

Determination of the Validity of Exclusion Clauses in Institutional Care Service Contracts

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Abstract

In order to exclude or reduce their liability for future damages to elderly residents, elderly care institutions usually prepare elderly care service contracts in advance and include relevant form clauses in them. In current judicial practice, there are controversies over the validity of exclusion clauses in elderly care service contracts, with some courts holding that the exclusion clauses are unreasonable and exclude their own liability, that they are invalid for failure to take reasonable instructions, and that they are invalid because the nature of the exclusion clause causes physical damage to the other party. Some courts have also held that exclusion clauses which are not based on damage caused by the institution are valid. In this regard, it is important to clarify the order of application of the norms for determining the validity of exclusion clauses in institutional pension service contracts: first, to examine whether the exclusion clause is included in the pension service contract; second, to examine whether the exclusion clause is an exclusion of the pension institution's responsibility for causing damage to the elderly due to its own causes; and finally, to examine whether the pension institution has "unreasonably" exempted or reduced its own liability.

Keywords: elderly service contract, form clause, exclusion clause, validity determination

1. Presentation of the Problem

In recent years, China has been facing the impact of a rapidly ageing population. According to data released by the National Bureau of Statistics, by the end of 2022, the number of elderly people aged 60 or above in China will have reached 280 million, accounting for 19.8% of China's total population, which is only 0.2% short of China's overall transition to a moderately ageing society. Faced with the challenges of a rapidly ageing population, meeting the needs of the elderly in their old age

has become an important task. The traditional mainstream model of elderly care in China is family-based, with the elderly usually choosing to be cared for by their children at home, and this model is also the one that best meets the needs of the elderly. However, due to factors such as family planning policies and changing fertility attitudes, the mainstream family structure in China has changed to a "4-2-1" demographic structure, with a trend towards smaller families. A couple has to take care of children and both parents while working, which puts a lot of pressure on their lives. In addition,

not all parents choose to live with their children and it is not uncommon for older people to live alone. This makes the traditional family model of ageing unsustainable in the current family structure and in urgent need of reform (AKOSA F, YEBOAH-ASSIAMA E, ASARE B E, et al., 2020). In this context, the institutional care model is particularly important, as it has the advantage of having a complete infrastructure and personalised care compared to the traditional family care model.

The Chinese government is also aware of the advantages of institutional care, and has clearly stated in the 14th Five-Year Plan that it will “support families to take over the function of elderly care, and build an elderly care service system that coordinates home, community and institutional care, and combines medical and recreational care”, which clearly indicates that it will support the development of institutional care services based on family care. The development of institutional care services for the elderly is clearly proposed (BUDA D., 2012).

Institutional care differs from traditional family care. It refers to the concentration of elderly people in need of services in one place, and the provision of elderly care services by specialised institutions to provide unified care for these elderly people. At present, China's elderly care institutions can be divided into two main categories: public and private. Public institutions are those run by the government, while private institutions are those run by social organisations, individuals and other social forces other than the government, which provide rehabilitation, care and maintenance services for the elderly and receive remuneration for doing so with a certain degree of profitability (GUILLEMARD S., 2019). Both types of institutions can be the subject of legal relationships for elderly care services and conclude contracts for elderly care services with elderly people and their relatives living in the institutions.

When concluding a contract with an elderly person and their relatives, the institution usually draws up a standard contract without consulting the elderly person and includes an exclusion clause in the contract in order to improve efficiency and to exclude its own liability. In court practice, exclusion clauses in such contracts are usually held to be invalid, but the basis for the decision is confusing. Some courts have invalidated exclusion clauses on the grounds that the institution “failed to

adequately fulfil its duty to explain and advise”, some courts have invalidated exclusion clauses on the grounds that they “unreasonably exclude or reduce its own liability”, and some courts have invalidated exclusion clauses on the grounds that the agreement in the exclusion clause violates the provisions of Article 506 of the Civil Code. It can be seen that the current judicial practice regarding the validity of exclusion clauses in contracts for institutional care of the elderly is confusing and that there is no uniformity in the rulings and no relatively consistent conclusion can be drawn (GUILLEMARD S., 2019). In this paper, we start from the existing judicial decisions, sort out the basis for determining the validity of the exclusion clause in the elderly service contract by different courts, analyse the different bases for determining the validity of the elderly service contract, and finally propose the order of application of the norms for determining the validity of the exclusion clause in the elderly service contract.

