
The Enactment of the Labor Contract Act: Its Significance and Future Issues

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The Labor Contract Act of Japan, enacted in November 28, 2007, and effective from March 1, 2008, sets forth rules on basic rights and obligations in relation to labor contracts. This article examines the significance of this act and future issues that it raises. It begins with a review of the background to its enactment, including the increasing role of individual labor contracts and the rise in number of individual labor disputes, and a summary of events leading up to its enactment. This is followed by an explanation of the significance of the act's enactment. I then proceed to demonstrate how the Labor Contract Act differs in character from other labor legislation, such as the Labor Standards Act, before turning to look at interpretive issues focusing on the provisions on rules of employment. I conclude by identifying issues of future interest, including enhancement of the act's content.

I. Enactment of the Labor Contract Act

1. Background and Need for Enactment¹

(1) Increase in Role of Individual Labor Contracts

One of the most important developments that led to consideration of enactment of the Labor Contract Act was the rise in importance of individual labor contracts against the backdrop of diversifying employment conditions. Whereas the emphasis used to be on establishing working conditions uniformly on the basis of collective labor agreements and rules of employment, factors such as the introduction in recent years of performance-based personnel and wage systems (e.g., annual salary determination systems) and the diversification of forms of employment have reduced the relative importance of uniformly determined working conditions. Instead, the content of agreements and working conditions agreed through individual labor contracts has grown more important. Rules on such individual labor contracts have thus assumed important significance, necessitating the statutory clarification of legal rules regarding labor contracts.

(2) Increase in Individual Labor Disputes and Increasing Importance of Law

Another factor behind the enactment of the Labor Contract Act was the increase in individual labor disputes (“individual disputes”) between individual workers and employers. For example, the statistics on civil cases brought before district courts show that the number

¹ Regarding the background and significance of enactment of the Labor Contract Act, see Takashi Araki, Kazuo Sugeno & Ryuichi Yamakawa, *Shokai Rodo Keiyakuho* [The labor contract act in detail] ch. 1 (Kobundo 2008).

of labor-related cases in Japan in 1991 at the end of the “bubble” period was 1,054 (662 ordinary suits and 392 provisional dispositions). In 2005, this number had risen to 3,082 (2,446 ordinary suits and 636 preliminary injunctions). There was thus an approximately threefold increase in the space of little over a decade.² The number of general labor consultations under the administrative individual labor dispute resolution system established under the Act Regarding the Promotion of the Resolution of Individual Labor Disputes in 2001 far exceeded this number, reaching 997,237 in fiscal 2007 (though this number does also include legislation-related inquiries), and even the number of consultations concerning only civil individual disputes (excluding cases such as those handled by labor standards offices) came to 197,904.³

The first response to the rise in individual disputes was to enhance the resolution system. In addition to the above individual labor dispute resolution system established in 2001 as an administrative solution, a labor tribunal system was established under the Labor Tribunal Act in 2004 to require the courts to hear individual labor cases, propose settlements and render determinations over a maximum of three sessions. With this increase in individual disputes and enhancement of resolution systems, the development of clear and substantive legal rules contributing to the resolution and prevention of individual disputes emerged as the next priority.

This increase in individual disputes and the corresponding response may be regarded as forming part of the increase in the role of law in Japanese society and the economy against the background of the growing emphasis on after-the-fact regulation and compliance. It is also possible to see the demand for clarification of rules on labor contracts as a reflection of the emphasis that has come to be placed on the administration of workplace and employment relations in accordance with legal rules in employment society.

(3) Absence of Legislation

While the Labor Standards Act is obviously one piece of legislation concerning individual labor relations, this act is essentially classified as administrative and criminal law, and contains few provisions concerning the relationship of rights and obligations under labor contracts. Thus it does not specify, for example, under what circumstances dismissals

² See Saiko Saibansho Jimu Sokyoku [Administrative Affairs Bureau, Supreme Court], *Rodo Kankei Minji-Gyosei Jiken no Gaikyo* [Outline of Labor Relations Civil and Administrative Cases for 1991], 44 *Hoso Jiho* (Lawyers Association Journal) 121 (No. 7, 1992) and Saiko Saibansho Jimu Sokyoku [Administrative Affairs Bureau, Supreme Court], *Rodo Kankei Minji-Gyosei Jiken no Gaikyo* [Outline of Labor Relations Civil and Administrative Cases for 2005], 58 *Hoso Jiho* (Lawyers Association Journal) 103 (No. 8, 2006). Subsequently, the Labor Tribunal System entered operation in April 2006, and in 2007, when this system had been in operation for one year, the number of individual labor cases filed before district courts consisted of 2,174 ordinary suits, 387 provisional dispositions, and 1,494 labor tribunal cases.

³ For details of the operation of the individual labor dispute resolution system in fiscal 2007, see <http://www.mhlw.go.jp/houdou/2008/05/h0523-3.html>.

and farming-outs (secondments or temporary external transfers) ordered by employers are lawful, or whether disadvantageous changes can be made to the content of labor contracts through the employer's unilateral revision of rules of employment or work rules. Regarding these issues, rules have been created by precedent (i.e., the establishment of principles of case law).⁴

However, many of these principles of case law were expressed in light of specific cases, making them unclear or difficult to apply in some instances. In this respect, it was desirable that clear rules be established by statute in order to resolve disputes surrounding labor contracts in a simple, swift, and stable manner. The establishment of clear rules by statute could also be expected to serve in an expanded role as providing standards of conduct to be followed in personnel management and labor-management relations, thereby helping to prevent disputes from arising. Thus there arose a need to establish legislation providing private-law rules separately from the Labor Standards Act in the form of a statute that set forth rules on the relationship of rights and obligations under labor contracts.

