4. Law of Civil Procedure and Bankruptcy

For the year under review, this paper will focus on two Supreme Court decisions in the fields of civil procedure and bankruptcy laws: the Supreme Court decision on whether the so-called additional joinder of parties should be permitted; and the Supreme Court decision on whether Article 59 of the Bankruptcy Act should apply when a construction contractor was declared bankrupt half-way through performance of the contract.

1. A case considering whether the so-called "additional joinder of parties" should be permitted.

Decision by the Third Petty Bench of the Supreme Court on July 17, 1987. Case No. (*o*) 1382 of 1984. A *jokoku* appeal claiming damages. 1249 *Hanrei Jihō* 57; 647 *Hanrei Taimuzu* 109; 41 *Minshū* 1402.

[Reference: Code of Civil Procedure, Articles 59 and 132.]

[Facts]

X (plaintiff, *koso* appellant, *jokoku* appellant) sued Y_1 (defendant) for 70,000,000 yen in damages owing to defects in certain land ("the former action"). While the former action was being tried in the court of first instance, X filed an application with the court entitled "An application to amend the action and parties." In this application X asserted as follows: Y_2 (defendant, *koso* respondent, *jokoku* respondent) was also liable for causing the damage to X, and therefore X claimed against Y_2 as well as Y_1. So X added Y_2 to the former action as a defendant and essentially changed his claim to the following: "Y_1 and Y_2 shall jointly and severally pay X 70,000,000 yen in damages."

The court of first instance viewed X's application as meaning that X had brought a new action against Y_2 and issued an order to X to affix revenue stamps proportionate to the value of the claim.

X, however, did not obey the order. Thus, the court rejected X's claim against Y_2 on the basis of procedural deficiency (Tokyo District Court decision on May 30, 1984).

X filed a *koso* appeal from the decision and asserted as folows: It should be permissible to amend the action by means of adding a new defendant to a pending suit if the application to make the amendment (a) was made before the conclusion of the oral proceedings in the court of first instance and (b) met the requirements for joinder of parties under the Code of Civil Procedure ("CCP") Article 59. The liability of Y_1 and Y_2 was joint and several; therefore the amount claimed by X in this case was 70,000,000 yen, and not 140,000,000 yen. Thus the order to increase the amount of the revenue stamps was improper and, consequently, the decision which had rejected X's claim against Y_2 because of X's noncompliance with the order was, also, improper.

The court of second instance, holding that "a person in the *koso* appellant's position, who seeks judgment by means of adding a claim against a new defendant, should in fact bring a new, separate action against the new defendant and then petition the court for a joinder of oral proceedings under CCP Article 132," did not permit the so-called additional joinder of parties and, in approving of the court of first instance's handling of the case, dismissed the *koso* appeal (Tokyo High Court decision on August 16, 1984).

X filed a *jokoku* appeal from the decision.

[Opinions of the Court]

Jokoku appeal dismissed.

If plaintiff A, while his action against defendant B is in progress ("the former action"), intends to seek a judgment against a new defendant, C, by means of adding a claim to the pending action, A should first bring a new, separate action against C ("the new action") and then petition the court to make a joinder of oral proceedings of the two actions under CCP Article 132, i.e. ask the court to judge whether the joinder of oral proceedings is permissible. Even if CCP Article 59's requirements for joinder of parties/actions are met regarding the right or obligation which constitutes the subject of the former

and the new actions, it is impossible to approve the effectiveness of the joinder, i.e. allow the new action to be joined with the former action as a matter of course, without applying CCP Article 132.

[Comment]

This is the Supreme Court decision in the *jokoku* appeal from the Tokyo High Court decision on August 16, 1984, which was previously reported in this bulletin (6 Waseda Bulletin of Comparative Law 99).

In the case under review plaintiff X originally brought an action only against Y_1; then, in the course of the proceedings X intended to add Y_2 to the pending action as a defendant. The main issue of this case was whether X might amend his action to that of the form of joinder of parties by means of adding a third party (Y_2) to the pending action even though he had not originally brought the action as one against co-defendants. That is, it was disputed whether a so-called "additional joinder of parties" was permissible.