2. Overview of the Exclusion Clauses in Institutional Elderly Service Contracts

2.1 Definition of the Concept of Exclusion Clauses in Institutional Elderly Service Contracts

Before defining the concept of exclusion clauses in institutional care service contracts, it is necessary to define the legal concept of institutional care service contracts. A clear definition of the legal concept of an institutional care service contract is the basis for an effective understanding of the exclusion clause in an institutional care service contract. An institutional care service contract is an agreement between an institutional care institution and an elderly person or his or her relatives on the civil rights and obligations in relation to the provision of elderly care services to the elderly person living in the institution (HOLIAN M J., 2009). The legal relationship between the institution providing the service and the elderly person receiving the service and the elderly person's relatives is the subject of the contract. The current law requires that a contract for the provision of elderly care services must be signed before an elderly person can be admitted to an elderly care institution. An exclusion clause, also known as an “exculpatory clause”, is a clause inserted by the party providing the standard contract in order to exclude or reduce its own liability in the future. There are currently two schools of thought on the scope of

exclusion clauses: the broad view and the narrow view. The broad view is that exclusion clauses include clauses that completely exclude and limit or mitigate liability, while the narrow view is that exclusion clauses only include clauses that exclude liability. For example, Prof. Wang Liming believes that “an exclusion clause is a clause that excludes or limits the future liability of the parties by agreement”.

The author also agrees with the general view that the term “exclusion of liability” should be interpreted in a broader sense to include clauses that mitigate and limit liability, which will help to regulate the exclusion clause more comprehensively and thus be more conducive to protecting the interests of the parties to the exclusion clause (HOLIAN M J., 2009). Therefore, this article discusses exclusion clauses in institutional aged care service contracts based on the broad view of the exclusion clause and refers to the clauses in the pre-drafted form contracts of aged care institutions that exclude, mitigate or limit their own liability in the future as exclusion clauses.

2.2 *The Nature of Exclusion Clauses in Institutional Care Service Contracts*

The emergence of form clauses is based on economic development and the increasing speed of trade, and is a way of simplifying the contracting process in order to cope with the heavy transaction process. The widespread use of form clauses has helped to improve the efficiency and reduce the cost of contracting, so institutions have opted for pre-drafted form contracts when entering into institutional care contracts with elderly parties (JEONG S & AHN B., 2022). However, due to the pre-drafted nature of the form contract, the negotiation process between the contracting parties on the relevant issues is ignored and the conclusion of the form contract does not reflect the true intention of the elderly party, who does not have the freedom to contract and is in a passive position to accept it. At the same time, since the elderly care institutions are the drafters of the standard contracts, they are qualified to draft the standard clauses and usually use the standard contracts to draft clauses that exclude, reduce or limit their own liability to the detriment of the legitimate rights and interests of the elderly residents, and the exclusion of liability clauses of the elderly care institutions in the elderly care service contracts belong to such clauses.