2. Immediate Background to Enactment⁵

(1) Report of the Labor Contract Legislation Study Group

Proposals had long been made that a comprehensive law on labor contracts should be enacted.⁶ However, it was the following supplementary resolution added by both houses of the Diet to the bill to amend the Labor Standards Act in 2003 that set in train work on concrete legislation. This stated that "a forum for expert investigation and research should be established to actively consider formulation of a comprehensive law on labor contracts, including matters such as changes in labor conditions, external assignments, and employment transfers, and necessary measures, including the enactment of statute, should be taken based on the results."

In response to this Diet resolution, the Study Group on Future Labor Contract Legislation was established in the Ministry of Health, Labour and Welfare in April 2004 (chaired

⁴ For example, the *Nippon Shokuen Seizo* case (Supreme Court, Apr. 25, 1975, Minshu 29-4-456) concerning abuse of the right of dismissal, the *Toa Paint* case (Supreme Court, Second Petty Bench, Jul. 14, 1986, Hanji 1198-149) concerning temporary transfers, and the *Shuhoku Bus* case (Supreme Court, Grand Bench, Dec. 25, 1968, Minshu 22-13-3459) concerning the amendment of labor conditions by amendment of rules of employment. Note that the principle of abuse of right of dismissal was expressly stated in Article 18-2 of the amended Labor Standards Act of 2003, and transferred to Article 16 of Labor Contract Act as a result of the latter's enactment.

⁵ Regarding the immediate background to enactment of the Labor Contract Act (including the state of deliberations in council), see, among others, Araki et al., above n. 1, ch. 2, and Shinobu Nogawa, *Wakariyasui Rodo Keiyakuho* [A simple introduction to the Labor Contract Act] 31ff (Shoji Homu 2007).

⁶ See, for example, Labor Standards Act Study Group Report, *Kongo no Rodo Keiyakuho-to Hosei no Arikata ni tsuite* [Future of legislation on labor contracts, etc] (Labour Ministry, Labour Standards Inspection Division ed., Japan Institute of Labour 1983).

by Professor Kazuo Sugeno of Meiji University Law School). This investigated the current situation and areas of concern regarding rules on labor contracts, and, in its final report issued in September 2005, presented its recommendations regarding the need for a labor contract law and the content of such a law. The recommendations in the report were quite detailed, and covered almost all the issues concerning rules on labor contracts.⁷

(2) Discussion by Deliberative Council and Amendment in the Diet

The locus of discussion subsequently moved to a tripartite deliberative council consisting of public members and representatives of workers and employers (specifically, the Labour Conditions Subcommittee of the Labour Policy Council). Wary of the above report, however, workers and employers entered discussion unfettered by it. In the content of discussion as well, there were substantial differences of opinion between workers and employers. At the same time, the Subcommittee considered a new framework for exemption from working hour restrictions under the Labor Standards Act, and opinion on this, too, was divided.

Although a certain agreement of opinion was ultimately reached between workers and employers in the deliberative council, the areas in which a consensus was reached consisted mainly of giving statutory form to existing case law, and the various new recommendations raised by the above Study Group Report were not incorporated in the council's proposals. The resulting Labor Contract Act consequently consisted of just 19 articles. (Changes were also made in the Diet to the bill for the Labor Contract Act bill put forward by the Government. These included the addition of provisions on the underlying principles governing labor contracts in the form of "giving consideration to the balance of treatment" (Article 3, Paragraph 2) and "harmony between work and private life" (Article 3, Paragraph 3).

3. Significance of Enactment

The matters governed by the Labor Contract Act were dramatically narrower than those proposed in the Study Group Report. In this sense, therefore, the act represented a small-scale departure. Nevertheless, the passage of the Labor Contract Act was highly significant.⁸ This is because, as previously observed, it was the first piece of legislation to set forth private-law rules on labor contracts and to provide a separate mechanism of application from the Labor Standards Act. In this sense, the Labor Contract Act may be regarded as forming one of the basic statutes of labor law in Japan.

⁷ A press release on the above report can be found at the Ministry of Health, Labour and Welfare's website (<http://www.mhlw.go.jp/shingi/2005/09/s0915-4.html>). For a simple commentary, see Ryuichi Yamakawa, *Atarashii Rodo Keiyaku Hosei wo Kangaeru* [Consideration of new labor contract legislation], *Gekkan Hogaku Kyoshitsu* [Monthly law workshop] 6 (No. 309, 2005).

⁸ See, for example, Araki et al., above n. 1, ch. 1, and Takashi Muranaka, *Rodo Keiyakuho Seitei no Igi to Kadai* [Significance of enactment of the Labor Contract Act and issues raised], *Jurist* 43 (No. 1351, 2008).

