

On the Rules for Incorporating Standard Terms

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Abstract: The rules for incorporating standard terms determine whether such terms are included in a contract, mainly stipulated in Article 496, Paragraph 2 of the Civil Code of the People's Republic of China. However, there are varying interpretations of this article, and there are also many disputes in the theoretical community. So, the specific requirements and contents of the incorporation rules still need to be studied. This article conducts research and argumentation on the incorporation rules for standard terms, summarizes two constitutive elements of the incorporation rules: the intention of the counterparty to generally accept the terms and the obligation to provide prompt explanations, and analyzes the specific application standards, in order to provide theoretical support for the application of the incorporation rules.

Keywords: Standard Terms; Incorporation Rules; Obligation to Provide Notice and Explanation

1. Introduction

In the contemporary society characterized by large-scale production and consumption, format contracts containing standard terms have become indispensable transaction tools in the market economy. The format terms have greatly reduced transaction costs, saved time, and improved transaction efficiency. Due to the inherent characteristics of format terms: unilateral drafting, non-negotiability, and information asymmetry, in the contracting process, the provider of the format terms usually holds an advantageous position, while the disadvantaged party, namely the contracting party, faces the situation of either accepting it completely or refusing to enter into the contract. The provider of the format terms may take advantage of this position to implant unfair terms in the contract that are beneficial to themselves. If the other party lacks the opportunity to pay attention and the ability to understand, and fails to notice and

understand the content of the terms, unfair phenomena will occur.

Article 496, Paragraph 2 of the Civil Code of the People's Republic of China (hereinafter referred to as the "Civil Code") specifically stipulates the rules for the incorporation of standard terms. The rules for incorporating standard terms, as an alternative to the negotiation and incorporation of ordinary terms, simplify the mechanism for the formation of contracts through offer and acceptance, save the time of both parties to the contract, and also aim to balance the interests of both parties and ensure the freedom and fairness of the contract. The judicial interpretation of the general provisions of the Contract Chapter has improved the incorporation rules, making standard terms more operable in judicial practice.

However, in the current judicial practice and theoretical discussions, there are still key issues that need to be clarified regarding the composition and specific application of the incorporation rules: opinions vary on whether the consent of the counterparty is a consideration factor, the standard of the notification obligation is ambiguous, the scope and boundaries of the obligation of explanation are unclear, and the understanding of the legal effect of the incorporation rules is different, etc.

2. The System Positioning and Constituent Elements of the Rules for Incorporating Standard Terms

Before delving into the rules governing the incorporation of standard terms, it is necessary to first clarify the position of these rules within the framework of format clause review, and pay attention to the constituent elements of the incorporation rules for format terms.

2.1 The System Positioning of the Rules for Incorporating Standard Terms

The rule for incorporating a standard clause refers to the criterion for determining whether a standard clause that meets the necessary conditions is successfully incorporated into a

contract. The review system for standard terms generally consists of three steps: establishment, incorporation, and validity. The incorporation rule is located in the middle control part, serving as the subsequent stage of the establishment judgment and the prerequisite for validity review. It places greater emphasis on procedural justice. Article 496, Paragraph 1 of the Civil Code defines standard terms and can extract the three constituent elements of standard terms: for repeated use, pre-drafted, and not negotiated with the other party. What is stipulated in this article is the judgment premise of the incorporation rule, determining which contract terms should be included in the discussion scope of the incorporation control set by the law. If a clause does not constitute a standard clause, the incorporation rule cannot be applied. Therefore, when applying the incorporation rule to incorporate standard terms, one should first examine whether the clause meets the constituent requirements of a standard clause and whether it should enter the next stage of incorporation control review. Only by judging from the perspective of contract incorporation whether a standard clause has been successfully incorporated into the contract can the validity rules or interpretation rules be applied to judge and interpret the validity of the standard clause. Incorporation is the prerequisite for validity judgment and interpretation.

2.2 The Constituent Elements of the Rules for Incorporating Standard Terms

The elements of incorporation are the main content of the incorporation rules, involving the conditions and procedures for incorporating standard terms.

Some scholars have divided the elements of incorporation into two parts: the positive elements and the negative elements. The positive elements refer to fulfilling the obligation to provide notice and explanation, while the negative elements refer to the determination of abnormal terms, that is, abnormal terms cannot exceed the limits of legal tolerance. If the terms are overly abnormal and not within the expectations of the counterparty, they should be regarded as not incorporated into the contract. In practice, courts in specific cases have also adopted similar viewpoints, believing that when judging whether a standard term is incorporated into the contract, the following three standards should be used for judgment: 1. Whether the

provider of the standard term has fulfilled the reasonable obligation of notice and explanation; Whether the counterparty understands and accepts the standard term; Whether the standard term is an abnormal term.

