

no decision has been handed down by the Supreme Court as of yet. This issue needs to be resolved in the near future as well.

7. Commercial Law

Tokyo District Court, July 18, 2002

Shinsei Bank v. Horie

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The court recognized that when the former directors of Choki Shinyo bank (hereinafter “Bank A”) lent money to EIE international credit bank (hereinafter “EIE”), they paid attention to their duty not to take too much risk. Therefore, the claim of the plaintiffs was dismissed.

Reference:

Commercial Code, Arts. 254, para. 3 & 266.1. no.5.

Facts:

On April 27th, 1990, Shinsei bank (plaintiff, X, which was Choki Shinyo Bank in those days) lent 6 billion yen to EIE. On July 27th of the same year, X postponed the term of the payment. After that, EIE went into bankruptcy, and X could not collect any money at all. X claimed that directors of Bank A (defendants, Ys) should compensate for the amount of the damage, because Ys breached their duties of care in the way they had failed to pay enough attention to their business in terms of the financing and the postponement.

Therefore, the issue of this case is ① whether Ys breached their duties of care or not in deciding the lending, and ② whether they carefully decided the postponement of the term of the payment.

Opinion:

Claim dismissed on the merit.

(1) ① Bank A had been dealing with EIE as a main bank for

a long time. They had systematically continued collecting information about EIE and kept an eye on the management. Therefore, Bank A recognized that EIE acted under their control. ② When Bank A were asked for the loan by EIE, they synthetically analyzed the information which they had collected and accumulated. As the result, Bank A decided that the need for the loan was caused, not by the performance of EIE getting worse but by a temporary lack of liquidity of funds on the part of EIE. ③ When Bank A lent money to EIE, Bank A was in a better position than other banks with regard to collecting and accumulating information about EIE and watching the management. On the one hand, if the performance of EIE got worse, other banks expected Bank A to take an initiative and undertake the financing. On the other hand, Bank A exclusively controlled the bank account, the money order of EIE, and the operation to administer the bond. ④ Bank A considered that the demand for the loan was caused by a temporarily lack of liquidity in EIE's funds, so they properly had a duty to avoid telling other banks that the performance of EIE had got worse. Consequently, Bank A decided that they needed to lend money to EIE after they synthetically analyzed the information which they had collected and accumulated, and that they surely could collect the credit by some measure to secure it. In the facts that are the premise of the judgment about their business and the content of the judgment, there is no evidence indicating that Ys breached their duties of care beyond the range of the permissive discretion about their business.

(2) ① According to the survey of Bank A on EIE, which was summarized on July 25th, 1990, it was expected that EIE would lack funds greatly from July, 1991 to July, 1993. However, it was expected that EIE would be able to raise the capital funds from July, 1990, to July, 1991. ② The postponement of the term was decided on the 26th of the same month, for it was expected that the market price of the stock would recover at the end of July but it failed to recover fully. So they needed to put off the term of payment. Considering these circumstances, the judgment that Bank A could collect the money they lent if they postponed the term of the payment for a month had considerable grounds. There is no evidence to recognize that the judgment about the postponement of the term was beyond the range of reasonable discretion.

Editorial Note:

This case has an interesting aspect in that Shinsei Bank sued the former directors of the same bank. When a bank lends money, it should consider the risk. If it can expect to make sufficient profits by the financing, it should do so. It must accurately understand not only the profits made by the financing but the risks and secure the credits. However, it is impossible to decide formally whether a judgment about the business by the directors is right or not. Therefore, if the court says that the directors breached their duties of care beyond the range of permissive discretion on their business, it must consider whether there had been reckless mistakes in their recognition of the facts that is a premise of the judgment about their business, and whether the process and the content of their judgments were remarkably unreasonable.

In this case, after the banking agency which had a position as a main bank, synthetically analyzed the information collected and accumulated systematically in the process of the business, the directors decided that they needed to lend capital funds and could collect the money by some measure to secure it. Therefore, the court found that Ys did not breach their duties of care.

There is a former judgment when *the Resolution and Collection Corporation* sued its former directors for their responsibilities (Tokyo District Court, April 25, 2002). The court of this case decided in accordance with a framework similar to the content shown by the former judgment. In the former judgment, the claim was affirmed, but in this case, the claim was dismissed.