According to Article 496(1) of the Civil Code, the definition of a form term should satisfy three elements, namely “repeated use”, “pre-drafted” and “not negotiated with the other party at the time of the conclusion of the contract” (HERBOTS J H., 2021). The definition of “form terms” in the Civil Code is consistent with the former Contract Law, which had removed the “repeated use” element from the definition of form terms during the drafting process, but ultimately retained it (JIA W, ZHANG P, DUOLIKUN N, et al., 2020). The reason for this is that, in judicial practice, a significant number of contracts are concluded by one of the parties providing the text of the contract and the other party signing it without objection. If the “repeated use” element is removed, it will easily lead to an over-reliance on the “failure to consult the other party” element in the determination of form terms, which will result in an undue extension of the scope of the determination of form terms (LI H & LU M., 2015). Of course, this does not mean that only repeated use can be considered a form term, as in practice there are some form contracts that are used only once. Therefore, the “repeated use” element of the Civil Code focuses more on the relevant purpose of the form clause than on the objective number of times it is used. Therefore, when determining form clauses in older service contracts, the “repeated use” element should be combined with the “pre-drafting” element, focusing on whether there is a subjective purpose of repeated use when the contract terms are pre-drafted.

Second, in determining the element of “without consultation”, in addition to the question of whether substantive consultation took place during the contract formation process, it is more important to consider whether the party accepting the contract has the right to modify and choose the terms of the contract. The essential feature of a formality clause is the non-negotiable nature of its content (LI L, LIN C, WU Z, et al., 2012). The other party can only choose whether or not to accept it, but has no contractual freedom to negotiate changes to its specific content. Therefore, the essence of ‘non-negotiability with the other party’ is not that it can be negotiated, but that it is not possible to do so.

When an elderly care institution enters into a contract for elderly care services with an elderly person and his relatives, it includes clauses in

the pre-drafted form contract that exclude, reduce or limit its own liability, with the intention of using the contract repeatedly with several elderly persons, and the elderly person can only passively choose to accept or reject the clauses in the contract that exclude or reduce his own liability, without being able to negotiate on specific matters (LI Q & CHAND S., 2019). The three elements of a formality clause are present. Therefore, the clauses in the contract for institutional elderly care services that exclude, limit or mitigate the liability of the institution are form clauses and are subject to the relevant provisions of the Civil Code on form clauses (LIN W., 2016).

2.3 Types of Exclusion Clauses in Institutional Elderly Care Service Contracts

Based on a summary of the current elderly care service contracts of a number of elderly care institutions and the model text of elderly care service contracts issued by the Ministry of Civil Affairs and some provincial and municipal civil affairs departments, it can be concluded that the exclusion clauses in the current institutional elderly care service contracts can be divided into two categories: Statutory exclusion clauses and agreed exclusion clauses, of which the statutory exclusion clauses mainly include force majeure exclusion clauses and third party tort exclusion clauses, while the agreed exclusion clauses the statutory exclusion clauses include force majeure and third party tort exclusion clauses, while the contractual exclusion clauses include accident exclusion clauses and fault exclusion clauses for the recipient of elderly care services.

2.3.1 Force Majeure Exclusion

Force majeure as an express exclusion of liability under Article 180 of the Civil Code of China is included in the standard contract of a large number of elderly care institutions, such as the provision that "if Party B suffers damage due to force majeure, such damage shall be borne by Party B itself and Party A shall not be liable for it" in the elderly care service contract of an elderly care institution in Anhui Province (MEJIAS ALONZO C., 2013). Although force majeure is a legal exclusion, it must be applied according to strict criteria, and only if the institution has exhausted its remedies and is still unable to prevent the damage from occurring can it use the force majeure exclusion clause to avoid liability. If no restrictions are placed on the use of force majeure exemptions by nursing

homes, this may result in them failing to take force majeure events seriously, to the detriment of the protection of the legitimate rights and interests of elderly residents.

2.3.2 Third Party Tort Exclusion

Article 1175 of the Civil Code provides that "if the damage is caused by a third party, the third party shall be liable for the damage". The third party tort exclusion is often included as a legal exclusion in contracts for elderly care services, where it is agreed that the elderly care institution will not be held liable for any violation of the elderly person's rights caused by a third party. The third party in the third party tort refers to the third party outside the care institution, i.e., not the staff of the care institution, including the third party outside the institution and the co-resident elder, in practice there are more tort disputes between the co-resident elder.

