

vision for interactivity between a criminal trial and the procedure for deportation, the defendant could be deported, prior to (or, theoretically, even in the middle of) a trial. In light of this defect in the law, the prosecutor asked for the detention of the defendant in order to sustain the possibility of due and prompt procedure in the appellate court, and the execution of punishment after the anticipated conviction in the appellate court. The majority opinion, after rejecting the argument of equal protection under the law (Constitution, art. 14), decided that the court could take into consideration the fact that the procedure for the deportation of the defendant has begun.

The dissenting opinions, on the contrary, emphasized on the significance of Article 345, implying limits in ordering the detention in respect of the time or the instance, and/or demanding higher standards in determining the cause or the necessity for detention. They also stressed the injustice of placing the defendant in jeopardy of a second detention owing to defects in the law, for which he is not responsible.

Scholars are divided as to the propriety of this decision. Since these issues reflect views as to the principle of presumption of innocence or as to the distribution of power between the judicial branch and the administrative branch, they are very difficult to solve. It should be noted, in any event, that these issues also relate to problems concerning the admission of State appeals, touching the principle of double jeopardy embraced in Article 39 of the Constitution.

TAKEHIKO SONE
JUN KOJIMA

6. Commercial Law

Osaka District Court, September 20, 2000

Nishimura v. Yasui
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When a bank corporation suffered damages resulting from fraudu-

lent securities transactions by an employee of the New York branch of the corporation, certain of its representative directors, executive directors, and directors, who had been managers of the N.Y. branch, were held liable to the corporation.

Reference:

Commercial Code, art. 254, para. 3; art. 266, para. 1. no. 5; art. 267.

Facts:

A was an employee of Daiwa Bank Corporation (hereinafter "Daiwa Bank"), and was assigned to perform transactions of securities in the New York branch of Daiwa Bank. Between 1984 and 1995, A had carried out dealings in U.S. treasury bonds in excess of the amount of A's discretionary fund and had caused a loss of 1.1 billion dollars. Furthermore, A concealed that loss by means of selling U.S. treasury bonds entrusted by customers of the bank or held by Daiwa Bank itself, and falsifying the re-custody certifications issued by re-custody banks. In 1995, these facts were exposed, and then the Daiwa Bank was indicted in the United States. Subsequently, Daiwa Bank plea-bargained with related authorities, was fined 340 million dollars, and paid a remuneration of 10 million dollars to lawyers.

In this case, the plaintiffs (Xs), who were shareholders of Daiwa Bank, brought an action against the representative directors, executive directors, non-executive directors, and auditors of Daiwa Bank (defendants, Ys). The action was a representative action and has been inherently divided to two cases.

In the first case, Xs asserted that the representative directors and directors who had been managers of the N.Y. branch should have had the duty to construct a control system to prevent A's fraudulent transactions and to stop expansion of the loss, and that the other directors and auditors should have had the duty to oversee whether the representative directors and directors who had been managers of the N.Y. branch had performed such a duty or not, but they failed to perform these duties. Therefore, Xs claimed damages of 1.1 billion dollars.

In the second case, Xs asserted that the representative directors,

executive directors, and directors who had been managers of the N.Y. branch should have had a duty to construct a control system to prevent Daiwa Bank from being criminally prosecuted, being fined 340 million dollars, and paying a remuneration of 10 million dollars to lawyers, and that other directors and auditors should have had a duty to oversee whether the representative directors and directors who had been managers of the N.Y. branch performed such a duty or not, but they failed to perform these duties. Therefore, Xs claimed damages of 350 million dollars.

The main issues of this case are following: (1) whether Ys failed to perform their duties to construct an internal control system, that is, whether Ys breached the duty of care and loyalty; (2) whether Ys failed to perform their duties to prevent a breach of U.S. laws and the criminal prosecution; (3) whether Ys are liable for damages and, if they are, to what extent they are liable for damages.

Opinion:

Claim partially affirmed.

