6. Commercial Law

Osaka High Court, January 20, 1998
Hoshino v. Yamamoto (Neo Daikyo Driving School Case I)
981 HANREI TAIMUZU 238

The representing director and directors, who decided to buy an estate of another company run by the representing director, were held liable to their company under Art. 266 of the Commercial Code. A non-executive director, who was the chairman and did not vote for or against the decision, was not liable.

Osaka High Court, March 26, 1999
Yamamoto v. Neo Daikyo Driving School
(Neo Daikyo Driving School Case II)
1065 KIN'YU SHŌJI 8

Under Art. 244, para. 1, no. 3, the resolution of the shareholder's general meeting to exempt the directors should be avoided except that non-executive director.

Reference:

Commercial Code, art. 247, para. 1, No. 3; art. 265, para. 1; art. 266, para. 1, No. 4 & 5; art. 266, para. 5 & 6.

Facts: (Case I & II are based on same facts)

Y1 (holding 120 shares) was the representative director of "A" company (issuing 460 shares), and he was also the representative director of "B" company. With approval of A's board under Article 265, paragraph 1 (provision of self-dealing regulation), Y1 had A buy the B's estate at 6 hundred millions yen for the purpose of financing B which had been in financial difficulties. In respect of this board's approval, Y2 (holding 40 shares, Y1's mother), Y3 (holding 40 shares, Y1's wife) and Y4 (holding 16 shares) who are the directors of A approved this self dealing. But Y5 (holding 10 shares) who was the non-executive and outside director of A declared that he maintained an attitude of neutrality and didn't vote on this approval resolution. So, Xs

who collectively held 120 shares in A brought a derivative suit against Y1–Y5 for damages because the value of this estate was much higher than the appropriate value (about 4 hundred millions yen), this dealing was unlawful and therefore Y1–Y5 breached Art. 266, para. 1, no. 4 & 5.

The lower court (Kōbe District Court, November 17, 1995, 901 HANREI TAIMUZU 233) held that Y1–Y4 were responsible for damages under Art. 266, para. 1, no. 4. In respect of Y5, the court held that he was not responsible under Art. 266, para. 1, no. 4 because Art. 266, para. 2 & 3 were not applied to him but he was responsible under Art. 266, para. 1, no. 5 because he did not fulfil his duty to monitor other directors.

Under such a situation, the shareholders who collectively held more than 2/3 in A's shares passed the resolution to the effect that A exempted Y1–Y5 from liabilities in respect of this dealing. So, Xs brought a suit for revocation of this resolution because it was passed by the interested shareholders and therefore it was considerably unjust (Art. 247, para. 1, no. 3).

The lower court (Kōbe District Court, October 21, 1998, 1065 KIN'YU SHŌJI 11) held that the exempt resolution in respect of Y1–Y4 was revoked but the exempt resolution in respect of Y5 was not revoked because Y5 had not approved this dealing positively.

Opinion:

Case I: *Appeal dismissed.*

Y1–Y4 were responsible for damages under Art. 266, para. 1, no. 5 because they breached their duties of skill and care, and loyalty. Y5 was not responsible under Art. 266, para. 1, no. 5 because he fulfilled his duty to monitor other directors.

Case II: *Appeal dismissed.*

The exempt resolution in respect of Y1–Y4 was revoked but the exempt resolution in respect of Y5 was not revoked because, for example, Y5 had not approved this dealing positively.

Editorial Note:

1. What is the liability under Art. 266, para. 1, no. 4?

To begin with, it is a problem whether the directors are responsible for damages under Art. 266, para. 1, no. 4. The liability under Art. 266, para. 1, no. 5 is the general liability by reason of the breach of the duties of skill and care, and loyalty. Though Art. 266, para. 1, no. 4 provides that the liability under this section is the liability in respect of director's self dealing, there are many theories about how to understand this liability.

The majority theory is that Art. 266, para. 1, No. 4 is applied to a director's self dealing with the board's approval and the nature of the liability under this section is strict liability (liability without fault). Because this theory assumes that the liability in respect of self-dealing without the board's approval is the liability under Art. 266, para. 1, no. 5 by reason of the breach of Art. 265 and it is desirable that the nature of the liability in respect of self dealing should be understood strictly because this dealing is dangerous to the company. The 1998 decision (Case I) adopted this theory.

