more discussion on the positioning of each factor and the relations between factors of judgment. Next what fact can be evidence to show the existence of direction and supervision should also be clarified. On the other hand, there would be cases where the intention of the parties should be respected instead of the external objective situation and formality when the nature of a worker needs to be judged.

9. International Law and Organizations

The Republic of China v. Y et al.
Supreme Court 3rd P.B., March 27, 2007
Case No. (o) No. 685 of 1987
61 MINSHU 711; 1967 HANREI JIHO 91

Summary:

1. The name of the party as a plaintiff at the time of the filing of the first-instance trial in 1967, the "Republic of China", has changed to the "People's Republic of China" as a consequence of the signing of the Japan-China Joint Communique in 1972.
2. The extinction of the representative authority of the party immediately takes effect, if the fact is so explicit, without notification of it to the party.
3. With the effect of Japan's recognition of a new government of a foreign state in 1972, the diplomatic mission of the previous government of the same state lost the representative authority and the proceedings abated.
4. When the final appellate court quashes a judgment of prior instance by confirming the existence of a cause of abatement, which is an *ex officio* investigation of the court, an oral proceeding is not necessarily required.

Reference:

(Concerning 1) Part I, Chapter 3 of the Code of Civil Procedure (Parties), Article 133, para. 2, item 1 of the Code of Civil Procedure; (Concerning 2 and 3) Article 37 of the Code of Civil Procedure; (Concerning 2) Article 36, para. 1 of the Code of Civil Procedure; (Concerning 3 and 4) Article 124, para. 1, item 3 of the Code of Civil

Procedure; (Concerning 3) Article 58, para. 1, item 4 and Article 124, para. 2 of the Code of Civil Procedure, Article 3–1 (a) of the Vienna Convention on Diplomatic Relations; (Concerning 4) Article 87, Article 140, Article 297, Article 313, and Article 319 of the Code of Civil Procedure, Article 395, para. 1, item 4 of the Old Code of Civil Procedure.

Facts:

The building *Kokaryo*, located in *Kyoto* City, was used by Kyoto University as a dormitory for students from China in the end of the Second World War. After the war, the University was unable to afford to keep the dormitory, and still the students stayed there. In 1950 and 1952, the representative of the Republic of China purchased the building, and completed the registration in 1961. As the students resident did not follow the instruction of the management, the plaintiff filed a suit against them claiming the vacation of the building in 1967.

The judgment of first-instance (*Kyoto* District Court, 1977) dismissed the claims on the ground that since Japan had recognized the government of the People's Republic of China in 1972, a transfer of ownership on the public property occurred, and the Republic of China had no entitlement of *locus standi* for that property. In the appeal-instance (*Osaka* High Court, 1982), the court remanded the case with the reason that the government without recognition could still claim the case about their own property, and that the matter of the transfer of ownership should be treated on merits, not on the stage of *locus standi* entitlement. After the remand, both judgments of first-instance and appeal-instance acknowledged the entitlement of the plaintiff and affirmed that the transfer of ownership had not occurred.

Opinion:

The judgment of prior instance is quashed, and the judgment of the first instance is revoked.

This case is remanded to the Kyoto District Court.

1. This is the case in which the appellee of final appeal claims the appellants to vacate the property (hereinafter referred to as the "Building") in the list attached to the first judgment of the first-instance, based on the ownership thereof.