II. Character of the Labor Contract Act and Interpretive Issues

1. Character of the Labor Contract Act

The Labor Contract Act provides for basic matters concerning labor contracts to facilitate the determination and modification of reasonable working conditions (Article 1). These concern mainly rights and obligations relating to labor contracts. In this respect, the Labor Contract Act is a “private law,” and so differs in character from the Labor Standards Act, which establishes minimum standards for working conditions and is enforced through administrative inspection and criminal sanction. The Labor Contract Act, by contrast, contains no punitive provisions, and also does not provide for inspection or guidance by labor standard inspectors.⁹

Instead, the Labor Contract Act is enforced by way of resolving civil disputes between parties through the use of the administrative individual labor dispute resolution system, labor tribunals, and litigation system. Naturally, as the existence of such rules for after-the-fact dispute resolution implies that disputes that arise are to be resolved in accordance with them, the Labor Contract Act may simultaneously be anticipated to function as a standard of conduct for the parties involved.

However, the Labor Contract Act presently contains provisions on principles (such as Paragraphs 1-3 of Article 3 and Paragraphs 1 and 2 of Article 4) which do not set forth enforceable rights and obligations in the sense of providing for claims through the courts for breaches; in other words, they establish a form of obligation merely “to endeavor.” The inclusion of provisions of this nature in the Labor Contract Act is thought to be an outcome of the bill’s drafting being defined by the limits of the consensus reached between workers and employers in the deliberative council, and from the point of view of the establishment of civil rules, the act contains halfway measures that are likely to be subject to revision in the future.

2. Interpretive Issues

(1) Summary

A. General Provisions

The Labor Contract Act consists of five chapters. The first chapter (General Provisions) describes the purpose of the act (Article 1), definitions of “workers” and “employers” (Article 2), the basic principles of labor contracts in general (Article 3), provisions on promoting understanding of the content of labor contracts (Article 4), and provisions on the obligation to care about worker safety (Article 5).

Of the above, Article 3, Paragraph 1 (agreement on an equal basis), Paragraph 2 (consideration of balance of treatment), and Paragraph 3 (consideration of harmony between

⁹ See Jan. 23, 2008, Kihatsu (Labor Standards Bureau Notice) No. 0123004.

work and private life) all establish the basic principles to be followed when entering and amending labor contracts. Owing to the abstract nature of the content of the provisions, they are not themselves considered to provide direct grounds for contractual rights and obligations. Rather, they affect the interpretation and application of other provisions. For example, Paragraph 2 and Paragraph 3 affect the interpretation and application of the provisions on the abuse of rights concerning temporary transfers, disciplinary action, and dismissals (Articles 14 through 16), and Paragraph 1 can also serve as the ideological underpinnings for a narrow interpretation of rules of employment that can be unilaterally established by employers.

Article 4, which concerns promotion of the understanding of the content of labor contracts, could similarly allow for infringements of it to be taken into consideration when applying general provisions, despite the fact that its wording makes it hard to interpret as directly affecting the relationship of rights and obligations. For example, if a worker suffers an unforeseen loss owing to the employer's insufficient explanation of changes to working conditions, there may be a basis for the employer's tort liability because of the infringement of the principle of faith and trust in light of the purpose of this article.

Article 5 concerning the employer's obligation to care about workers' safety confirms the existing principle of case law,¹⁰ and the phrase "by a labor contract" under the original bill was changed to "in association with a labor contract" through amendment in the Diet, clarifying that this obligation would not require supporting provisions in contracts, rules of employment, or similar sources in order to arise.

B. Establishment and Changing of Labor Contracts

Next, Chapter 2 provides for the establishment and changing of labor contracts. Article 6 describes the principle of agreement at the stage of conclusion of a labor contract, Article 8 establishes the principle of agreement at the stage when changes are made, and Articles 7, 9, and 10 establish provisions concerning the validity of rules of employment at each stage. (Articles 11 to 13 contain other provisions on rules of employment.) Articles regarding rules of employment will be examined below.

C. Continuation and Termination of Labor Contracts

While various issues can potentially arise in relation to the continuation and termination of labor contracts, Chapter 3, in Articles 14 through 16, provides only for farming-outs, disciplinary action, and dismissals. These provisions give statutory form to the principle of abuse of right established by precedent,¹¹ and do not establish any specifically new rules.

¹⁰ For example, the Rikujo Jieitai Hachinohe Sharyo Seibi Kojo case (Supreme Court, Third Petty Bench, Feb. 25, 1975, Minshu 29-2-143).

¹¹ Regarding farming-outs, see the *Shin Nippon Seitetsu* case (Supreme Court, Second Petty Bench, Apr. 18, 2003, Rohan 747-14); regarding disciplinary action, see the *Daihatsu Kogyo* case (Supreme Court, Second Petty Bench, Sep. 16, 1983, Hanji 1093-135); regarding dismissal, see the *Nippon*

Articles 14 and 15 are significant in their identification of the factors to be taken into consideration when determining whether an abuse of rights has occurred: circumstances pertaining to the need for farming-outs and the selection of workers in the case of abuses of the right to order farming-outs, and the characteristics and mode of the act committed by the worker in the case of abuse of the right to take disciplinary action. However, both articles also provide for “other circumstances,” which in the future will probably have to be identified more clearly.

D. Fixed-Term Labor Contracts

Chapter 4 concerns labor contracts for established terms, and consists solely of Article 17. Paragraph 1 of this article specifies that an employer may not dismiss a worker during the term of the contract unless there are unavoidable circumstances. Individual agreements and provisions under rules of employment that allow for mid-term dismissal in the absence of unavoidable circumstances are also considered to be invalid insofar that they conflict with Article 17.