2.3.3 Accident Exclusion Clause

The accident exclusion clause is an agreed exclusion and is the most commonly disputed exclusion clause. Accidents suffered by elderly people in elderly care facilities mainly include sudden illness, fractures, sudden death, falls, suffocation, burns, etc. Elderly care institutions usually include clauses in contracts for elderly care services to exempt themselves from liability for damages suffered by elderly people as a result of these accidents (NGUYEN TIEN V., 2022). Whether or not an elderly care institution can be exempted from liability by including an accident exclusion clause still needs to be discussed in conjunction with other specific circumstances.

2.3.4 Exclusion of Liability for the Fault of an Elderly Person

The fault of the elderly person is also part of the agreed exclusion, which can be divided into the fault of the elderly person and the fault of their relatives, including the elderly person's refusal to cooperate with the management of the institution, concealment of their condition, self-harm, suicide and other situations. The elderly care institution will include this in the scope of its own exclusion of liability and will be exempted from liability for losses suffered by the elderly person due to the fault of the elderly person and their relatives in the contract for elderly care services. The exclusion of liability on the part of the elderly person is also widely used by elderly care institutions and has been

adopted by the Ministry of Civil Affairs and some model elderly care service contracts promulgated by provinces and municipalities.

3. Controversy over the Validity of the Exclusion Clause in Institutional Elderly Care Service Contracts

At present, due to the increasing development of institutional elderly care services, disputes between elderly care institutions and elderly residents and their relatives are increasing day by day. The author searched the Judicial Documents website using the keywords “elderly care institutions” and “disclaimer”, and found that as of 28 March 2023, there were 204 judgments involving such disputes. After summarising these judgments, it can be seen that in judicial practice, the courts are divided when deciding cases involving exclusion clauses in contracts for institutional care of the elderly, which can easily lead to different judgments in the same case and affect judicial justice (PRABUDESAI R, DWIVEDI R & SHARMA V., 2022). Therefore, it is necessary to sort out the reasons for different decisions on the same type of cases and to analyse the reasons behind them in order to provide a reference for the handling of relevant cases in judicial practice.

3.1 Confusion in Judicial Decisions on the Validity of Exemption Clauses

In judicial practice, there may be conflicting decisions by two different courts on the disclaimer clauses in the same institutional elderly services contract. When the People’s Court ruled that the exclusion clause was invalid, there were various reasons for ruling that the exclusion clause in the elderly care services contract was invalid, such as the elderly care institution did not take reasonable instructions, the elderly care institution unreasonably exempted itself from liability, the exclusion clause was an exclusion clause that “caused personal injury to the other party”, etc. When the People’s Court ruled that the exclusion clause was invalid, there were various reasons for ruling that the exclusion clause in the elderly care services contract was invalid (QIANG W., 2021). Some courts have also held that the exclusion clause was valid because it did not “unreasonably exclude the liability of the institution”.

3.1.1 Unreasonable Exclusion of Own Liability and Failure to Take Reasonable Prompt Instructions Led to Invalidity

In the service contract dispute between Li Moumou and Ningguo Rongguo Leisure Pension Centre (hereinafter referred to as Rongguo Pension Centre), Li Moumou sent his father Li Mou to live at Rongguo Pension Centre and entered into a pension service contract with Rongguo Pension Centre in which it was agreed that “Rongguo Pension Centre shall be exempt from liability for illness, injury or death caused by Li Moumou’s own health condition, etc.” After Li went to hospital due to ill health, during the hospital was diagnosed with a number of basic diseases, but at the request of the family for the hospital discharge procedures, and died the day after discharge.

Ningguo court in the course of the trial that although the Rongguo elderly centre in the contract with Li Moumou concluded in the contract of elderly services agreed to stay in the elderly own health conditions and other reasons, resulting in illness and casualties, the Rongguo elderly centre does not bear the corresponding responsibility, but the agreement belongs to the elderly institutions unilaterally exempt from their own responsibility, and the elderly institutions in the contract with the elderly and their relations to enter into the contract of elderly services did not draw the contracting parties. Therefore, the exclusion clause agreed in the contract of elderly services is invalid and not legally binding on the parties.