2. The court judges *ex officio* as follows:
(1) (a) The records signify; (i) that the appellee filed the case with the *Kyoto* District Court on September 6, 1967, the "Republic of China" as the plaintiff and the "Ambassador Plenipotentiary of the Republic of China to Japan" as the representative of the plaintiff; (ii) that it was the Ambassador Plenipotentiary of the Republic of China to Japan that had authorized the counsel ZHANG Youzhong to represent the appellee in the first-instance; (iii) that in 1969, the appellant alleged that although the appellee regarded itself as the "Republic of China" which seemed to mean a part of the former Nationalist Party in Taiwan Province, the Party never could be regarded as the "Republic of China" or as any state which consisted of Chinese people in any sense. The appellee denied the alleged fact.
(b) The following facts are publicly known; (i) the term "Republic of China" was once used as the name of China as a state (hereinafter referred to as the "State of China"); (ii) while by the year 1949, the government of the People's Republic of China had governed throughout the mainland of China whereas the control of the government of the Republic of China had been limited to the Island of Taiwan etc., the Japanese government still recognized the government of the Republic of China as the legitimate government of the State of China, and signed the "Treaty of Peace between Japan and the Republic of China" with the latter government in 1952; (iii) as the Japanese government recognized the government of the Republic of China as legitimate, the authority to represent the State of China in Japan was, at the filing of the suit, held by the Ambassador Plenipotentiary of the Republic of China to Japan; (iv) at the time of the filing the case, the government of the Republic of China proclaimed itself the sole government of the State of China; (v) however, on September 29, 1972, when the case was pending in the first-instance, the government of Japan, in the "Joint Communique of the Government of Japan and the Government of the People's Republic of China" (hereinafter referred to as the "Japan-China Joint Communique"), recognized the government of the People's Republic of China as the government of the State of China, instead of that of Republic of China; (vi) upon the signing of the Communique, the name of the State of China in Japan had changed from the "Republic of China" to the "People's Republic of China."
(c) In light of the facts mentioned in (a) and (b) above, apart from the

issue of whether the ownership of the Building currently belongs to a party other than the State of China, the party to be identified as the plaintiff in the case should be the State of China whose name had been the "Republic of China" at the time of filing of the case and changed to the "People's Republic of China" on September 29, 1972.

(2) (a) As stated above, in 1972 the Japanese government recognized the government of the People's Republic of China as that of the State of China in the Japan-China Joint Communique, extinction of the authority, held by the Ambassador Plenipotentiary of the Republic of China, to represent the State of China in Japan should be regarded as a publicly well-known fact. In case the extinction of the authority is a well-known fact, it is appropriate to construe that the extinction of such authority immediately takes effect by applying Article 36, para. 1 of the Code of Civil Procedure *mutatis mutandis* according to Article 37.

Also in the case of extinction of the representative authority of a foreign state after the recognition of a new government by Japan, it is appropriate to construe that notwithstanding the provisions of Article 37, Article 124, para. 2, and Article 124, para. 1, item 3 of the Code of Civil Procedure, the court proceedings shall be abated immediately after the extinction of the said authority, as the origin of the diplomatic agent's authority, the legitimate government itself, has disappeared, and if the said authority continues to represent it, the interests of previous and following governments might clash.

Consequently, pursuant to Article 37 and Article 124, para. 1, item 3 of the Code of Civil Procedure, it should be regarded that the court proceedings were abated as of September 29, 1972.

(b) The court of first-instance, based on the premise that the party as the plaintiff in the case should be a *de facto* state with control over the Island of Taiwan, etc., continued the proceedings and gave judgment on the case. After that the court proceedings continued to the prior instance.

(c) According to the reasoning above, we can only conclude that after September 29, 1972, the court proceedings has been carried out without delegation of powers necessary to perform a procedural act on behalf of the plaintiff, i.e., the State of China, and therefore, the judgment of prior instance should be inevitably quashed without making judgment on the parties' arguments under Article 395, para. 1, item 4 of the Old Code of

Civil Procedure. Consequently we revoke the judgment of the first-instance and remand the case to the court of the first instance. The abatement of action necessarily occurs by operation of law when a cause of abatement exists, and with regard to the matters allowed for the court to investigate *ex officio*, such as the existence of the authority to represent a juridical person, the court is competent to confirm it. Therefore, in light of the purpose of the provisions of Articles 319 and 140 of the Code of Civil Procedure (as applied *mutatis mutandis* to the final appellate-instance pursuant to Articles 313 and 297 of the same Code), when the final appellate court quashes a judgment of prior instance by confirming the existence of a cause of abatement *ex officio*, the court is not always required to hold an oral argument.

It is obvious that the authority to represent the State of China in Japan held by the Ambassador Plenipotentiary of the Republic of China to Japan was extinguished by the signing of the Joint Communique, and that the person appointed as the representative of the appellee after the Communique, the "Director-General of the National Property Bureau of the Ministry of Finance of the Republic of China," actually does not have such authority. Although neither the ambassador nor the said appointed person holds the position of the representative of the State of China in Japan nor has the legal authority to do so, in this case, those actually performed procedural acts are described as the representative of the appellee and the aforementioned attorneys as counsels for the appellee.

The judgment has been rendered unanimously.