At present, the incorporation rules for standard terms in the Civil Code of China do not stipulate the negative elements. It is advisable to consider studying the negative elements. However, this viewpoint has certain problems. Whether abnormal terms are within the limits of legal tolerance involves the examination of the specific substantive content of the terms, which seems not to be within the scope of control of the incorporation rules for standard terms. Such terms may need to be controlled by the validity rules. That is, as long as the obligation of notice and explanation is fulfilled, the counterparty's general consent can incorporate the contract, and the content of the terms can be controlled through the validity rules. Therefore, the view of the distinction between positive and negative elements of incorporation is worthy of consideration.

It is also noteworthy that although the provision in the first sentence of Article 496, Paragraph 2 of the Civil Code, which stipulates that "the party providing the standard terms shall adhere to the principle of fairness in determining the rights and obligations between the parties," is located in the provisions on incorporation rules, the academic community generally believes that it does not constitute a judgment requirement for the incorporation of standard terms. The principle of fairness is a relatively abstract principle that cannot be fully judged through external forms. It requires substantive review, and the examination of specific arrangements of rights and obligations is a key aspect regulated by the effectiveness control of Article 497 of the Civil Code. Therefore, some scholars in China regard it as an effectiveness rule.

Based on this, we can summarize the constituent elements necessary for the incorporation of standard terms into a contract. This article believes there are two parts: one is the general expression of acceptance, that is, the consent of the counterparty. The other is the obligation of prompt explanation clearly listed in the legal provision.

3. The Express Intention of the Counterparties Constituting the Elements of the Contract to Generally Accept the Terms

of the Contract

The expression of acceptance means the relative party's general consent. Generalization means either full acceptance or full rejection, with no room for negotiation. Regarding this requirement, different countries have various stipulations. For instance, the German Civil Code directly stipulates the relative party's consent as a constituent element of the incorporated rule in its legislation. The Korean Law on the Regulation of Clauses does not consider the relative party as an element of consent. Although our country has not made direct regulations on this content at the legislative level, the relative party's consent has a significant impact on the incorporation of standard terms. The relative party's general acceptance of the meaning should be regarded as a constituent element of the incorporated rule for standard terms.

In the incorporated rule of the Civil Code regarding standard terms, there is no stipulation that the relative party, i.e., the non-standard term provider, needs to make a general acceptance of the meaning. Some scholars believe that this is a deficiency in the legislation. Although the Civil Code does not stipulate the relative party's general acceptance of the meaning, it does not mean that the incorporation of standard terms does not require the consent of both parties. Some scholars believe that although the relative party does not have the right to freely negotiate, they must have a general acceptance or rejection of the meaning. Another scholar points out that although standard terms have to some extent challenged the traditional principle of autonomy of will, the provider of standard terms does not have the power to force the relative party to accept the terms. The relative party has not completely lost the freedom of contract. The incorporation of standard terms still needs to follow the contract formation mechanism of offer and acceptance. Autonomy of will is the core principle in the field of contracts. Since the standard terms themselves have already impacted the autonomy of will, in the incorporated rule, the autonomy of will should be handled with caution. Only when the relative party makes a general acceptance can a standard term be incorporated into the contract. If the relative party's general acceptance of the meaning is not set as one of the constituent elements of the incorporation of standard terms, it will lead to a misunderstanding: after the

standard terms are drafted, they can be directly incorporated into the contract simply through a simple reminder, while ignoring whether the relative party truly accepts the content of the terms. This will seriously violate the freedom of contract.

Regarding the way of making the relative party's general acceptance of the meaning, according to Article 140, Paragraph 1 of the Civil Code, the way of making the expression of the meaning can be either explicit or implicit. However, silence is regarded as a conditional restriction on the expression of the meaning. Some scholars advocate that in the process of incorporating standard terms into the contract, the relative party's expression of consent should generally be made in an explicit manner. Of course, depending on the actual situation of the transaction, industry practice, and special agreements between the parties, it can also be made in an implicit manner. Another scholar proposes that the commitment made in an implicit manner should be subject to necessary restrictions. The prerequisite for this is that the provider of the standard terms has reasonably and fully fulfilled the obligation of notification. It cannot be assumed that the relative party's signature means their consent based on the relative party's goods or services. This view is also very reasonable. Of course, the general acceptance of the meaning made by the relative party through an explicit manner should actually be considered as a valid commitment under this premise.