3.1.2 Exclusion of Liability of “Causing Personal Injury to the Other Party” Led to Invalidity

In the case of Jin Moumou and Dali County Shengda Love Nursing Home (hereinafter referred to as Love Nursing Home) service contract dispute, Wang Moumou (the elderly) and his relatives and Love Nursing Home entered into the “Nursing Home Admission Agreement”, agreeing that Wang Moumou would stay in Love Nursing Home, accept the nursing services provided by Love Nursing Home and pay the corresponding fees to Love Nursing Home. When Wang Moumou was admitted to the Love Nursing Home, he signed a physical indemnity undertaking promising that “if any accidents occur during his stay at the Love Nursing Home due to his own illness or behaviour, the consequences of injury or death will be borne by his family and have nothing to do with the Love Nursing Home”. Later, Wang Moumou fell in the nursing home and died. The two parties to the contract disputed the assumption of responsibility and

went to court in vain.

The Weinan court ruled that although the agreement between Wang and the nursing home was that “the family will be responsible for any accident that happens to the elderly and has nothing to do with the nursing home”, the agreement deprived Wang of fair compensation for the damage he suffered and was not covered by Article 506 of the Civil Code, which states that the agreement is invalid as an exclusion of liability for “causing personal injury to the other party”.

3.1.3 Exceptions to the Validity of Exclusion Clauses

In judicial practice, the validity of exclusion clauses is not necessarily invalid, and some courts have recognised the validity of exclusion clauses. For example, the People’s Court recognised the validity of an exclusion clause in a service contract dispute between Beijing Fengtai Yihe Nursing Home and Zhang Moucheng. In October 2019, Zhang Moucheng was admitted to the centre due to the negligence of the nursing staff, resulting in a fall that left him bedridden. Zhang Moucheng was bedridden for a long time and later died from his illness. Zhang Moucheng and Yihe Nursing Care Centre disputed the liability of each party and took the case to court.

Although the trial court in this case ultimately ruled that Yihe Nursing Care Centre should bear the corresponding responsibility, it recognised the validity of the exclusion clause in its judgment. The court held that the “Contract for Elderly Services” was the true intention of both parties and was legal and valid, which agreed on the exclusion clause that the elderly care institution would not be liable for accidents not caused by the elderly care institution. Yihe Nursing Care Centre provided a reasonable explanation of the exclusion clause and Zhang Moucheng accepted it. In addition, the exclusion clause did not exclude the liability of Yihe Senior Care Centre, which could only be exempted from the institution’s liability if the institution could not prevent the accident even after exercising its reasonable duty of care. However, as Yihe Senior Care Centre failed to exercise reasonable care in this case, it was ultimately held liable.

In summary, after analysing and sorting out the above-mentioned cases, it is clear that there is a great controversy in judicial practice regarding

the validity of the exclusion clause of the institutional elderly services contract. Firstly, there are differences in the applicable legal basis, as some courts have followed the decision of Articles 39 and 40 of the former Contract Law and Article 10 of the Second Interpretation of the Contract Law and held that the exclusion clause was invalid on the grounds that the nursing home had failed to take reasonable instructions and had unreasonably exempted itself from liability. Some courts have also relied on Article 506 of the Civil Code to hold that the exclusion clauses provided by the care institutions were of the nature of “causing personal damage to the other party”, thus rendering them invalid. Secondly, with regard to the validity of exclusion clauses in contracts for elderly care services, some courts have held that as long as the elderly care institution has fulfilled its duty of reasonable care and the elderly person has suffered damage as a result of circumstances other than the care services provided under the contract, the exclusion clause agreed under such conditions should be valid and the elderly care institution should not be held liable (QU J., 2021). It can be seen that in judicial practice the application of the relevant legal norms of the exclusion clause has not yet been uniformly understood by different courts, and there is also dispute as to whether the exclusion clause is valid and under what conditions it is valid.