Paragraph 2 of Article 17, on the other hand, specifies that an employer must give consideration to not renewing a labor contract repeatedly by prescribing a term that is shorter than necessary in light of the purpose of employing the worker based on such a labor contract. This provision is regarded as being intended to require that consideration be given to establishing a necessary term in light of the purpose of individual contracts with regard to fixed-term contracts. Hence if a worker is taken on for a given period to perform a certain job and that work is expected to continue for one year, consideration must be given to entering a one-year contract from the start, rather than repeatedly renewing a two-month contract five times.

However, this provision does no more than require the employer to give consideration, and is not thought to have the effect of amending a labor contract to specify a necessary term. Where a two-month contract has been renewed as in the above scenario, however, it is considered reasonable, in view of the import of this article, for workers to expect the continuation of employment through renewals. Consequently, if renewal of the contract is refused before the passage of one year, then the principle of abuse of right of dismissal (Article 16 of the Labor Contract Act) may be applied by analogy.¹²

Shokuen Seizo case, above n. 4.

¹² Ryuichi Yamakawa, *Rodo Keiyakuho Nyumon* [An introduction to the Labor Contract Act] 191 (Nihon Keizai Shinbun Shuppansha 2008).

(2) Rules of Employment

A. Validity at Time of Establishment of Labor Contract (Article 7)

a. Purpose

The main clause of Article 7 of the Labor Contract Act specifies that when a worker and an employer enter a labor contract and the employer has “informed” him/her and other workers of rules of employment providing for reasonable working conditions, the content of the labor contract shall be based on the working conditions provided by such rules of employment. Thus where working conditions are not agreed upon in detail between individual workers and their employers, which is often the case, the working conditions provided for in labor contracts are complemented by the conditions provided for under the rules of employment.

Regarding the legal character of rules of employment, there is a division of opinion between legal norm theorists, who argue that rules of employment themselves have the effect of a legal norm, and contract theorists, who argue that rules of employment serve simply as a template that enters into the content of a labor contract when consented to by a worker. However, the Supreme Court has held that the working conditions set forth by rules of employment constitute the content of labor contracts provided that they are reasonable in content.¹³ This interpretation is close to the contract theory, and especially the theory of fixed form contract. The main clause of Article 7 of the Labor Contract Act gives statutory form to this principle of case law alongside the case law principle of requiring that workers be “informed” of the rules of employment for such rules to become binding.¹⁴ While the establishment of provisions by statute is seen as having reduced the practical significance of discussing the legal character of rules of employment, there appears to remain some scope for consideration of whether the practical benefits of discussion have been completely eliminated.

The proviso to Article 7 states that this shall not apply to any portion of a labor contract in which a worker and employer have agreed on working conditions that differ from the content of the rules of employment, except in cases that fall under Article 12. Article 12 specifies that any working conditions that do not meet the minimum standards established by the rules of employment, even if agreed by the worker and employer, are invalid. This proviso means that where working conditions that are at least equivalent to those stipulated in the rules of employment have been individually agreed by a worker and an employer, these conditions constitute the content of the contract.

¹³ *Nippon Denshin Denwa Kosha Obihiro Kyoku* case, Supreme Court, First Petty Bench, Mar. 13, 1986, Rohan 470-6.

¹⁴ *Fuji Kosan* case, Supreme Court, Second Petty Bench, Oct. 10, 2003, Rohan 861-5.

b. What Are “Working Conditions”?

Under Article 7, the content of labor contracts is governable by the provisions on “working conditions” under rules of employment. In the case that this article is applied, matters thus provided for can potentially govern the content of contracts and be binding on workers. This is so even if not agreed to by workers as long as they are reasonable and workers have been “informed” of them. The term “inform” means, as stated below, that rules of employment should be provided in a state in which they can be easily known by workers, regardless of whether they actually recognize them.

Consequently, the meaning of “working conditions” is a potentially important question. As the term “working conditions” is also used in Article 10 concerning changes in working conditions by rules of employment, a similar problem arises. If, for example, a worker receives a loan to cover the cost of overseas study or other such training and he/she leaves the company within a certain period of time after returning to Japan, it becomes necessary to consider the question of whether that worker is under an obligation to return this loan if the rules of employment provides for such obligation. It is also necessary to consider whether a worker’s duty not to compete against his/her former employer after leaving a company also falls under the “working conditions” referred to in this article, thus binding workers by the provisions of their rules of employment.¹⁵

A judgment has to be made on this question taking into consideration a variety of factors, including the relationship with other obligations under the labor contract, whether the effect of the provision at issue extends beyond the termination of a labor contract, and the extent of constraints on the rights, interests, and freedom of the worker. Arriving at a conclusion deduced from a general definition of the term “working conditions” is, therefore, not easy. Given that this article could serve to bind a worker who is unaware of the content of the rules of employment, a definition that included all matters constitutive of agreement between the parties would be too broad. The term should perhaps, therefore, be qualified to limit its scope to those elements of treatment of a worker that may be regarded as constituents of a labor contract.