Editorial Note:

40 years have passed since the case was lodged with the first-instance in 1967.

When the first judgment was rendered in 1977, Japan had already recognized the government of the People's Republic of China, and the following *Kokaryo* cases were mostly treated and debated as a matter of "recognition of governments." In those arguments, what was mainly approved was to take the fact as an "incomplete succession of government," that is, indeed Japan recognized a new government in Beijing, there still exists the *de facto* government which had been governing and is continuing to govern the Taiwan area. For Japan, there occurred a change of legitimate

government of China, but in two areas of China, nothing was changing; the Beijing government continued to control the huge mainland of Chinese continent and the Taiwanese continued the same as it had been doing. Therefore the latter could even keep its own property except for ones for diplomatic purposes or for exercising authority. When it comes to the appellant's capacity to be a party in a domestic court of Japanese judicial system, it seemed to be reasonable to admit it the access to the court for settling disputes. Except for the first and final judgment, every court followed the same stance on this matter.

The judgment of March 2007 denied the idea of two Chinese governments standing side by side. It supported the Japanese government's recognition of the government of the People's Republic of China and its denial of any other government in the Chinese area. Taiwan was an inseparable part of the country, which was affirmed in "Japan-China Joint Communique" in 1972. To keep one country as legitimate necessitates to deny the legitimacy of the other country. In the judgment, the court regarded the People's Republic of China as appellee. This could be argued as the replacement of the party done by the court's *ex officio* law-making, and as this is not allowed in positive law, it is said the court realized this with a legal technique by finding the cause for abatement of proceedings, that is, extinction of representative entitlement. As for the matter of Taiwan's capacity to be a party, it is said not necessarily to deny it.

There is an argument on the necessity of distinguishing the bilateral matter of government recognition and the multilateral legal standing of a government in international society. Also some argue that the fact that Japan had concluded peace treaties with two governments signifies its approval of two states. In any case, the idea that the capacity to be a party should not be denied seems to be shared widely.

X et al.v. Nishimatsu Construction Co. Ltd.
Supreme Court 2nd P.B., April 27, 2007
Case No. (*jyu*) 1658 of 2004
61 (3) MINSHU 1188; 1969 HANREI JIHO 28

Summary:

The Supreme Court denies the claim for compensation against a

Japanese construction company by Chinese nationals who had been forcibly brought to Japan and forced to work during World War II.

Reference:

Treaty of Peace with Japan (San Francisco Peace Treaty), Articles 14 and 19; Treaty of Peace between Japan and the Republic of China (Japan-ROC Peace Treaty), Article 11; Joint Communique of the Government of Japan and the Government of the People's Republic of China (Japan-China Joint Communique), Paragraph 5; Treaty of Peace and Friendship between Japan and the People's Republic of China (Japan-China Peace and Friendship Treaty), Preamble.

Facts:

The appellees (the plaintiffs) are Chinese nationals who were forcibly brought to Japan during World War II by the Government of Japan, and were forced to work at a construction site of a hydroelectric power plant in Hiroshima. The plaintiffs sought damages from the appellant (the defendant, Nishimatsu Construction Co. Ltd.) for the appellant's failure to perform obligations of taking care of safety (due diligence) when it had managed that corporation.

In the first instance, Hiroshima District Court denied the plaintiffs' claims by recognizing the plea of the extinctive prescription alleged by the defendant, though it admitted the fact that they had been forcibly brought to Japan and forced to work at the appellant's plant (the judgment of Hiroshima District Court on July 9, 2002). In its appellate instance, however, Hiroshima High Court denied the plea of the extinctive prescription by finding that invoking the extinctive prescription in this case would constitute an abuse of right, and it admitted the plaintiffs' claims.

Opinion:

The judgment of prior instance is quashed.

The appeals to the court of second instance filed by the appellees of final appeal are dismissed.

1. The waiver of claims as the basic principle of the postwar arrangements

The San Francisco Peace Treaty, which established the basic framework of the postwar arrangements for Japan, endorsed Japan's obligation

to make war reparations to the Allied Powers, and entrusted the Allied Powers with the disposition of Japan's overseas assets under the jurisdiction of the Allied Powers with the view to effectively appropriating such assets to cover part of war reparations (Article 14(a)2). On the other hand, the treaty gave consideration to Japan's debt capacity, by recognizing that the resources of Japan were not sufficient to make complete reparation (principal paragraph of Article 14(a)), and declared that specific arrangements for war reparations, including service reparation, shall be determined through negotiations between Japan and each of the Allied Powers (Article 14(a)1). With regard to the disposition of the claims, including claims held by individuals, the treaty declared that Japan and the Allied Powers should mutually waive all claims arising between them and their nationals in the course of prosecution of the war (Article 14(b), Article 19(a)).

