5. Commercial Law

A case concerning validity of the resolution of the board of directors in which a specially interested director has facilitated the proceedings as the chairman.

Decision by the Second Civil Division of the Tokyo High Court on February 8, 1996. Case No. (*ne*) 4352 of 1995. 151 *Shiryōban Shojihōmu* 143.

[Reference: Commercial Code, Articles 260-2 (2) and 265.]

[Facts]

X (plaintiff, appellant), who was the largest stockholder of Company Y (defendant, appellee), brought an action against Company Y to declare the invalidity of the resolution of the board of directors on September 19, 1995 giving approval a transaction in which the land held by Company Y would be sold to Company A for 829,190,000 yen. On the day of that resolution, representative director B, who was also a representative director of Company A, facilitated the proceedings as chairman.

X claimed: (1) that the transaction between Company Y and Company A in which B was a representative director of Company A was a transaction between company and director regulatecd by Article 265; and (2) that because the proceedings had been expedited and voted on by the specially interested director B as chairman, the resolution approving the transaction was invalid. The district court upheld the claim. Y appealed.

[Opinions of the Court]

Appeal dismissed.

This resolution of the board of directors has defects in that a person who was prohibited from voting and was a specially interested director who illegally voted on and facilitated the proceedings as chairman. A resolution with these defects should be construed to be invalid.

Any director who may not exercise his voting power because he is a specially interested person should be excluded from the resolution.

It is natural conclusion in the light of excluding any specially interested director that such a director should not have the power to facilitate the proceedings as chairman.

[Comment]

It is unquestionable that the transaction in this case is a transaction between company and director regulated by Article 265 and that B should be considered a specially interested person with respect to the resolution of the board of directors giving approval to that transaction. Therefore, the main issues in this case are (1) whether it is always a cause of invalidity of a resolution that the specially interested director who "should not take part in the resolution of the board of directors (Article 260-2 (2))" has voted, and (2) whether it makes the resolution invalid that the specially interested director has facilitated the proceedings as chairman.

Article 260-2 (2) forbids any director to vote on a resolution in which he is specially interested at the board of directors meeting. But the construction whether any voting by a specially interested director, violating that Article, always results in the invalidity of that resolution is devided. Some asserts strongly that the resolution should not become invalid if the resolution could be approved without any vote by the specially interested director. According to this view, the resolution in question could be approved without the vote of B and thus should not be invalid, since six directors of seven directors in company Y were present (including B) and the resolution got the approval of all participated directors (including B). Y stood on this construction in this case. However I disagree with this view. Generally accepting such a view is likely to replace the fundamental issue with the issue of decision by majority. Article 260-2 (2), on the point that voting by any specially interested director leads with high probability to an unfair decision, evenly forbids such voting. To heighten the effect of the aforementioned restriction, it should be concluded that voting by any specially interested director causes the invalidity of the resolution.

There is also a question of whether it causes invalidity of a resolution that a specially interested director has facilitated the proceed-

ings as chairman of the board of directors. With respect to the chairman of the board of directors there is no provision in the corporate law. Unlike the case of a shareholder meeting, however, there is consensus that the chairman of the board of directors must be a member of the board, since the board consists of directors only and is an organ to make any decisions of corporate policy and to supervise management. In relation to this, at first it must be considered whether Article 260-2 (2) forbids the specially interested director not only from voting but also from being present at the meeting and from giving an opinion. With respect to this point, although the opposite view is strong, it should be concluded that this Article broadly forbids such acts since allowing attendance or giving an opinion is likely to unfairly influence other directors' decision making in the course of discussion. Consequently, it follows that the specially interested director should not facilitate the proceedings as chairman when there is a resolution of the board. This conclusion is probably supported by the fact that at a board of directors meeting, the chairman has far greater discretion and plays a greater part than at a shareholder meeting, since there is a possibility to discuss any matter concerning corporate management. Even though the specially interested director thus should be forbidden from facilitating the proceedings when there is a resolution of the board by sitting at meeting as chairman, secondarily there is a question of whether such a director's violation causes the invalidity of the resolution. On this point, although there are opposing views, it should be concluded that it does so. Exercising the power of chairman by such a director generally has the high possibility of leading to an unfair resolution, and so there is great necessity to void such a resolution without requiring proof of occurrence of an unfair result.

As stated above, it should be respectively a cause of invalidity of a resolution of the board that at the time of voting on the resolution the specially interested director has voted or he has facilitated the proceedings as chairman, however in this case X argued to affirm the invalidity of the resolution, claiming both. Probably, it is because especially with respect to the former, there is powerful opposition, both have been argued. Incidentally, this case became

affirmed at the time the appeal was dismissed.

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6. Labor Law

A case in which it was held that the collective agreement and the work rules which include disadvantageous changes of retirement allowances have no effect on unorganized workers because of the existence of a "special circumstance", though even a collective agreement which causes a disadvantageous change of working conditions of unorganized workers affects them in principle. The case of *Asahi Kasai Kaijo Hoken* Co.

Decision by the Third Petty Bench of the Supreme Court on March 26, 1996. Case No. (*o*) 650 of 1993. 691 *Rōhan* 16.

[Reference: Trade Union Law, Article 17.]

[Facts]

The issue of law in this case is the general binding effect of a collective bargaining agreement (Trade Union Law, Article 17) which changes a working condition (retirement allowance) disadvantageously. Y (defendant, *kōso* respondent, *jōkoku* appellant) is a non-life insurance company. Y took over another company's business and unified most of working conditions in order, but Y could hardly coordinate its own mandatory retirement system and the retirement allowances for the other company were more advantageous. Then, Y concluded a collective bargaining agreement with a trade union which lowered the mandatory retirement age and reduced retirement allowances because of poor business conditions. Thus the age of mandatory retirement was lowered from the former 63 years old to 57, and the retirement allowance was reduced from about 20,070,000 yen to about 18,500,000 yen. X (plaintiff, *kōso* appellant, *jōkoku*