3.2 Analysis of the Causes of Disputes on the Validity of Exclusion Clauses in Judicial Decisions

Firstly, the promulgation of the Civil Code has changed the rules on the validity of exclusion clauses in the former Contract Law, and some courts have followed the provisions of the former Contract Law, resulting in the application of the wrong basis for adjudication. Article 39 of the former Contract Law provides that the supplier of a form contract has the obligation to explain the terms of the form contract, but does not specify the effect of the fulfilment of this obligation on the validity of the exclusion clause (RAPPARD P., 1988). Article 9 of Interpretation II of the Contract Law supplements Article 39 of the Contract Law by clarifying that if the supplier of an exclusion clause fails to draw the attention of the other party to the exclusion clause, the clause is revocable. Since a revocable clause is considered valid until it is revoked, this is tantamount to recognising that the validity of a disclaimer clause is not affected by a supplier’s failure to

comply with its obligation to draw attention to it. At the same time, Article 10 of Interpretation II of the Contract Law provides that if the provider of a standard term fails to comply with its obligation to indicate and explain, and if the circumstances set out in Article 40 of the Contract Law are present, the court shall declare the term invalid.

Article 496 of the Civil Code provides that if the party providing a form clause does not fulfil its obligation to indicate or explain the form clause and the other party does not pay attention to or understand the form clause, the other party may claim that the clause does not become part of the contract. The change between the old and the new provisions has led some courts to follow the provisions of the former Contract Law and its judicial interpretations when deciding that the exclusion clause provided by a care institution is not valid on the grounds that the party providing the form clause has not fulfilled its obligation to indicate and exclude its primary responsibility. However, according to Article 496 of the Civil Code, the failure of the provider of a standard clause to comply with its obligation to provide information has the legal effect of excluding the standard clause from the content of the contract (ROHLING M., 2021). The changes made to the old law by the new law have led some courts to follow the provisions of the old contract law and to question the validity of certain exclusion clauses for nursing homes.

Second, the current judicial practice is confusing as to the order of the legal norms to be applied in determining the validity of the exclusion clause, and some courts have not clarified the order of application of the relevant norms. Although the Civil Code has provided for the validity of the exclusion clauses, it has not clarified the order of application of these validity norms, so that in practice the people's courts may apply different norms when determining the validity of the exclusion clauses of the elderly service contract (ROMZEK B S & JOHNSTON J M., 2002). If the provisions of Article 506 of the Civil Code on the invalidity of exclusion clauses for causing personal injury to the other party are applied directly, most exclusion clauses will easily be found to be invalid directly. If one chooses to apply first the rules on the incorporation of form clauses in Article 496 of the Civil Code, the institution may be deemed to have "failed in its duty to inform or explain", with the result that the exclusion

clause is not part of the contract for services to the elderly from the outset, and there would be no need to determine its validity (SUN W., 2017). If, after applying the incorporation rules, it is accepted that the exclusion clause is incorporated into the contract and the parties agree to exclude the liability of the nursing home for injuries to the elderly person not caused by the nursing home, provided that the nursing home has reasonably performed its duty of care, then there is a possibility that the exclusion clause will be held to be valid. It is therefore necessary to clarify the standards for determining the validity of the exclusion clause and the order of their application.

4. Construction of the Path for Determining the Validity of the Exclusion Clauses in Institutional Elderly Service Contracts

First of all, in order to determine the validity of the exclusion clause of the contract for services to the elderly, it is necessary that the contract for services to the elderly as a whole is not in a situation of invalidity or pending validity. Specifically, firstly, both parties to the contract must have full legal capacity, and if the elderly person is a person with limited or no legal capacity, his or her relatives must conclude the contract on his or her behalf. Secondly, it must be the true intention of both parties to enter into a contract for elderly care services. Finally, the content of the contract must not contravene mandatory legal and administrative provisions or principles of public order and morality. The validity of the exclusion clauses in the contract for elderly care services is only meaningful if the contract itself is valid. Given that the above conditions are met, the evaluation of the validity of the exclusion clauses in the contracts for institutional care services for the elderly should focus only on Articles 496, 497 and 506 of the Civil Code.