Working on this basis, the agreement to return study costs would comprise a separate consumption loan contract rather than a component of the labor contract (if such plan is equivalent to a pre-dispute agreement to pay damages for violation of a labor contract, it is invalid due to infringement of Article 16 of the Labor Standards Act), and so would not fall within the scope of the working conditions referred to in this article. In this case, therefore, an agreement with the worker would become necessary. Regarding the duty not to compete after retirement, on the other hand, it is possible to argue that it is included under “working conditions” due to its being a form of incidental obligation under a labor contract. As this

¹⁵ See the *Shin Nihon Shoken* case (Tokyo District Court, Sep. 25, 1998, Rohan 746-7) for a case affirming provisions on the return of study costs. See the *Tokyo Legal Mind* case (Tokyo District Court, Oct. 16, 1995, Rohan 690-75) for an affirmation of the duty not to compete.

would severely restrict a worker's freedom of choice of occupation, however, it is open to some doubt whether a worker is bound by clauses that he/she did not recognize.

c. "Informing" of Workers of the Rules of Employment

For rules of employment to constitute the content of a labor contract, Article 7 of the Labor Contract Act requires as a condition that the worker be "informed" of them. As the being "informed" referred to here is also required in Article 106, Paragraph 1 of the Labor Standards Act, this should be interpreted as meaning that the rules of employment should be provided in a state in which they can be easily known by workers, although it is not necessary for workers to actually recognize their contents.¹⁶ Regarding the method of informing under the Labor Standards Act, Article 52-2 of the Labor Standards Act Enforcement Ordinance specifies that workers must be informed by such methods as permanent display in an easily visible location in the workplace, issuance in writing, or publication by electronic means. While the methods of "informing" referred to in the Labor Contract Act may be regarded as being largely the same as those specified in the Labor Standards Act Enforcement Ordinance, they are not necessarily limited to these methods, and it is persuasively argued that other substantive methods of informing are also allowed.¹⁷

B. Binding Effect under Changes in Rules of Employment (Article 10)

a. Purpose

Regarding disadvantageous changes made to working conditions through the revision of rules of employment, the Labor Contract Act makes it clear as a contractual principle, firstly, in Article 9, that an employer may not, unless agreement has been reached with a worker, change any of the working conditions that constitute the content of a labor contract in a manner disadvantageous to the worker by changing the rules of employment. It then proceeds, in the main clause of Article 10, to state that if an employer "informs" a worker of changed rules of employment, and if the change to the rules of employment is reasonable in view of the extent of the disadvantage incurred by the worker, the need for changing the working conditions, the appropriateness of the contents of the changed employment conditions, the status of negotiations with a labor union or the like, and any other circumstances pertaining to the change to the rules of employment, the working conditions that constitute the contents of a labor contract shall be in accordance with such changed rules of employment.

Variously discussed by legal scholars, the position expressed by the Supreme Court is that, while disadvantageous changes to working conditions by rules of employment are not in principle permitted, changes deemed to be reasonable are binding even on workers who

¹⁶ See, for example, above n. 9, Kihatsu No. 0123004, and Kazuo Sugeno, *Rodoho* [Labor law] 111 (8th ed., Kobundo 2008).

¹⁷ Above n. 9, Kihatsu No. 0123004.

opposed such changes.¹⁸ Theoretically as well, the dominant scholarly view supports the principle of case law in order to achieve a balance between the need to change working conditions and the restriction of dismissals, as use of dismissal as a means of lowering personnel costs for management reasons is restricted in Japan in line with the practice of long-term employment and the principle of the abuse of right of dismissal that has grown out of this background.¹⁹

The main body of Article 10 gives statutory form to this principle of case law (the doctrine of reasonable changes of rules of employment), including the requirements for determining whether a change is “reasonable,” in addition to the requirement of “informing” workers as described in Article 7. The Study Group Report contained (i) a proposal having an affinity with the contractual principle that recommended that, provided that the changes to the rules of employment are reasonable, agreement should be presumed to have been reached between the parties to a labor contract that working conditions should be in accordance with the changed regulations, and (ii) the proposal that, provided that the changes to the rules of employment are reasonable, the regulations themselves should be binding on the worker (proposing, in other words, a clear recognition of an employer’s authority to make such changes). However, as the approach adopted was to import the principle of case law without modification, the provisions of the Labor Contract Act do not provide any clear indication as to their legal character. However, the wording of this article should probably be interpreted as signifying that the legal technique of presumption expressed in proposal (i) has not been adopted, and that employers are given the power under this article itself to change working conditions under certain conditions.

b. Significance of Disadvantageous Changes and Changes That Are Not Considered “Disadvantageous”

As the main clause of Article 10 of the Labor Contract Act does not itself use the term “disadvantageous,” it is possible to argue that the question of what is “disadvantageous” does not even arise when applying the provisions of this article. However, these same provisions are regarded as providing an exception to Article 9 of the Labor Contract Act, which does not in principle allow disadvantageous changes to be made to working conditions by rules of employment, and the application of Article 10 is considered to be premised on “disadvantageous” changes.

The next question to consider thus concerns what cases qualify as “disadvantageous.” Judicially, changes are considered, as a rule, to fall into the category of disadvantageous changes if a defendant submits changes as a defense against a plaintiff’s claim and argues

¹⁸ Above n. 4, *Shuhoku Bus* case, etc.

¹⁹ Regarding the state of discussion, see Tokyo Daigaku Rodo Ho Kenkyu Kai [University of Tokyo Labor Law Study Group], *Chushaku Rodo Kijunho* [Annotated Labor Standards Act] vol. 2, at 969 (Yuhikaku 2003).

that the right claimed by the plaintiff does not arise or is reduced.²⁰ In other words, whether or not something is “disadvantageous” is something that needs to be considered in the context of the working conditions that are litigated, and circumstances such as improvements made to other working conditions may be regarded as being taken into consideration in judging whether changes are “reasonable.”