Considering that the purpose of the waiver of claims under the framework of the San Francisco Peace Treaty is to avoid leaving the issues concerning claims to the solution by way of the exercise of rights in individual, ex-post civil litigations, it is appropriate to construe that the term "waiver" of claims in this context does not mean effectively to extinguish claims but it only means to have the competency of these claims in litigation lost. Therefore, the obligors are not prevented from voluntarily and spontaneously taking measures to satisfy specific claims in light of the contents thereof.

2. The waiver of claims under the Japan-ROC Peace Treaty

The Japan-ROC Peace Treaty entered into with the Government of the Republic of China addresses postwar arrangements between Japan and China. Article 11 of the treaty provides that "any problem arising between Japan and the Republic of China as a result of the existence of a state of war" shall be settled in accordance with the relevant provisions of the San Francisco Peace Treaty. This provision can be construed to necessarily cover the issue of disposition of claims, including claims held by individuals. Therefore, we should construe that all claims of China and Chinese citizens arising in the course of prosecution of the Japan-China War have been waived in accordance with Article 14(b) of the San Francisco Peace Treaty.

However, it is true that at that time of the conclusion of the Japan-

ROC Peace Treaty, the control of the government of the Republic of China was limited to the Island of Taiwan and other neighboring islands, and in light of this fact, the exchange of notes attached to the treaty stated that "the terms of the present Treaty shall, in respect of the Republic of China, be applicable to all the territories which are now, or which may hereafter be, under the control of its Government." We should find it fully possible to construe this statement to indicate only the future possibility of applying the provisions on war reparations and disposition of claims to the mainland of China that was under the control of the Government of the People's Republic of China.

Consequently, we cannot firmly conclude that Article 11 of the Japan-ROC Peace Treaty and Protocol 1(b) providing for war reparations and waiver of claims, including claims held by individuals, are applicable in the mainland of China, which was never placed under the control of the Government of the Republic of China after the conclusion of the treaty. Nor can we consider that these provisions are necessarily effective with regard to Chinese citizens who live in the mainland of China. Since it is obvious that the appellees are Chinese citizens who live in the mainland of China, we cannot conclude that the waiver of claims under the treaty is necessarily effective with regard to the appellees.

3. Waiver of claims under Paragraph 5 of the Japan-China Joint Communique

Paragraph 5 of the Japan-China Joint Communique provides that "[t]he Government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan." When reading this language, we must say that the statement does not clearly specify who is entitled to "demand" war reparation that is to be renounced under the Joint Communique, or more specifically, it is not very clear whether the statement means to cover disposition of claims in addition to war reparations between Japan and China, and if it covers disposition of claims, whether it means to cover the waiver of claims held by individual citizens of the People's Republic of China.

However, reviewing the negotiation process which has been publicly known to date based on the evidential materials such as the publicly disclosed official records on the negotiations for the normalization of diplo-

matic relations between Japan and China, we should construe that the Japan-China Joint Communique is a peace treaty in its substance, and we cannot construe that the Joint Comminique provides for arrangements for war reparations and disposition of claims that are different from those under the framework for the San Francisco Peace Treaty only because the language of the provision of Paragraph 5 of the Japan-China Joint Communique does not clearly specify individuals as the subject who are entitled to "demand" war reparation. Consequently, we should conclude that the Japan-China Joint Communique is intended, like the framework of the San Francisco Peace Treaty, clearly to declare that both countries will mutually waive all claims arising in the course of prosecution of the war, including claims held by individuals.