4.1 Evaluation of the Validity of Exclusion Clauses in Elderly Care Service Contracts Under the Current Legal System

The Civil Code distinguishes for the first time between the inclusion and the validity of exclusion clauses, whereas Article 39 of the former Contract Law did not distinguish between the inclusion and the validity of exclusion clauses. Although it provides that the supplier of a standard form contract must take reasonable steps to draw the other party's attention to the exclusion clause, according to

Article 9 of Interpretation II of the former Contract Law, the other party only has the right to request the withdrawal of the exclusion clause if the supplier of the standard form contract fails to comply with its obligation to indicate and explain the exclusion clause. Article 496 of the Civil Code amends Article 39 of the former Contract Law in such a way that, if the supplier of a standard form contract fails to comply with his obligation to inform and explain (ROMZEK B S & JOHNSTON J M., 2002), so that the other party does not pay attention to or understand the clause in which it has a material interest, the content of the exclusion clause is deemed not to be included in the contract. Therefore, according to the evaluation criteria of the Civil Code, only if an elderly care institution fulfils its obligation to inform and explain the exclusion clause to the elderly residents, it can be included in the composition of the elderly care service contract, and thus the effectiveness of the exclusion clause must be evaluated.

The validity of the exclusion clause is assessed in accordance with Articles 497 and 506 of the Civil Code, once the institution has fulfilled its obligation to inform and explain the exclusion clause and the exclusion clause has become part of the contract for elderly care services. Article 497 of the Civil Code provides that a form clause is null and void if the provider of the clause excludes or reduces its liability in an unreasonable manner (SUN W., 2017). The interpretation of "unreasonable" is not clearly defined in the existing legal system, which is tantamount to giving the judge the discretion to interpret the exclusion clause as "unreasonable" if he or she considers it contrary to substantive fairness, and thus to declare the exclusion clause invalid the judge has the power to interpret the exclusion clause as "unreasonable" if he or she considers it contrary to substantive fairness, and thus to declare the exclusion clause invalid.

Article 506 of the Civil Code provides that exclusion clauses that "cause personal injury to the other party" are invalid, and some scholars have argued that any agreement in a contract for the provision of elderly care services that exempts an elderly person from liability for personal injury is invalid. Even if the exclusion clause only applies to personal injuries suffered by the elderly residents during their stay in the nursing home due to accidents or their own health conditions, the exclusion clause should be considered invalid. However, this view is in

contrast to the model contracts for services to the elderly issued by some provinces and municipalities, which contain extensive provisions on the exclusion of liability for personal injury to the elderly not caused by the nursing home itself (TYNKKYNNEN L-K, LEHTO J & MIETTINEN S., 2012). Therefore, in the author's opinion, the invalidity of the exclusion clause for causing bodily harm to the other party, as stated in Article 506 of the Civil Code, only applies to the exclusion of the harm caused to the elderly by the elderly care institutions from their own causes, including the causes of the elderly care institutions' intentional, negligent, failure to fulfil their contractual obligations and failure to fulfil their safety and security obligations. If the exclusion clause only applies to the case where the elderly person suffers personal injury due to an accident or physical cause after the nursing home has fulfilled its obligations in accordance with the contract, then the exclusion clause should be considered valid. The reason for this is that most elderly people living in residential care homes have underlying illnesses and are in poor health, which makes them more likely to suffer personal injury.

If all the exclusion clauses in the elderly care service contract are deemed invalid, the elderly care institution will be exposed to excessive risk and will not be able to avoid liability even if it fulfils its care obligations as agreed, which will inevitably result in the elderly care institution bearing the burden of improving the quality of its services, to the detriment of the development of the elderly care industry.