This, however, raises the question of what to make of changes that are not “disadvantageous.” Regarding this point, differences are possible depending on what changes have been made to working conditions. However, if, for example, the retirement age is extended and working conditions beyond the former retirement age are lowered (in which case, although it may not be possible to describe the change as “disadvantageous” as the opportunity for employment after the former retirement age did not even exist before its extension, the working conditions themselves are comparatively lower than previously), the main clause of Article 10 is applied by analogy, and the “reasonableness” of the change is judged more leniently than it would be in the case of a disadvantageous change.²¹

c. Cases of Changes Agreed to by Workers

If a worker agrees individually to a change to the rules of employment, there also arises the question of whether the requirement that such changes be reasonable is rendered redundant. Article 9 of the Labor Contract Act may be interpreted as recognizing the binding force of the changed rules on condition that the requirements specified in Article 10 regarding disadvantageous changes that have not been agreed to are met. Thus, the premise of Article 9 is that working conditions may be changed disadvantageously by changing the rules of employment if so agreed to by a worker. Where a change has been agreed to (naturally giving careful consideration to whether agreement is the worker’s true intent), therefore, the requirement that changes be reasonable may be regarded as redundant.²²

d. Changes under Rules of Employment to Conditions Prescribed by Individual Contracts

The main clause of Article 10 of the Labor Contract Act applies to “cases where an employer changes the working conditions by changing the rules of employment,” and is not limited to cases of changes in working conditions specified in the rules of employment by the rules of employment. Application of the main clause of Article 10 is consequently not limited to cases of changes in working conditions provided for by rules of employment by the amendment of said rules of employment; it also includes cases where, although rules of employment already exist, the working conditions specified in individual labor contracts rather than the rules of employment are changed by the addition of provisions in those rules

²⁰ Ryuichi Yamakawa, *Koyo Kankeiho* [Employment relations law] 38 (4th ed., Shinseisha 2008).

²¹ The ruling in the JR Kamotsu case (Nagoya District Court, Dec. 27, 1999, Rohan 780-45) requires “reasonableness equivalent to that in the case of disadvantageous changes.”

²² One ruling that shows it to be redundant is that in the *Iseki Koki* case (Tokyo District Court, Dec. 12, 2003, Rohan 869-35).

of employment (excluding, however, cases where the proviso to Article 10 examined below applies; the same hereinafter).

In the case of changes to working conditions established by customary labor practices as a result of the fresh establishment of provisions in the rules of employment as well, the fact that labor practices can create a relationship of rights and obligations through their constitution of the content of a labor contract means that, ultimately, the content of labor contracts can be changed by rules of employment, and so the main clause of Article 10 would apply.

On the other hand, had working conditions been established hitherto by individual labor contracts at business establishments without rules of employment (due, for example, to their having fewer than 10 regularly employed workers) and had the existing working conditions been changed as a result of the fresh establishment of rules of employment, the rules of employment could not be described as being “changed” and so the main clause of Article 10 would not, in itself, apply. As the situation is the same in terms of a change being made in the content of individual labor contracts, however, the provisions of this article could appropriately be applied by analogy.²³

e. Judgment of Reasonableness

The main clause of Article 10 specifies the following factors as criteria for judging whether the changes made to rules of employment are reasonable: (i) the extent of the disadvantage incurred by the worker, (ii) the need for changing working conditions, (iii) the appropriateness of the content of the changed rules of employment, (iv) the status of negotiations with a labor union or the like, and (v) any other circumstances pertaining to the change to the rules of employment. The reasonableness of changes to rules of employment is judged taking into all-round consideration a variety of factors, and these factors, having been to a large extent clarified by past court cases, are made explicit in this article.

Of these, the factor that leaves the greatest scope for consideration is (iv) the status of negotiations with a labor union or the like. More generally, this factor may be regarded as concerning the appropriateness of the procedure followed when changes are made. On this point, the Supreme Court has ruled that it may be tentatively assumed that, if a labor union comprising the great majority of workers in the workplace consents to a change to the rules of employment, the content of the changed rules of employment is reasonable on the grounds that it is the outcome of a reconciliation of interests by management and workers.²⁴

In the case that the working conditions of young and middle-aged workers are improved while lowering the wages of older employees by some 40 percent in order to remedy an imbalance in personnel expenditures on older employees, the Supreme Court has, while recognizing the need for such change, stated that such a change would cause only some em-

²³ Regarding the above, see Sugeno, above n. 16, at 114-15, 121.

