riage has broken down irretrievably. The current decision is significant in that it does acknowledge the legitimacy of this interpretation, and makes it clear that the court holds the marriage to have broken down irretrievably if the petitioner persuades the court that (1) there was an agreement to dissolve the marital relationship and (2) there has been no such relationship recently.

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4. Law of Civil Procedure and Bankruptcy

Among several court reports published this year, a Supreme Court report in the field of civil procedure has clarified for the first time the meaning of statutory conditions for the recognition of foreign judgments in Japan. In addition, two lower court reports in the field of bankruptcy law have reached differing conclusions regarding the proper legal interpretation of construction contracts when the contractor enters bankruptcy. Both topics are discussed below.

1. The meaning of the "reciprocity" requirement as part of statutory conditions for recognition of foreign sovereign judgments in Japan, and possible violations of Japanese public policy in the promulgation of foreign judgments as a ground for denying them recognition in Japan.

Decision by the Third Petty Bench of the Supreme Court on June 7, 1983. Case No. (*o*) 826 of 1982. A case involving a demand for the execution judgment. 37 *Minshū* 611.

[Reference: Civil Procedure Act §200(iii), (iv); Civil Execution Act §24.]

[Facts]

On Nov. 6, 1970, X (plaintiff, *koso* appellee and *jokoku* appellee) brought an action to obtain payment of commercial debts of approximately 54,300 dollars against Y (defendant, *koso* appellant and *jokoku* appellant) in the United States District Court of the District of Columbia. On Dec. 14, 1970, Y was served with a summons requiring Y to respond to the initiation of legal proceedings by X. Y thereafter hired S, an attorney admitted to practice in the District of Columbia, instructing S to handle Y's defense in the ensuing proceedings. Subsequently, the District Court issued a judicial order requiring Y to appear in person for deposition by X, as part of the discovery process. However, at this time Y was no longer in the United States. Therefore S attempted to notify Y by telegram and other means that a judicial order to appear had been issued, and that a default judgment could be rendered against Y if Y did not appear or show good cause for his failure to appear. But Y neither appeared nor showed good cause. In consequence, on April 27, 1972, the District Court ruled orally that Y should pay the amount sought by X, plus interest due thereon and court costs. This judgment became final and irrevocable on June 28, 1972.

X, in order to obtain execution of this United States District Court judgment against Y, subsequently brought an action in the courts of Japan. X sought recognition and enforcement of the foreign judgment under Article 24 of the Civil Execution Act and Article 200 of the Civil Procedure Act, since Y was a resident of Japan.

Y disputed X's right to obtain enforcement of the foreign judgment within Japan on two grounds. First, Y argued that because the requirements for recognition of foreign sovereign judgments in the District of Columbia were stricter than those in Japan, there was not "reciprocity" between the two jurisdictions as required by Article 200(iv) of the Civil Procedure Act. Second, even if there was reciprocity, Y argued that X had obtained the foreign judgment by fraud, thereby violating Japanese "public order" and thus preventing recognition under

Article 200(iii) of the Act.

The court of first instance rendered judgment for X, holding that the foreign judgment satisfied the requirements of Article 200.

The court of appeals, rejecting Y's appeal, held that "reciprocity" under Article 200(iv) of the Civil Procedure Act existed if the conditions for recognition imposed by the foreign nation were approximately, though not entirely, the same as those applicable in Japan. Such reciprocity would exist if the conditions imposed by the foreign jurisdiction were somewhat less strict than those required by Japan, but there were not substantial differences between them. In this case, reciprocity existed, the court held.

Further, the appeals court ruled that although the foreign judgment must not be "repugnant to the public order or good morals of Japan" under Article 200(iii) of the Civil Procedure Act, and although this requirement applied to the procedures by which the foreign judgment was arrived at as well as its substance, there had been no violation of public order in this case. No fraudulent measures were found to have resulted in the foreign judgment.

Y made *jokoku* appeal from these holdings to the Supreme Court, on the ground that the court of appeals erred in its interpretation of Civil Procedure Act, Article 200(iii) and (iv).