4.2 The Order of Application of the Norms for Reviewing the Validity of Exclusion Clauses in Institutional Elderly Care Service Contracts

As mentioned above, although the Civil Code provides for the inclusion and validity of exclusion clauses, it does not specify the order of application of these norms, which leads to inconsistent judicial results due to confusion in the application of the norms in judicial practice. Therefore, the order of application of the norms on the validity of exclusion clauses in elderly service contracts should be clarified in order to serve the adjudication of such cases in judicial practice. The examination of the validity of the exclusion clause in the elderly service contract should be divided into two steps in order, one is to examine whether the exclusion clause is in accordance with the specification of the subscription, and the other is to examine

whether the exclusion clause is in accordance with the specification of the validity.

4.2.1 Review of Whether the Exclusion Clause Is Incorporated into the Content of the Contract

According to Article 496 of the Civil Code, if the provider of the standard form contract fails to comply with its duty to inform and explain, the exclusion clause is deemed not to have been included in the contract and there is no need to examine whether it complies with the rules on validity. In order to determine whether the supplier of the standard form contract has complied with its duty to inform and explain, the following points should be taken into account. Firstly, it is necessary to clarify what is meant by “reasonable means to bring it to the attention of the other party”. If the provider of the form contract has used “reasonable means to draw the attention of the other party”, it can be presumed that it has used reasonable means. Therefore, the court should examine whether the elderly care institution has identified the exclusion clause in the contract for elderly care services with a special sign sufficient to attract the attention of the other party, and if so, it can be considered that the institution has taken reasonable steps to bring it to the attention of the elderly party. Secondly, the duty to explain the exclusion clause should be based on whether the elderly party understands and accepts the clause. Whether or not the senior party has understood the exclusion clause is subjective and difficult to verify. Therefore, whether or not the elderly party understands the specific meaning of the exclusion clause should be expressed in an explicit way, such as by signing or placing a fingerprint next to the exclusion clause to indicate agreement.

In summary, in order to determine whether the disclaimer is incorporated into the contract for elderly care services, the following elements should be met: first, the elderly care institution should have taken reasonable steps to remind the elderly party of the disclaimer; second, the elderly care institution should have explained the disclaimer; and third, the elderly party should have expressly stated that he/she understands and agrees to the content of the disclaimer. Only if these three elements are met will the court find that the disclaimer has been incorporated into the contract.

4.2.2 Review of the Validity of the Exclusion Clause

Once the exclusion clause has been included in the contract, it should be checked whether it complies with the rules of the Civil Code on the validity of exclusion clauses. In the case of a contract for elderly care services as a whole, it should be determined whether the exclusion clause complies with the provisions of Article 506 of the Civil Code. If the exclusion of liability is an exemption from liability for damage caused to the elderly person by the institution itself, it is invalid in violation of this article. If the exclusion clause exempts the institution from liability in the event that “the elderly person suffers personal injury as a result of an accident or for his own physical reasons after the institution has fulfilled its obligations in accordance with the contract”, this does not violate Article 506 of the Civil Code and the institution should be examined under Article 497 of the Civil Code as to whether it has “unreasonably” excluded or reduced its liability in accordance with Article 497 of the Civil Code. There is no explanation of what is “unreasonable” in the current Civil Code, but I believe that it can be measured according to the principles of equity and justice and the principle of uniformity of rights and responsibilities. If the institution has drawn up the exclusion clause on the basis of fairness and good faith, and the rights and obligations of both parties are shared more equally, then it is appropriate to consider the exclusion clause as “reasonable” and the court may find it valid. If the provider has drafted the exclusion clause in bad faith in order to avoid liability and excessively exclude the rights of the other party, and there is a serious imbalance between the rights and obligations of the two parties, then it should be considered “unreasonable” and the exclusion clause should be considered invalid.

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