In Japan's Code of Civil Procedure, there is no provision for this kind of joinder. Academic theories, for the most part, agree that the additional joinder of parties is permissible. The accepted theory holds that even if a plaintiff did not originally bring an action in the form of joinder of parties, so long as (a) application is made before the conclusion of formal oral proceedings in the court of first instance and (b) CCP Article 59's requirements are met, the plaintiff may add a new defendant to the action and amend the action to that of joinder of parties.

The main grounds of this accepted theory are as follows:

(1) If an additional joinder of parties is permitted, certain benefits will naturally result. The litigants may be able to take advantage of the fact that the former action is in progress. Accordingly, by permitting this kind of joinder, procedural economy may be enjoyed and overlaps of proceedings or inconsistencies in decisions can be avoided.

(2) When a litigant party brings separate actions and then seeks the joinder of oral proceedings of the actions under CCP Article 132, whether the oral proceedings are joined depends upon the discretion

of the court. That is, there is no guarantee that the joinder of oral proceedings under CCP Article 132 will be made. Thus, it is necessary to permit the additional joinder of parties.

(3) Additional joinder of parties being permitted, the litigant does not necessarily have to affix revenue stamps as far as the value of the claim of the former and new actions is common. Accordingly, from the aspect of reducing the costs of the parties, it is essential to permit this kind of joinder.

In academic circles, theories which clearly deny the additional joinder of parties can rarely be found. However, questions regarding the accepted theory are pointed out as follows:

(1) There is no provision for the additional joinder of parties.

(2) Even if there will be benefits which will come about naturally due to the additional joinder of parties, the litigants can not always take advantage of the fact that the former action is in progress.

(3) Such a joinder is likely to cause delays in the pending action and can be considered to be an abuse of the process of the court.

(4) In practice, there does not appear to be any special problems in requiring that a party should bring a separate action and then seek a joinder of oral proceedings under CCP Article 132.

Regarding precedents, until now there was no Supreme Court decision directly relating to this matter. And, also, opinions of the lower courts are divided (6 Waseda Bulletin of Comparative Law 99, 102-103). The current decision is the first Supreme Court decision that bore directly on the issue. It may be very significant in terms of the actual practice of law that the Supreme Court did not permit the additional joinder of parties in the current decision.

2. The bankruptcy of a construction contractor (legal person) and the application of the Bankruptcy Act, Article 59.

Decision by the First Petty Bench of the Supreme Court on November 26, 1987. Case No. (*o*) 521 of 1984. A *jokoku* appeal case requesting priority in payment from the bankrupt's estate. 1265 *Hanrei Jihō* 149; *Hanrei Taimuzu* 113; 41 *Minshū* 1585.

[Reference: Bankruptcy Act, Article 59; Civil Code, Article 632.]

[Facts]

X (plaintiff, *koso* respondent, *jokoku* appellant) made a construction contract totalling 20,000,000 yen ("the contract") with construction company A ("Co. A") on July 22, 1981, and paid Co. A 16,000,000 yen as partial payment sometime before December 5 of the same year.

However, Co. A, having completed only 60% of the work called for by the contract, was declared bankrupt on February 3, 1982, and Y (defendant, *koso* appellant, *jokoku* respondent) was appointed as a trustee in bankruptcy.

So X, after having given a peremptory notice under the Bankruptcy Act ("BA") Article 59 (2) to Y, asserted that the contract was rescinded because there was no definite answer from Y within the period of time set by X. Then X demanded, as a priority payment from the estate of the bankrupt (Co. A), a refund of 4,000,000 yen, the difference between 12,000,000 yen—the evaluation proportionate to Co. A's performance of the contract—and the payment of 16,000,000 yen. In response to this, Y asserted that BA Article 59 would not apply to a contract for work in the case of the bankruptcy of a contractor.

The court of first instance determined that the contract for work might be divided into two types, according to its content—a contract which involved personal services by the contractor or a contract which did not involve personal services—and BA Article 59 would apply only to a contract of the latter type. Thus, the court accepted the application of BA Article 59 in the case under review. The court held that X had a right of peremptory notice under BA Article 59 (2) as a hiring party, and that it would be reasonable to recognize that the contract under review had been rescinded when X gave a peremptory notice to Y and received no definite answer from Y. Consequently, the court ordered Y to refund 3,400,000 yen—the difference between the evaluated amount proportionate to performance of the contract and the payment of 16,000,000 yen—to X (Osaka District Court decision on August 9, 1983). Y filed a *koso* appeal from the decision.