[Opinions of the Court]

Jokoku appeal dismissed.

The phrase "Reciprocity is guaranteed" in Article 200(iv) of the Civil Procedure Act should be construed as meaning that the foreign nation in question must provide recognition to foreign judgments under conditions not different in their principal elements from those imposed by Japanese law for recognition of the same types of judgments.

After all, it may be unreasonable to expect foreign jurisdictions to adopt entirely the conditions for recognition imposed in Japan, unless there is an international convention to establish

common standards. (As used here, the term "recognition" includes any legal effect granted to a foreign judgment within Japan.) Moreover, a liberal and broad interpretation of Article 200(iv) is made advisable by the highly-developed character of public relations in current international society, the need to prevent inconsistent judgments between the same parties in different jurisdictions, and the benefits of procedural economy and simplified remedies for the redress of rights.

This holding appears to contradict a prior decision by the Great Court of Judicature, but the prior decision should henceforth be interpreted in a manner consistent with the present opinion of this Court. In a 1933 opinion, the Great Court of Judicature held that where a foreign nation imposed requirements for recognition equally lenient with or more lenient than those of Japan, then reciprocity existed. (Decision by the Great Court of Judicature on Dec. 5, 1933. Case No. (*o*) 2295.) However, this rule would lead to illogical results: under it, recognition requirements in Japan might be stricter than those in a particular foreign nation whose legal system purported to recognize Japanese judgments. But if this were the case, then there would be no reciprocity between the foreign nation and Japan, which might lead the foreign nation to cease recognizing Japanese judgments. This development, in turn, would prevent recognition of any judgments of the foreign nation within Japan.

Finally, both the process and the substance of foreign judgments can be considered in evaluating their relation to "public order" under Article 200(iii) of the Civil Procedure Act.

[Comment]

This Supreme Court decision is noteworthy as the court's first clarification of conditions for recognition of foreign judgments.

In order for a final foreign judgment to be granted legal effect in Japan, it must satisfy the requirements of Article 200 of the Civil Procedure Act. In summary, Article 200 requires that:

(1) Japanese law does not prohibit the exercise of jurisdiction by the foreign court(§200(i));

(2) The losing defendant, being a Japanese, must have received personal service of a summons or have made a personal appearance in the action(§200(ii));

(3) The foreign judgment must not be repugnant to the public order or good morals of Japan(§200(iii)); and

(4) Reciprocity is guaranteed between Japan and the foreign jurisdiction(§200(iv)).

This case focused on the requirements of Article 200(iii) and Article 200(iv). First, it was suggested that the procedure for issuance of the foreign judgment violated Article 200(iii). Second, it was especially argued that no reciprocity existed between the District of Columbia and Japan. (§200(iv))

On the first issue, the Supreme Court accepted prevailing theories that procedural elements might constitute violations of public policy sufficient to bar recognition of a foreign judgment. This principle may be of great importance in the protection of Japanese citizens against potentially unfair foreign judgments.

As for the second issue, an old decision of the Great Court of Judicature construed reciprocity to exist whenever a foreign nation would recognize Japanese judgments under conditions equally lenient as, or more lenient than, those which Japan applied to foreign judgments. (Decision of Dec. 5, 1933. 3670 *Shimbun* 16.) This decision was followed subsequently by lower courts (e.g., Decision by the Tokyo District Court on Oct. 24, 1970. 625 *Hanrei Jihō* 66.), and adopted by many theorists. However, it was criticized for the following reasons:

(a) It is impractical to require evaluation of whether conditions for recognition are "the same" in Japan and abroad;

(b) Absent international conventions, it is unlikely that foreign nations will adopt the same recognition rules as Japan;

(c) Stringent evaluations of foreign recognition rules would likely lead to frequent non-recognition of foreign judgments, perhaps prejudicing the national interests of Japan;

(d) An adoption of the principle of reciprocity would not be appropriate from the viewpoint of legislative policy, because it would make remedies to enforce individual rights in Japan too

dependent on the attitudes of foreign governments.