(1) It is necessary for sound management of corporations that the existence of several risks is accurately perceived and such risks are appropriately controlled: and representative directors and executive directors have a duty to construct a risk control system; other directors and auditors have the duty to oversee whether the representative director and executive director performed such a duty or not. Three directors who had been managers of the N.Y. branch of Daiwa Bank and one auditor failed to perform such a duty. Therefore, these directors and auditor are liable for a breach of the duty of care and loyalty.

(2) When a director runs a corporation, compliance with laws is fundamental to management: the Article 266, paragraph 1, no. 5 of Commercial Law demands that a director of a corporation, when his/her corporation does business in foreign countries, comply with not only Japanese laws but also the laws of those countries. And the court recognized that the representative directors and directors who had been managers of the N.Y. branch of Daiwa Bank was failed to prevent breach of U.S. laws. Therefore, the court held that they are liable for a breach of the duty of care and loyalty.

(3) The court also considered to what extent the directors and auditor who are liable in issues (1) and (2) should compensate Daiwa Bank for its loss. The eleven directors were liable for damages: the maximum of damages that the court affirmed was 775 million, and the minimum was 70 million dollars.

Editorial Note:

In recent years, in Japan, cases that shareholders of corporations, especially publicly-held corporations, bring representative suits have increased, and directors of corporations are often challenged for their mismanagement or illegal actions. Under these circumstances, the Daiwa Bank case came into the spotlight and hit the headlines, because the court of this case affirmed the claims of the plaintiffs, the shareholders of Daiwa Bank, and imposed a severe liability for the damages on the defendants, the directors of Daiwa Bank, though there have hardly been ever cases in which courts affirmed that directors of publicly-held corporations were liable for a breach of the duty of care and loyalty in spite of specific law-breaching actions of directors.

However, there are several remarkable implications in this case other than the amount of damages that the court affirmed.

First, the court held that the word “laws” in the Article 266, paragraph 1, no. 5 of Commercial Law included not only Japanese laws, when a corporation does business in foreign countries, also the law of those countries, and the compliance demanded of directors constituted a part of the contents of the duty of care. It extensively and forcefully emphasizes the importance of compliance in the management of a corporation.

Second, the court recognized that directors of corporations have the duty to construct an internal control system. Until now, there have been no cases that court have admitted that directors have such a duty. This is the most remarkable implication in this case. But details of such a duty have not necessarily been articulated at present. Hence, it remains necessary to discuss further the details of internal control, including discussion of internal audit.

What does seem sure is that this case made an impact on various sorts of people (*i.e.* business leaders, lawyers, scholars of law, politi-

cians and so on). But also, as stated above, this case is highly suggestive legally. Therefore, it is considered that this case will greatly affect discussions of legal systems for the liability of management, directors, and auditors in Japan.

YASUHIRO OSAKI
MUNEHISA WADA

7. International Law

Kobe District Court, November 27, 2000

Takao Kadoma v. Japan

1743 HANREI JIHŌ 108

Postal savings cannot be cashed in Japan on the basis of a certificate for repayment issued by Manchukuo.

Reference:

(1) Treaty between the Government of Japan and the Government of Manchukuo Relating to the Abolition of Extraterritoriality in Manchukuo and the Transfer of Administrative Authority over the South Manchuria Railway Zone, 1937;

(2) Agreement (II) Annexed to the Treaty between the Government of Japan and the Government of Manchukuo Relating to the Abolition of Extraterritoriality in Manchukuo and the Transfer of Administrative Authority over the South Manchuria Railway Zone, November 9, 1937;

(3) Business Agreement Appended to the Agreement (II) Annexed to the Treaty between the Government of Japan and the Government of Manchukuo Relating to the Abolition of Extraterritoriality in Manchukuo and the Transfer of Administrative Authority over the South Manchuria Railway Zone, November 30, 1937;

(4) Agreement between the Postal Authorities of the Two States on the Basis of the Understandings under the Business Agreement