But, firstly, the strict liability would deprive the directors of the incentive to do their best. Secondly, if a director was strictly responsible for self dealing when there was a proper board's approval, the meaning of the board's approval would be lost and Art. 265 would be a meaningless provision. Thirdly, in modern companies (especially in groups of companies), interlocking directors are not an unusual practice and therefore it is possible that some self dealings would be of benefit to the companies. So, I think that the majority theory is unjust and therefore the liability under Art. 266, para. 1, no. 4 is a liability (liability with fault) by reason of the breach of Art. 265, in other words, Art. 266, para. 1, no. 4 is a mere cautious provision of Art. 266, para. 1, no. 5.

2. Why does Art. 266, para. 6 mitigate the exemption requirement of a certain director's liability?

While Art. 266, para. 5 generally requires the consent of all shareholders as the exemption requirement of a director's liability, Art. 266, para. 6 mitigates the requirement only in the case of the director's liability under Art. 266, para. 1, no. 4 and requires the resolution by shareholders who collectively held more than 2/3 in the company's shares. Why is this special requirement provided?

The majority theory and the 1998 decision (Case I) explain that the Act mitigates the exempt requirement of the liability under Art. 266, para. 1, no. 4 because this liability is strict liability and, according to the circumstances, it is excessively strict.

But I can't agree with this theory because, as mentioned above, the liability under Art. 266, para. 1, no. 4 is not strict liability. Then it is a problem why Art. 266, para. 6 mitigates the exemption requirement of the liability under Art. 266, para. 1, no. 4 though this liability is a liability (liability with fault) by reason of the breach of Art. 265. In my opinion, Art. 266, para. 1, no. 4 is a mere cautious provision of Art. 266, para. 1, no. 5 and therefore the substance of liability under Art. 266, para. 1, no. 4 is the liability by reason of breach of duty of skill and care and loyalty. I can't find a reasonable raison d'etre for Art. 266, para. 6 because there is no reason that the liability under Art. 266, para. 1, No. 4 should be interpreted as a special liability unlike the liability under Art. 266, para. 1, no. 5.

"Draft proposals on amendment in respect of company's organs" (by the Counsellor's Office of the Civil Affairs Bureau of the Ministry of Justice on December, 1978), "Outline of draft bill to partially amend the Commercial Act etc." (by the Legislation Council on January, 1981) and "Draft proposals on amendment of the Commercial Act and the Limited Liability Company Act" (by the Counsellor's Office of the Civil Affairs Bureau of the Ministry of Justice on May, 1986) proposed that Art. 266, para. 1, no. 4 and Art. 266, para. 6 should be repealed and I think that this proposal is appropriate.

3. Conclusions

In this case, as the board approved the self-dealing, there was no breach of Art. 265, para. 1. So, the problem is not whether the directors were responsible under Art. 266, para. 1, no. 4 but whether they were responsible under Art. 266, para. 1, no. 5 by reason of a breach of their duties of skill and care and loyalty.

Though it is a matter of course that Y1–Y4 should be responsible under Art. 266, para. 1, no. 5, how about Y5? I think that the declaration that he maintains an attitude of neutrality is nothing else but the declaration that he follows the board's final decisions and that he should be presumed to approve the self dealing. Therefore I think that

Y5 should be responsible under Art. 266, para. 1, no. 5.

As the exemption requirement of liability under Art. 266, para. 1, no. 5 is the consent of all shareholders, the exemption resolution in this case did not satisfy this exemption requirement. So I think that there is no resolution because this exemption resolution has a considerable defect.

YASUHIRO OSAKI
KENJI KAWAMURA

7. Labor Law

Supreme Court 2nd P.B., February 28, 1997
Sato v. Daishi Bank Co.
51(2) MINSHŪ 705, 1597 HANREI JIHŌ 7, 936 HANREI TAIMUZU 128, 710 RŌDŌ HANREI 12

Reduction of salary as a disadvantageous change in work rules can be applied to a dissenting employee, when the necessity for the change was very high, the disadvantage to the employee was relatively small, and the employer achieved the agreement on the change with a major labor union.

Facts:

Y (*jōkoku* respondent) is a local bank. X (*jōkoku* appellant) had hired Y since 1953 and he had retired in 1989 at the age of 60. Y raised the retirement age from 55 to 60 under the instructions of the Governor and the Labor Minister in 1983. Y concluded a collective bargaining agreement on the extension of the retirement age with the major labor union, and accordingly Y amended the work rules. When extending the retirement age, the salary for workers over 55 was reduced by about 30 percent. X sued Y for backpay, alleging that Y infringed his acquired rights to the salary under the old system.