The *koso* appellate court, contrary to the court of first instance, accepted Y's appeal and set aside the judgment of the court of first instance and dismissed X's claim. The court expressed criticism of the opinion that the contract should be dealt with according to the general rules for executory contracts under BA Article 59 only when the obligations of the contractor did not involve personal services as not having a sufficient basis in statutory provisions. The court held as follows: Even if the content of the obligations of both the contractor and the hiring party are examined on a realistic basis, the rescission of the contract due to the bankruptcy of the contractor might be ill-founded. Further, even if the obligations of the contractor might be substitutable, there was no need to apply BA Article 59, since the reasonable resolution might be achieved by means of the appropriate application of BA Article 64 (Osaka High Court decision on February 17, 1984).

X filed a *jokoku* appeal from the decision.

[Opinions of the Court]

Original (Osaka High Court) decision reversed and remanded.

When a contractor with a contract for work is declared bankrupt, it is reasonable to construe that the Bankruptcy Act, Article 59, shall apply regarding disposition of the contract except in a case in which the trustee in bankruptcy can not choose the completion of performance the bankrupt owes under the contract because the work, the purpose of the contract, is of a nature such that nobody but the bankrupt can complete it.

[Comment]

In reference to a contract for work, there are provisions regarding the disposition of the contract in case of the bankruptcy of a hiring party (Civil Code, Article 642; Bankruptcy Act, Article 59). However, there is no special provision to deal with the disposition of the contract in the case of the bankruptcy of a contractor. Consequently, there is a dispute in academic circles as to whether the Bankruptcy Act ("BA") Article 59, the general provision for the disposition of executory contracts, shall apply to the bankruptcy of a

contractor.

With regard to executory contracts, BA Article 59 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 perform its obligations (BA Article 59 (1)). It also provides that the other party may give a peremptory notice to the trustee in bankruptcy, setting a reasonable period of time for reply and requesting that a definite answer should be given within the specified period as to whether the trustee will rescind the contract or demand performance of the contract, and if the trustee fails to respond with a definite answer within the stated period, it shall be deemed that the trustee has rescinded the contract (BA Article 59 (2)).

The formerly accepted theory always denied the application of BA Article 59 in the case of the bankruptcy of a contractor. The reason is that the fulfillment of a contractor's obligations constitutes performance of personal services and, hence, has no relation with the administration and disposition of the bankrupt's estate by the trustee in bankruptcy.

Recently, however, there has been much criticism of this theory to the effect that the theory should not apply to the contract which does not involve personal services. In contrast, currently prevailing theory divides the contract for work into the following two cases, according to its content: the contract which involves personal services by the contractor and the contract which does not involve personal services.

In the case of the contract for personal services, recent theory also denies the application of BA Article 59, just as the formerly prevailing theory did. However, it insists that if the contract does not involve personal services, it is, as a pecuniary relationship, taken over by the trustee in bankruptcy and, hence, should be dealt with according to the general rules for executory contracts. Therefore BA Article 59 shall apply. Further, it insists that if the contractor is a legal person, e.g., a company, BA Article 59 always applies because there is, by definition, no possibility of an offer of personal services by a legal person.

As regards precedents, there was no Supreme Court decision relating to this matter until now, and the opinions of lower courts were divided (See 5 Waseda Bulletin of Comparative Law 66). The decision of the court of first instance in this case under review is "case (b)" which was reported in Vol. 5 of this bulletin. And the decision of the *koso* appellate court in this case was given by the same judge who had acted in "case (a)" of Vol. 5 of this bulletin, applying essentially the same reasoning (See 5 Waseda Bulletin of Comparative Law 66).

The Supreme Court decision under review basically seems to be founded on the currently prevailing theory.

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5. Criminal Law and Procedure

a. Criminal Law

1. A case in which the act of obstructing a ballot for the draft of a regulation at a committee meeting of the prefectural assembly was held to come under the Criminal Code, Article 234.

Decision by the First Petty Bench of the Supreme Court on March 12, 1987. Case No. (*a*) 627 of 1984. A case of trespass and the obstruction of business by force. 41 *Keishū* 140.

[Reference: Criminal Code, Articles 95 and 234.]

[Facts]

In order to promote the retirement of officials who are over a certain age, the Niigata Prefectural Government proposed to the prefectural assembly a partial amendment of "the Regulation for