: Review of default clause of Draft Proposal and the analysis of Tokyo District Court decision on January 24, 2006

Section 1 reviews the remedy of fraudulent solicitation. Traditionally Japanese court order the theory based on tort theory. The scholars has

discussed that the contractual remedy including annulment of such contract should be provided. However until this introduction of new civil code, the movement to such theory has not been penetrated.

Section 2 reviews the remedy against fraudulent solicitation. In France, Germany, England and United States. This review leads my conclusion that the Draft Proposal has been influenced by common law misrepresentation theory and that such paradigm shift is preferable to both consumers and sophisticated business.

Section 3 analyses the Representation & Warranty clauses and discuss impact thereon.

Such clause is derived from common law agreement. However this clause is now indispensable clauses in M&A agreement and other sophisticated agreements. This means the classical concept of “the Buyer shall be cautious” is transformed to “the Seller shall disclose”

Section 4 review and comment on contract related provisions of preliminary draft of new Civil Code. Some clauses are not sufficient for the modernization of contract theory. For example Draft Proposal persist in scienter in order to find the fraud. However in order to function fraud provisions, scienter requirement should be abandoned.

Section 5 specifically discuss the effect of default doctrine and effect of violation of representation and warranty clauses. The Proposal appears to move to common law strict liability theory from fault theory in Roman law concept in this regards. Such move is preferable for practitioners. For example fault theory may leads to unreasonable consequences in the violation of representations and warranty clause and the adoption of common law strict liability standard may avoid

such problem completely.

« Confiance légitime » dans la phase précontractuelle : un essai sur le mécanisme de détermination du contenu du contrat (5)

Kazuma YAMASHIRO

D'après l'analyse courante du droit civil japonais, on procède à la détermination du contenu du contrat par les deux sortes de l'interprétation : l'interprétation du *contrat* et celle de la *déclaration de volonté*. Nous élucidons quel est le rôle propre de l'interprétation de la *déclaration de volonté*, pour déterminer le contenu du *contrat*. Pour ce but, cet article est consacré à l'étude des deux principes qui règnent dans la formation du contrat : le consentement, l'un, et la théorie de l'apparence, l'autre.

En droit français contemporain des contrats, qui s'objectivise et subit l'influence du droit de la consommation, le domaine du principe de la « confiance légitime » est peu à peu élargie. Nous croyons que la recherche de cet aspect juridique, qui est directement présenté par des tentatives doctrinales de rénovation de la théorie de l'apparence, permet d'approfondir notre connaissance du droit des contrats et des obligations.

Sur la base de cette étude comparative, nous proposons une hypothèse : parmi les interprétations de la déclaration de volonté, l'interprétation dite *naturelle* et celle *normale* devraient se distinguer l'un de l'autre, car la dernière ne pourrait pas concerner « la commune intention des parties contractantes », qui est poursuivie dans l'interprétation du contrat. L'interprétation *normale*, qui a pour but d'inclure les con-

fiances légitimes suscitées par des comportements précontractuels et unilatéraux du cocontractant dans le champ contractuel, pourrait servir à garantir la loyauté dans la période précontractuelle.