In consequence, the Court urged a lenient interpretation for Article 200 of the Civil Procedure Act, in line with recent theories that recognition should be granted if the foreign nation's rules were "about the same" as those in Japan. This alters the 1933 interpretation of the Great Court of Judicature.

2. Cases considering whether Article 59 of the Bankruptcy Act should apply when a construction contractor becomes bankrupt half-way through performance of the contract.

Case (a):

The court held that Article 59 of the Bankruptcy Act did not apply.

Decision by the Fourth Civil Division of the Osaka High Court, on Sept. 8, 1982. Case No. (*ne*) 180 of 1982. A *koso* appeal case requesting priority in payment from the bankrupt's estate. 510 *Hanrei Taimuzu* 118.

Case (b):

The court held that Article 59 of the Bankruptcy Act applied. Further, if the contract was rescinded under Article 59(2), the claim of the non-performing party would have priority in payment from the bankrupt's estate (*zaidan-saiken*).

Decision by the Eleventh Civil Division of the Osaka District Court, on Aug. 9, 1982. Case No.(*wa*) 4751. A case requesting priority in payment from the bankrupt's estate. 510 *Hanrei Taimuzu* 118.

[Reference: Bankruptcy Act §§59, 60 and 62.]

[Facts]

The factual backgrounds of cases (a) and (b) are similar. A corporation contracted to perform construction work, and received part payment. In the middle of its performance, the corporation-contractor was declared bankrupt. The party that hired the contractor sought rescission of the contract by peremptory notice (*saikoku*) under Article 59, Paragraph 2 of the Bankruptcy Act. The hiring party then entered a claim for repayment

of the sum it had advanced to the contractor, and sought priority in payment of this claim from the bankrupt contractor's estate under Article 60, Paragraph 2 of the Bankruptcy Act.

[Opinions of the Court]

Case (a):

Koso appeal dismissed.

The contractor and the hiring party were obliged, respectively, to complete the work and to pay for it. If the contractor is declared bankrupt, the completion of the performance he owes under the contract would thus increase the amount of funds available to the bankruptcy estate. This would benefit both the bankrupt contractor and the hiring party.

The conclusion reached above thus allows performance, and rejects rescission of the contract, without employing the traditional distinction between "personal service" contracts and "substitutable" contracts capable of performance by another. If the contract was for personal services by the contractor, the usual rule suggests that the contractor's performance is unrelated to the administration or disposition of the bankruptcy estate: in short, bankruptcy should have no effect on completion of the contract. Therefore, Article 59 of the Bankruptcy Act would not apply. Further, even if the contractor's duties are a substitutable obligation, there is no need to apply Article 59, since authority for full performance of the contract could be established by intervention of the bankrupt's estate under Article 64 of the Bankruptcy Act.

Case (b):

Complaint partly allowed.

Article 59 of the Bankruptcy Act does not always recognize or enforce uncompleted bilateral contract obligations created prior to the bankruptcy. However, Article 59 does allow a trustee in bankruptcy to agree to recognize an advantageous bilateral contract, or to escape obligations under a disadvantageous one. We must therefore first decide whether Article 59 applies to this case, since Article 59 cannot apply if this is a personal services contract. Personal services do not pertain to the administration

of the bankrupt's estate because contracts for personal work arise from a personal relationship between the parties. Further, there is a policy that the bankrupt party should not be prevented from exercising his freedom to work.

If this case presents a contract for personal services, then, the contract does not come under the authority of the trustee in bankruptcy, but rather continues to exist between the contractor and the hiring party outside of any bankruptcy proceedings. And if the work has been completed, a claim for compensation for his services belongs to his free assets (*jiyu-zaisan*).

On the other hand, if no personal services contract existed here, then the contractor's rights and duties under the contract are part of a pecuniary relationship and are subsumed into the bankrupt estate. Thus, Article 59 of the Bankruptcy Act should apply the general rules for executory contracts in bankruptcy to this case. In short, this case can be treated like other bilateral contract cases.