4. Obligations of Notification and Explanation Regarding the Constitutive Elements

The obligation of disclosure requires the provider of the standard terms to actively inform the other party about the existence of the terms. They must take effective measures to ensure that the other party is clearly aware of the actual existence of the terms, and also create reasonable opportunities for the other party to understand the content of the terms. If no disclosure is made, the other party may not be aware of the existence of the standard terms, thus losing the basis for reaching an agreement on the intentions regarding the transaction matters. This also reflects the protection of the other party's contractual freedom. The obligation of explanation refers to the situation where the contracting party has understood the content of the terms, or may not have understood it or have

questions about it. At this time, the provider of the standard terms needs to provide explanations according to the requirements of the other party.

4.1 The Reasonable Standards and Levels of the Hints

When fulfilling the obligation of notice, it is necessary to adopt reasonable methods and reach a reasonable degree. The following aspects need to be noted:

First, notice is an obligation. The provider of the standard terms should take the initiative to do so and actively create the opportunity for the counterparty to know the standard terms.

Second, the appearance of the document. The document should make the counterparty believe that it is a contract clause stipulating the rights and obligations between the parties, that is, the document carrying the standard terms should make the counterparty realize that the terms on this document are significant and have an impact on their rights and obligations. For example, a certain merchant posted a consumption notice in the corner of its store. The paper was small and the color was dim, mixed with various colored posters around, making it difficult to attract customers' attention, and customers would not think to read it carefully. This is not a qualified form of notice in the obligation of notice. Also, according to Article 10, Paragraph 3 of the Judicial Interpretation of the General Provisions of the Contract Law, setting up check boxes, pop-up windows, etc. in online contracts does not belong to a qualified form of notice.

Third, the method of drawing attention. Generally, the notice should be given to the counterparty individually and separately, but in special circumstances, it can be done by posting notices or other methods based on the characteristics of the transaction. However, the notice must be prominent. It can be done by bolding, underlining, or using special fonts, and the expression must be clear and understandable. The notice should not cause ambiguity.

Fourth, the time of drawing attention. The time of drawing attention must be strictly limited to before the contract is concluded or during the process of concluding the contract. Because the obligation of notice is an obligation in the rules of contract incorporation, the establishment of the contract means that the standard terms have been successfully incorporated into the contract. At this point, re-issuing the notice is meaningless.

Fifth, the degree of drawing attention. The degree of drawing attention should be sufficient to draw the counterparty's attention. Regarding the standard for drawing attention, there are different viewpoints in the academic community. Some scholars believe that the objective view should be adopted, that is, it should be based on whether it can attract the attention of a general counterparty. Another view is the subjective view, that is, it should be based on individuals. Some scholars believe that a compromise view should be adopted, that is, based on the general person as the principle, taking into account special circumstances, such as visual impairment or illiteracy. The objective view neglects the interests of individual groups, and the subjective view is too demanding and considers all individuals. Therefore, the compromise view seems more reasonable, conducive to operation and considering special circumstances, which is in line with the legislative spirit of the contract incorporation rules.

For special groups, special methods of notice should be used to ensure that the counterparty can notice it to a sufficient degree. For example, elderly people who need to use reading glasses and have a slow reading speed, if the provider of the standard terms does not prepare necessary tools and does not give sufficient time, it cannot be considered that the obligation of notice has been fulfilled. In practice, appropriate notice methods can be adopted based on the different types and characteristics of contracts, such as for the standard terms in insurance contracts provided to the elderly, the content that needs to be noticed can be specially enlarged, or a dedicated person can be arranged to read and explain to ensure that the elderly with poor vision can notice it in time.