²⁴ *Daishi Ginko* case, Supreme Court, Second Petty Bench, Feb. 28, 1997, Minshu 51-2-705.

ployees to incur a major disadvantage, and so is difficult to accept as reasonable unless interim measures are taken to alleviate the disadvantage experienced by the minority of employees. Its ruling was thus that even if a labor union consisting of the great majority of employees agrees to a change, this cannot be accepted as a major factor to be taken into consideration in such cases.²⁵

It is thus not necessarily clear from precedent how the consent of labor unions comprising a majority of workers to changes to rules of employment regulation is to be viewed, and the matter has been the subject of some theoretical discussion.²⁶ Regarding the principle of case law that relies on the general provision of “reasonableness,” there exists a problem of a lack of predictability, and the Study Group Report proposed that changed rules of employment be assumed to be reasonable provided that such a change has been agreed to by a majority of workers after appropriate consolidation of workers’ opinion or have been recognized by a resolution passed by at least four fifths of the members of the labor-management committee, except in the case that it would cause major disadvantage to only some workers. However, this proposal was not adopted, and the principle of case law was put into statutory form in the Labor Contract Act without modification. The question of what weight should be given to the agreement to changes by labor unions comprising a majority of workers therefore remains an issue for interpretation and legislative consideration.

f. Significance of Procedural Compliance with the Labor Standards Act

In judging whether or not disadvantageous changes in rules of employment are binding on workers, there emerges the question of what position to assign to whether the procedures prescribed by the Labor Standards Act (Articles 89 and 90) were followed when the changes were made. Although the Labor Contract Act appears not to evidence a clear stance on this question, the absence of any reference to the procedures for changes to rules of employment in Article 10 and the separate provision (in Article 11) that the provisions of the Labor Standards Act are to be followed indicates that it does not adopt the position that such compliance is necessary for changes to be binding.

Insofar as provisions on procedures for changing of rules of employment were deliberately included in the Labor Contract Act, however, it may reasonably be argued that whether or not the procedures prescribed by the Labor Standards Act have been followed should be taken into consideration in judging whether changes are reasonable (“other circumstances pertaining to the change to the rules of employment”).²⁷ In this case, moreover, whether or not the representatives of a majority of the workers have been appropriately selected (see Article 6. 2 of the Labor Standards Act Enforcement Ordinance) may also be regarded as lying within the scope of consideration as a premise for application of Article

²⁵ *Michinoku Ginko* case, Supreme Court, First Petty Bench, Sep. 7, 2000, Minshu 54-7-2075.

²⁶ See Tokyo Daigaku Rodo Ho Kenkyukai, above n. 19, at 977ff.

²⁷ Sugeno, above n. 16, at 119.

90.

g. Individual Agreements Not to Be Changed by Rules of Employment

The proviso to Article 10 of the Labor Contract Act specifies that the principle described in the main clause of Article 10 shall not apply to any portion of a labor contract agreed upon by a worker and employer as establishing working conditions that are not to be changed by any change to the rules of employment, except in cases that fall under Article 12 due to the minimum standards established by the rules of employment not being met. Prior also to enactment of the Labor Contract Act, lower trial court rulings established that the amount of yearly pay determined by individual negotiation cannot be reduced by changes to the rules of employment.²⁸

However, it is often not clear whether it has been agreed that a given working condition is one that is not to be changed by changes in employment conditions. In such cases, therefore, there is ultimately no alternative but to make a judgment on each individual case taking into account factors such as whether the working conditions at issue conform in character to uniform collective decisions, and the process leading up to the agreement.²⁹

III. Future Issues

1. Enhancement of Content

As we have thus seen, the enactment of the Labor Contract Act is highly significant. At present, however, the matters that it covers are quite limited. A key issue for the future will therefore be to enhance the act's content and develop it into a law that establishes literally comprehensive rules on labor contracts. Given the existence of principles of case law on such matters as temporary hiring decisions, internal transfers including job rotations, and non-renewal of employment contracts, there is a particular need for legislation that incorporates these principles.³⁰ At the same time, however, it will be worth considering questions such as whether these principles of case law can simply be put into statute form without modification, or whether new content should be incorporated to reflect conditions in contemporary society.

On the subject of internal transfers, for example, the inclusion of the principle of harmonizing work and private life in Article 3, Paragraph 3 of the Labor Contract Act, the content of Article 26 of the Child and Family Care Leave Act, which requires that consideration be shown by employers when assigning workers to different positions requiring a

²⁸ *CAI* case, Tokyo District Court, Feb. 8, 2000, Rohan 787-58.

²⁹ Yamakawa, above n. 12, at 75.

³⁰ Regarding temporary hiring decisions, see the *Dai Nippon Insatsu* case (Supreme Court, Second Petty Bench Jul. 20, 1979, Minshu 33-5-582); regarding internal transfers, see the *Toa Paint* case, above n. 4; regarding non-renewal of employment contracts, see the *Tokyo Shibaura Denki Yanagicho Kojo* case (Supreme Court, First Petty Bench, Jul. 22, 1974, Minshu 28-5-927).

change of residence, and the growing importance assigned to harmonization of work and private life in an aging society in demographic decline, as reflected by the enactment of a “Work-life Balance Charter,” make it worth considering also the adoption of an approach that brings the principles of case law up to date with the needs of contemporary society.

In addition, the Labor Contract Act Study Group Report made proposals on issues such as a system for enabling workers who have rejected an offer of a reduction in working conditions and have been dismissed to submit objections and temporarily continue working under the new working conditions while negotiations on these conditions continue, as well as the clarification of case law regarding four requirements (factors) for economic dismissal. Since these proposals did not find their way into the bill in the subsequent consideration process, they could be placed on the agenda for discussion again (while still bearing in mind the importance of reaching a consensus between workers and employers). Regarding so-called labor-management committees, the Study Group Report did not go so far as recommending that such a system itself be enshrined in law. In the future, however, such a move could be considered head on as a part of collective labor-related legislation from the point of view of the future shape of worker representation systems.