Here, however, the contracting party before the court is a corporation. It is out of the question to suggest that a corporation could offer "personal services", since this is by definition incorrect. Accordingly, Article 59 of the Bankruptcy Act applies, and plaintiff as hiring party has a right of peremptory notice under Article 59, Paragraph 2 of the Bankruptcy Act.

[Comment]

After a judgment of bankruptcy has been entered, contract creditors of the bankrupt are forbidden from exercising their rights as creditors outside of the bankruptcy proceedings (Bankruptcy Act §16). But if this principle were applied to bilateral contracts in which neither party had yet fully performed, injustice would result. That is, the hiring party might be held to complete its performance as due under the contract, by paying the bankrupt estate. In return, however, the hiring party would only receive a *pro rata* payment from the bankrupt estate's assets, by virtue of his status as a creditor in bankruptcy. This would create an inequitable relationship between the parties. Accordingly, the

Bankruptcy Act provides generally that equity between the parties should be maintained where executory contracts are concerned. In such cases, Article 59 of the Bankruptcy Act provides that the trustee in bankruptcy may, at his option, either rescind the contract or perform the obligations of the bankrupt party and demand that the other party should also perform its obligations (Bankruptcy Act §59(1)). It also provides that the other party may give peremptory notice to the trustee in bankruptcy, setting a reasonable period of time for reply and requiring that a definite answer should be given within the period as to whether the trustee will rescind the contract or demand performance. If the trustee fails to respond with a definite answer within the stated period, it shall be deemed that he has rescinded the contract. Moreover, with regard to some types of contracts, the Bankruptcy Act provides for special rules which are exceptions to the aforesaid general rule depending on the circumstances.

As for personal service contracts, their status under Article 59 of the Bankruptcy Act is unclear. No statutory provisions appear to deal specifically with the disposition of personal service contracts in the bankruptcy of a contractor, although there are provisions regarding the bankruptcy of a hiring party (Civil Code §642, Bankruptcy Act §62). Therefore, there are arguments about whether Article 59 of the Bankruptcy Act, which is a general rule for the disposition of bilateral contracts, also applies to bankruptcy of a contractor. According to prevailing theories, the fulfillment of a contractor's obligations constitutes performance of personal services, and hence is independent of the bankrupt estate. Article 59 of the Bankruptcy Act has no application.

Conversely, however, recent influential theories insist that the contractor's bankruptcy may or may not involve contracts for personal services. As discussed previously, Article 59 of the Bankruptcy Act does not apply to the case of a contract for personal services. But if the contract does not involve personal services, it is, as a pecuniary relationship, taken over by the trustee in bankruptcy. Thus, it should be dealt with according to the general rules for a bilateral contract, and Article 59 of the

Bankruptcy Act will apply. If the contractor is a legal person such as a corporation, Article 59 of the Bankruptcy Act always applies, because there is by definition no possibility of the offer of personal services by a legal person.

It is noteworthy that the traditional theories always deny the application of Article 59 in a contractor's bankruptcy, while the more recent theories take a broader view. The latter theories appear to consider the contents of the individual contract in question in order to arrive at reasonable results. And they coincide with the recent trend that bankruptcy is different for natural persons than it is for legal persons, which have gained wide acceptance.

The decision in case (a) above was based on traditional and still-prevailing doctrine, while that in case (b) was based on the recent influential theories. Up to these two cases , there had been no legal precedents for application of these theories. Both cases were thus decisions of first impression.

In the final stages of these two cases, a *koso* appeal was filed from the decision of case (b); the appeal was disputed in the Osaka High Court. The result was that the application of Article 59 of the Bankruptcy Act was denied by the same judge who had acted in case (a), under about the same reasoning (Decision by the Fourth Civil Division of the Osaka High Court, on Feb. 17, 1984. 525 *Hanrei Taimuzu* 110). A *jokoku* appeal was filed from the decision of the High Court. Thus, any future decision of the Supreme Court on this matter will demand close attention.

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