Therefore, the standard for the degree of drawing attention is generally that the general counterparty should be able to quickly capture the content of the notice when quickly browsing the terms. For special groups, special methods of notice should be used. In addition, with the development of electronic technology, online contracts are widely used in China. Some scholars believe that when judging whether the degree of drawing attention is reached, it is necessary to distinguish between online contracts and paper contracts as different carriers. Because the establishment of online contracts often takes place on the internet, the content of the website is rich, and the attention of the

counterparty is easily distracted. Simple bolding or underlining may not be sufficient to attract the attention of the counterparty. In practice, cases of online contracts are gradually increasing, and this viewpoint is worth drawing on and applying. The determination of the obligation of notice in online contracts requires special attention. In the case of "Beijing Century Excellence Information Technology Co., Ltd. v. Chen Wei - Contract Dispute over Purchase", both parties had a dispute over whether the "usage conditions" clause had fulfilled the obligation to inform and be included in the contract. The court held that: From the registration process, Century Excellence Company did not require users to read and agree to the terms of the "usage conditions"; from the page display, the relevant links were located at the bottom of the website and could only be accessed by clicking the link. This was not conducive to consumers' identification; from the order checking process, the "usage conditions" were in a regular font and in a darker color. Therefore, consumers could complete the entire process of purchasing goods without reading the clause. Thus, Century Excellence Company should not be regarded as having fulfilled the obligation to inform. This is a new situation in the development and popularization of online contracts. In such cases, technical measures such as forced redirection or delayed consent can be considered to make the other party notice the prompt content.

4.2 The Target of the Prompt

Regarding the objects of the notice, the expression in the Civil Code is "terms with significant interests", but no further explanation is provided for the determination of significant interests. Currently, there is a view that the determination of significant interest terms should depend on the specific circumstances of the standard terms, and an example is given by referring to Article 26 of the Consumer Rights Protection Law. Another academic view holds that determining based on specific circumstances would lead to an exploration of the individual circumstances of the parties, and it is more feasible to determine based on an abstract and normal rational standard, such as the general terms for contract formation. The terms described in these two viewpoints are all limited within the scope of standard terms, and some of the content of the terms may have been negotiated, so they may not belong to standard

terms and do not need to consider whether they belong to the significant interest terms in the notice. Regarding these two viewpoints, the second view ignores the individual interests, and the first view is more conducive to practical considerations. When handling issues in practice, adopting this view is more convenient.

4.3 Disclosure Obligation

Explanation is a passive obligation that needs to be carried out according to the requirements of the contracting party. Some scholars argue that under the passive explanation rule, if the counterparty does not make a request, no explanation is required. Such a rule is too unfavorable to the contracting party. From the perspective of protecting the rights and interests of the counterparty, this rule is unreasonable. However, if the provider of the standard terms is required to provide active explanations, the burden may be too heavy and is not conducive to the conclusion of the transaction. Moreover, after being prompted, the counterparty should have a more comprehensive understanding of the terms that are of significant interest to them. Therefore, it is more reasonable to require the counterparty to make a request as a prerequisite for the necessity of explanation. If, like the exemption terms in insurance contracts, it is indeed necessary for the provider of the standard terms to provide active explanations, special provisions can be made through special laws to transform the passive obligation into an active one. For example, Article 17(2) of the Insurance Law of China stipulates that the insurer needs to make clear explanations to the policyholder in oral or written form regarding the exemption terms in the insurance contract. Here, the obligation of explanation is not based on the request of the counterparty. Therefore, the obligation of explanation is generally a passive obligation. According to special laws, it can be transformed into an active obligation. As for the object of explanation, the Interpretation of the General Provisions of the Civil Code (Judicial Interpretation) Article 10(2) stipulates that it should be "the concepts, contents, and legal consequences of abnormal terms that have significant interests with the counterparty". The understanding of significant interests-related abnormal terms should be consistent with the provisions of the notification obligation, and the specific content of the explanation is the basic meaning of the relevant terms and the possible

impact on the counterparty. When providing explanations, reasonable methods should be adopted to reach a reasonable degree. In terms of methods, both oral and written forms are acceptable. It should be noted that, like the notification obligation, the explanation should also adopt a compromise standard and adopt special explanation methods or approaches for special groups. For example, for groups with lower cultural levels, more simple and easy-to-understand language should be used for explanation, and for individuals with intellectual disabilities, explanations that they can accept and understand should be adopted. If a contract is used for a long time, it should be explained based on the consistent understanding of the counterparty, and explanations should also be made in ways that different groups and different regions can understand. In summary, explanations should be made in a way that ordinary people can easily understand, taking into account the special circumstances of special groups, choosing appropriate methods, and ultimately achieving the level where the counterparty can clearly understand.

5. Conclusion

The rules for incorporating format terms are a part of the control over the incorporation of format terms, focusing on formal review. Our country has adopted a relatively strict incorporation control mechanism. However, some issues involved in the incorporation rules of format terms are rather complex. For instance, whether the determination of abnormal terms

falls under substantive review and how the incorporation rules of format terms operate in different types of contracts require further research and discussion.

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