The Japan-China Joint Communique has not been treated as a treaty or ratified by the Diet in Japan. However, it is obvious that the People's Republic of China recognized the Joint Communique as a creative legal norm in international law, and in this context, we can acknowledge that the Joint Communique is a legal norm at least as a unilateral declaration made by the People's Republic of China. Furthermore, in the Japan-China Peace and Friendship Treaty that is indisputably categorized as a treaty under international law, it has been confirmed that the principles enunciated in the Joint Communique should be strictly observed, and because of this, the contents of Paragraph 5 of the Japan-China Joint Communique should be deemed to have acquired the nature of legal norm as a treaty in Japan as well. In any case, it is obvious that the Joint Communique can be recognized as having the nature of legal norm under international law.

Editorial Note:

In the postwar compensation cases in Japan, it has been an essential issue whether the provisions of the peace treaties after World War II, which provide the waiver of claims, can be understood as the waiver of claims held by individuals. In particular, the fact that the San Francisco Peace Treaty provides the waiver of claims of the Allied Powers and their nationals in Article 14(b) and the waiver of claims of Japan and its nationals in Article 19(a) has raised a question of what legal effect these provisions have on the litigation in which foreign individual war victims claim compensation for damage against the Government of Japan or a Japanese

corporation. Though it is said that the waiver of claims in these types of provisions means the waiver of the right of diplomatic protection under international law, it has been left unresolved whether these provisions effectively extinguish claims, and what meaning these provisions have, otherwise.

The Government of Japan had expressed its view that the waiver of claims only means the waiver of the right of diplomatic protection, and that this does not mean the waiver of claims held by individuals under national law. From around 2001, however, the Government began to allege that "the legal obligation of Japan and its nationals to meet the demand of nationals of the Allied Powers disappeared" by the provision of the waiver of claims. As to the judgments of lower trials, opinions on this matter have been divided: some judgments find that the provisions of the waiver of claims cannot deprive individual victims of their right of claim, because their right of claim is an inherent right granted to them as individual persons, which cannot be waived even through a treaty concluded by their State of nationality. Other judgments find that the waiver of claims suggests the disappearance of their substantial right of claim under national law.

In light of such divided opinions, it is interesting that the present judgment found that the waiver of claims did not mean effectively to extinguish claims on one hand, but it meant to have the competency of these claims in litigations lost on the other hand. By this rather complicated opinion, though following the traditional understanding that the provisions of the waiver of claims mean the waiver of the right of diplomatic protection under international law, the Supreme Court denied the legal standings of individual victims before national courts.

In addition, the war reparation between Japan and China has some more complex problems: 1) whether the waiver of claims in the Treaty of Peace between Japan and ROC has the same effect as the San Francisco Peace Treaty does; 2) whether that Treaty still can be applied to the people living in the mainland of China after the change of the recognition by Japan of Chinese government; and 3) whether the waiver of claims in Paragraph 5 of the Japan-China Joint Communique has the same effect as the San Francisco Peace Treaty does.

The Hiroshima High Court found that the waiver of claims of the

Chinese nationals are not spelled out in Paragraph 5 of the Japan-China Joint Communique, which is different from Article 14(b) of the San Francisco Peace Treaty, and that the Government of the People's Republic of China waived only the claim to war reparations. Moreover, that Court found that the claims held by individuals are inherent rights of those nationals, and that the State cannot let their nationals waive this right by way of a treaty.

The Supreme Court, on the contrary, considered that the San Francisco Peace Treaty not only dealt with the reparation between Japan and the Allied Powers which became the parties to that Treaty, but also established the basic framework of the postwar arrangements between Japan and other Allied Powers which were not the parties by providing that the agreement of the specific war reparation would be concluded between Japan and the each Member of the Allied Powers individually. Based on this assumption, it found that this framework should also apply to the war reparation between Japan and the People's Republic of China.

Interestingly the Supreme Court also found that the contents of Paragraph 5 of the Japan-China Joint Communique should be deemed to have acquired the nature of a legal norm as a treaty in Japan, by confirming that the principles enunciated in the Joint Communique should be strictly observed in accordance with the Japan-China Peace and Friendship Treaty.

This judgment is quite significant from a theoretical point of view, because it analyzed some issues of international law on which we have not known so many precedents, namely the effect of a treaty on following treaties dealing with almost the same matters, legal significance of non-treaty agreement like a joint communique, and legal effect of the treaty concluded with the government of whose recognition was withdrawn later, and so on. At the same time, this judgment is also extremely important from a practical point of view, because, by denying the ground of claims held by individuals, it completely closed the door to the victims of war seeking a judicial remedy before a Japanese court.