

# Italy

## The law on abusive clauses

by Mario Serio

Law no. 52 of 26 February 1996 has implemented EC Directive 93/13 on abusive clauses (OJ 1993 L95/29) with a series of additions to the Italian civil code.

Adopting provisions is in itself an innovation for the Italian legal system. With the exception of the re-writing, back in 1975, of much family law and of a few articles regarding company law, the civil code framework has stood unaltered since its early days in the 1940s. But other significant changes can be seen as consequences of the said implementation and as new frontiers in the Italian law of contract. This letter focuses attention on the major aspects of the legal changes made and the impact this is having on the whole structure of private law.

First of all, the Italian legislator has adopted with no apparent reluctance the fundamental distinction, directly stemming from the EC directive, between contracts between professionals and consumers and all other contracts. This is a major and long-awaited step in the direction of setting up a brand new contractual category – one that other civil law systems have already conceived – that of consumer contracts, where contracts are made by members of the public whose legal position is expected to be weaker and needs a protective shield against the contractual force the other party is presumed to exercise.

To create a contractual category based upon unequal legal positions undoubtedly opens up new scenarios in contractual law for at least three reasons:

(1) it acknowledges that equality of bargaining power is a myth bound to be swept away

(2) it paves the way to the building of a novel body of measures aimed at filling the gap between consumers and professionals and giving the former the chance to have their voices heard concerning contracts that the latter have unilaterally drawn up; and

(3) it defines the category in question with a sufficient degree of accuracy, encompassing both private persons and legal entities.

The implementation of the EC directive has brought about two further consequences. First, it has been necessary to determine what gives rise to the finding that a clause is abusive (eventually the legislator has adopted the list that was annexed to the directive). Secondly the consumer can now take action to defend himself from an unconscionable bargain because, where a clause is found to be abusive, it is deprived of any effect.

Finally the directive's implementation allows bodies and organisations representing consumers' interests to apply for prohibitory injunctions for the prevention of the use of abusive clauses.

As has been observed, Italian contractual law is now provided with modern and powerful instruments to try and regulate the relations between parties with differing positions: now it is up to the courts' decisions and the development of legal doctrine to fulfil expectations of a fairer law of contract. 

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# Japan

## Conferences on Anglo-Japanese law

by Professor Yutaka Tajima

The first international conference of Anglo-Japanese Law was held at the University of Cambridge on 16 and 17 September 1996 and the second international law conference was held at the University of Tsukuba, Tokyo on 1 and 2 October 1997. Both events were successful. The main title of the second conference was Law Reform in Business Law – Perspectives in Anglo-Japanese Law. The conferences are an attempt to combine the academic activities of higher legal institutions, particularly of the Institutes of Advanced Legal Studies located at London, Tokyo and Murdoch. The subjects discussed in the Tsukuba conference were: directors' duties and shareholders' action, insider dealing, corporate governance, commercial arbitration, the uses of trust law, aspects of insurance law, and electronic international contracts.

The subjects chosen for the conference are those areas of law in which there is a need for law reform in Japan. The big bang

in the field of financing and banking laws is of course a serious problem. Several reform bills have been proposed and some have already become statutes. For example, the *Bank of Japan Reform Act 1997* and the *Stock Holding Company Act 1997* have passed in the Diet. In the past, the Bank of Japan was under the control of the Ministry of Finance and, as a consequence of the legislation, the Bank of Japan will enjoy more independence and more power will be given to it. The *Stock Holding Company Act 1997* will enable a group of large corporations to harmonise the way they co-operate with each other so that they can cope with international trade competition. Several other legislative reforms are still under consideration.

Cases of economic corruption, which was the main subject of the Cambridge conference, were recently prosecuted in Japan. After reading the news related to these cases, a friend visiting from abroad told me that 'Japan has become democratic at last'.



Indeed, these incidents can be viewed as evidence that the generation of Japanese who were educated after the Second World War have begun to have control over the government as well as over major corporations. Japan is now directed toward banishing every sort of corruption from the whole society.

Apart from the legislation responding to changes in the financial world, there are also reforms arising from scientific progress and the need for modernisation. The *Brain Death Act* 1997 has passed through the Diet, and will enable medical doctors to use parts of a body whose brain is determined to be dead. The aim of this statute is the utilisation of human bodies for medical purposes. The process is of course very rigid, and those medical doctors who wish to operate under the Act must obtain the consent of the patient and his or her kin.

Other recent modernising measures include legislation which makes environmental assessment obligatory. The *Labour Standards Act* and its related statutory provisions have been amended to provide for sexual equality so that women are no longer equated with children.

In the historical perspective, a few important reforms have been introduced in recent years. First, the code of civil procedure was renewed in 1996 and became effective on 1 January 1998. The old code, enacted in 1890, was written in old language. Now it has been rewritten. Its substance, essentially based on German law, was also partly modified in favour of Anglo-American law but was not drastically changed, the reforms being mainly for the purpose of simplification of language.

Note should also be made of recent discussions relating to the activities of the national defence force. In accordance with changes in the international situation, Japan wishes to play an important role in the United Nations, especially as a member of the Security Council. Because the Tsukuba conference was restricted to reforms in business law, this area was excluded from our discussion. 

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# Japan

## Doom and gloom in the Tokyo market or a global storm?

by Dr Chizu Nakajima

The fall of Yamaichi Securities Co, one of Japan's big four brokerage houses, has further demoralised the people of Japan and has taken jobs away from many hard working men and women. Its repercussions on the rest of the world are still to be felt at the time of writing.

Was Yamaichi's collapse totally unavoidable? The main cause of its failure, according to news reports and announcements from the Bank of Japan (*Financial Times*, 24 November 1997), was Yamaichi's engagement in illegal practices, including making payments to *sōkaiya* (general meeting fixers) paying compensation to favoured clients and, worst of all, concealing liabilities by moving losses from one account to another, a practice known as *tobashi*. Whilst these practices had been known to and conducted in the industry for many years and – thanks to media attention – even the public have recently been made aware of them, nothing much has been done to control them notwithstanding the statutory prohibitions, at least until now. It was, so it has been alleged, due to the cover-ups by the securities companies through the use of offshore companies that the regulators had not been able to get to the bottom of the financial state of many houses, including Yamaichi, until it was too late.

There have been other failures including the seventh largest broker, tenth largest commercial bank and a small credit association which, in fact, failed thanks to a man with *sōkaiya* connections. Whilst Japan has experienced worse economic conditions before the Second World War, what makes everyone in Japan so weary is not only the sheer scale of debt mountains – estimated by the government to be over 20,000 billion yen but rumoured to be at least twice this – but revelations of the link between the financial sector and organised crime and the extent

to which those established houses have allowed themselves to be involved with the underworld.



The report of the Securities and Exchange Surveillance Commission (SESC), published in October 1997, noted that its activity had gone up considerably as a result of an increase in crimes involving securities companies. It is, however, more likely that it was public demand for a tighter control of the financial sector and SESC's efforts to step up inspections of financial intermediaries that have uncovered a larger number of cases, resulting in a 'record five criminal complaints' (*Japan Times*, 2 October 1997) filed with the prosecutors. These prosecutions consisted of one against Nomura Securities Co, the largest of the big four, for alleged loss compensations made to *sōkaiya*, three suspected cases of insider dealing and one case of spreading rumours about listed shares in violation of the *Securities and Exchange Law*. As the report covers only the first half of 1997,