2. Rearrangement of Relationship with Civil Code

While not an issue that directly concerns the Labor Contract Act, moves are afoot to amend the portion of the Civil Code concerning the law of obligations. As a part of this process, it is possible that rearrangement of the relationship between the provisions on employment contracts in the Civil Code and the Labor Contract Act may become an issue for consideration.

The fact that the Civil Code uses the term “employment contract” while the Labor Contract Act uses the term “labor contract” means that the first issue to arise will be the relationship between the two. It has long been disputed whether the “labor contracts” referred to in the Labor Standards Act are the same thing as “employment contracts.”³¹ (As this comes down to a question of how “employment contracts” are conceived of under the Civil Code, the enactment of the Labor Contract Act is considered not to express a conclusion.)

If employment contracts and labor contracts are considered to be the same thing, there arises the problem of not only the propriety of using differing terms to describe the same type of contract, but also the advisability of establishing provisions in two different laws concerning the same matter (for example, Article 623 of the Civil Code and Article 6 of the Labor Contract Act concerning the establishment of a contract). When amendment of the law of obligations comes up for consideration, therefore, it will become necessary to con-

³¹ For a summary of the debate, see Tokyo Daigaku Rodo Ho Kenkyukai [University of Tokyo Labor Law Study Group], *Chushaku Rodo Kijunho* [Annotated Labor Standards Act] vol. 1, at 185 (Yuhikaku 2003).

sider whether the provisions on employment (labor) contracts should be consolidated into one or the other.³²

This point will necessitate consideration of fundamental issues including how to reconcile the purpose of enactment of the (chapter on employment in the) Civil Code and the purpose of enactment of the Labor Contract Act, the nature of the process of enactment and amendment (whether this should be tasked to the Legislative Council in the Ministry of Justice or the Labour Policy Council), and, as we consider next, the role of government in the enactment of civil labor legislation. Another important factor to consider, however, will be the Labor Contract Act's present lack of comprehensiveness.

Thus, at present, simply responding by transplanting the provisions of the employment chapter of the Civil Code into the Labor Contract Act, or vice versa, will not result in integrated private-law rules on labor (employment) contracts. In order to deal with this problem, therefore, the Labor Contract Act will ultimately have to be further developed, and simple consolidation will need to be considered with caution.³³

3. Future Shape of Civil Labor Legislation

(1) Need for Rights and Obligations Perspective

As we have seen, the Labor Contract Act is, unlike the Labor Standards Act, a law that establishes private-law rules on labor contracts. No penalties or mechanisms for administrative enforcement are established, and the main methods of realization are expected to be the court system (including labor tribunals) and administrative individual labor dispute resolution promotion system.

Legislation and regulations setting forth civil rights and obligations are likely to expand in the future through, among other things, development of the content of the Labor Contract Act. A lot of labor legislation to date has, with the exception of criminal sanctions, been expected to be implemented mainly through administrative enforcement. As the emphasis has in this sense been on establishing standards of conduct, there has been a relatively weaker focus on how provisions change the relationship of rights and obligations under civil law and what specific remedies are available through the courts and administrative ADR (Alternative Dispute Resolution). For example, Article 8 of the Part-time Labor Act prohibits discriminatory treatment of part-time workers regarded as the same as regular full-time workers, but it is unclear whether juristic acts in contravention of this article are immediately invalidated.

³² Shinobu Nogawa argues in his *Rodoho* [Labor law] at 31(Shoji Homu 2007) that an "Employment Contract Act" should be newly enacted as a separate piece of legislation.

³³ See Ryuichi Yamakawa, *Koyo no Kitei wo Nokosu Hitsuyo wa Aruka* [Do provisions on employment need to be retained under the Civil Code?] in *Minpo Kaisei wo Kangaeru* [Views on amendment of the Civil Code] 311 (Horitsu Jiho Zokan [Special Edition of The Law Journal], Nihon Hyoronsha 2008).

When considering future legislation and amendments, therefore, it will be necessary to consider, assuming the enhancement of systems for individual labor dispute resolution, what impact is exerted on the relationship of rights and obligations under civil law and how civil remedies can be used in implementing the law.

(2) Civil Labor Legislation and Administrative Support

Adopting quite the opposite perspective from the above, on the other hand, it will need to be considered when devising civil labor legislation whether it is sufficient to purely develop the relationship of rights and obligations. This leads back to the question of whether civil labor legislation should be characterized simply and purely as a civil law like the Civil Code, or whether it should be seen as more of a “soft law” that is expected to be backed up by administrative measures intended to achieve a given policy objective.

Possible administrative measures of this kind may include, for example, the provision as guidelines of standards of conduct for interested parties in order to improve predictability, and advice on compliance with the law. (The Labor Contract Act Study Group Report proposed that guidelines should be provided on the measures that should be taken by employers further to establishment of provisions that expressly set forth the contents of case law concerning abusive dismissals and economic dismissals, but this recommendation was not incorporated in the Labor Contract Act.)

Although this issue does not appear to have been consciously discussed to date, labor law cannot be properly implemented only by resolving disputes after they have arisen. Rather, it is also important for labor law to control the day-to-day behavior of parties to employment and labor relations. Also, there are a number of labor statutes that are intended to achieve certain governmental policies. Thus, it is worth considering the adoption of administrative assistance in the field of labor contract law, on the condition that party autonomy is respected. However, since the contents of such assistance might depend on the purpose of each piece of legislation as well as the measures of assistance, deeper consideration will be required when enacting and amending individual laws.