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Japanese Online Service Form Contracts: Can Ambiguity Be Interpreted by the Operator?

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This article discusses a lawsuit brought by a qualified consumer association to rectify an alleged violation of consumer interest (exoneration of operator's liability in connection with ambiguous membership revocation clauses) by seeking an injunction against certain ambiguous provisions under the Consumer Contract Act ("CCA"), Article 12, Para. 3. The Tokyo High Court rejected the Operator's argument and granted an injunction against enforcing such provisions (November 5, 2020, Rei 2 (Ne) 1093, Rei 2 (Ne) 2358; LEX/DB 25566893).

I. Relevant Facts:

The facts involved an online game (*Mobage*) user agreement which included the following provisions in relevant parts:

User Agreement, Article 7

1. If a member falls within any of the following circumstances, the Company may revoke his/her membership:

(c) If the Company determines that the member inappropriately caused trouble to other members;

(e) The Company otherwise determines that a member is unfit as a member.

3. The Company shall not be responsible for any damages caused by its actions described above.

The original decision by the Saitama District Court (February 5, 2020, 2458 Hanji 84) enjoined the provisions because they lacked clarity and held that Article 7.3 constituted void exoneration of the operator's liability under CCA, Article 8, Para. 1, Items 1 and 3. Following this original judgment, the operator modified the provisions to add "the Company reasonably determines" for Article 7, Para. 1, Items (c) and (e) of the User Agreement. Both parties appealed.

II. Issues:

Whether the provisions can be saved by the addition of the new word "reasonably" in light of the following circumstances:

1. CCA Article 3, Para. 1, Item 1 directs the operator to use best efforts to prepare clear and understandable contracts with respect to consumers' rights and obligations.

2. There is a court precedent that involved a cell phone user agreement (i.e., a consumer agreement) that allowed the operator to amend its user agreement without restriction on its face. The court held that this provision is valid even in light of the consumer association's challenge for injunction, by pointing out that such provision should be read to require reasonableness. Tokyo High Court, Nov. 28, 2018, 2425 Hanji 20 ("Cell Phone Decision").
3. Online service operators often have practical a need to revoke memberships etc. to avoid interruptions and hazards to the service and for that purpose a broadly drafted revocation provision is often thought of as a necessary evil within the industry.

III. Tokyo High Court's Decision:

1. In the spirit of CCA Article 3.1.1 (ease and clarity requirement), the court should be restricted from saving ambiguous provisions in light of the policy advanced by such CCA provision.
2. If we acknowledge disparity in access to information and negotiation power between the operator and the consumer, it is difficult to assume that the operator's initial erroneous determination can be corrected in implementation.
3. The court didn't find that the User Agreement, Article 7.1(c) and (e) were inappropriate provisions *per se*, but found the exoneration of liability provision of Article 7.3 triggered by such revocation provisions to be void under the prohibition-against-exoneration provisions (Articles 8.1(1) and (3)) of the CCA.

IV. Discussion:

1. If very few customers actually review form consumer contracts, it should be possible to argue that users' interests are hardly interfered with by ambiguous provisions. In addition, many operators argue that without broad-gauged revocation clauses, service operation can be at risk by not being able to remove "bad apples" quickly enough. In this case, the game service involved a chat function among members and it was partly this feature that prompted the alleged need for quick removal of members.
2. The High Court takes the form-over-substance approach in consumer contracts. The fact that members don't read contracts is exactly the reason for not tolerating ambiguity and the operator's unilateral power to interpret the same. Admittedly, there is another approach to address the problem as adopted in the Cell Phone Decision by reading in the "reasonableness" requirement in interpreting an open-ended provision. This court disagreed with such approach particularly because leaving in overbroad language empowers the operator beyond appropriate boundaries and that results in a significant chilling effect on the members' behavior. One can argue that such spirit is already laid out in CCA Article 3.1.1 (a 2018 amendment).
3. As a technical matter, there may be important ripple effects of this decision: first, this line of thinking can also apply to CCA Article 10 (general avoidance of one-side contract provisions) without going through the specific requirements of the prohibition against exoneration of liability (Article 8), which is a specific category of Article 10. Indeed, User Agreement Article 7.1(c) and (e) can be deemed as one-sided provisions standing on their own without the exoneration provision of Article 7.3. Second, this holding may go beyond consumer contracts by impacting form contracts generally as described in Civil Code Article 548-2, Para. 2, which does not require a consumer aspect of the contract.

So what are the **takeaways** from this case for online operators? The following come to my mind: (i) it is important to provide examples of causes for removal etc. or more specific requirements to trigger detriment to members; (ii) the “need to remove” factor is unlikely to be persuasive in light of the ease/clarity policy advanced in the CCA; and (iii) the “nobody reads the stuff” argument does not work as a matter of fact, particularly to well-intentioned qualified consumer associations who are generally effective in prosecuting favorable cases.

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If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Tokyo lawyer:



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