concluding that since working conditions are defined based on agreement, the said breach of the duty never leads to the formation of a labour contract although it may cause issues of administrative or civil damages.

3. Decision's impact

Concerning the ruling at the High Court, the final appeal was brought in the High Court.

Recently, as shown in this case, illegal worker supply or dispatch violating the Worker Dispatch Law to avoid the duty of employment is widespread. Coverage of Worker Dispatch Law has been widened through revisions, and the legal extent of indirect employment has become large. Particularly, worker dispatch in the sector for manufacturing products has been receiving a lot of criticism since the Law was revised, because it could risk the worker's status or the security of his/her rights. The ruling here has opened the way for the legal relief of workers, as the formation of an implied labour contract was recognized in a more extensive perspective than before, where a person illegally exploited a worker employed by another person. Nevertheless, there are some objections to the theoretical framework adopted by the judgement at the High Court. The final decision at the Supreme Court is attracting attention.

Furthermore, the High Court rejected the legal effect of the breach of the duty to offer direct employment. However, it has posed a question on whether it is enough as a measure of relief of the worker concerned. Such a point in question remains to be solved, in addition to the judgement of the necessity of the revision of the Labour Dispatch Law.

9. International Law and Organizations

Acquisition of Japanese Nationality by a Child born out of Wedlock

Supreme Court, Grand Bench, June 4, 2008
Case No. (*Gyo-Tsu*) No. 135 of 2006
62 Minshu 1367, 2002 Hanrei Jiho 3

Summary:

1. Article 3, para. 1 of the Nationality Act provides that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth may acquire Japanese nationality only if the child has acquired the status of a child in wedlock as a result of the marriage of the parents, thereby causing a distinction in granting Japanese nationality, and in 2003 at the latest, this distinction was in violation of Article 14, para. 1 of the Constitution.
2. A child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth shall acquire Japanese nationality if the child satisfies the requirements for acquisition of Japanese nationality prescribed in Article 3, para. 1 of the Nationality Act, without satisfying the requirement of the status of a child in wedlock as a result of the marriage of his/her parents.
(There are concurring opinions and dissenting opinions.)

Reference:

(Concerning 1 and 2) Article 10 and Article 14, para. 1 of the Constitution, Article 3, para. 1 of the Nationality Act; (Concerning 1) Article 2, item 1 of the Nationality Act; (Concerning 2) Article 81 of the Constitution.

Facts:

The appellant of final appeal, born to a father who is a Japanese citizen and a mother who has the nationality of the Republic of the Philippines, a couple having no legal marital relationship, submitted a notification for acquisition of Japanese nationality to the Ministry of Justice in 2003 on the grounds that he/she was acknowledged by the father after birth, but the minister determined that the appellant had not acquired Japanese nationality due to the failure to meet the requirements for acquisition of Japanese nationality. In this case, the appellant sued the appellee, seeking a declaration that the appellant has Japanese nationality.

In the preceding instance, the appellant alleged his/her acquisition of Japanese nationality under Article 2, item 1 of the Nationality Act, and also alleged that he/she had acquired the nationality by submitting a notifica-

tion for acquisition of the nationality to the Minister of Justice, on the grounds that Article 3, para. 1 of said Act which provides that in the case of a child born out of wedlock to a Japanese father, only the child who has acquired the status of a child in wedlock as a result of the marriage of the parents may acquire Japanese nationality by making a notification to the Minister of Justice, is in violation of Article 14, para. 1 of the Constitution.

While denying the appellant's acquisition of Japanese nationality under Article 2, para. 1 of the Nationality Act, the judgment of prior instance held as follows with regard to the allegation concerning Article 3, para. 1 of the said Act. That is, even supposing the provision of the said paragraph should be in violation of Article 14, para. 1 of the Constitution and therefore void, this does not lead to creating a new system for granting Japanese nationality automatically to a child born out of wedlock who only satisfied the requirement of acknowledgment by a Japanese father after birth. Furthermore, the Nationality Act is subject to strict literal interpretation, and if the court, contrary to the lawmakers' intention, under the name of analogical or broad interpretation, creates any additional requirements for acquisition of Japanese nationality, it could amount to a law-making activity and would be never acceptable. In conclusion, the judgment of prior instance dismissed the appellant's claim.

Opinion:

The judgment of prior instance is quashed.

The appeal to the court of second instance filed by the appellee of final appeal is dismissed.

1. Concerning Article 2, item 1 and Article 3 of the Nationality Act

Article 2, item 1 of the Nationality Act applies the principle of *jus sanguinis* for the acquisition of nationality by birth, providing that a child shall be a Japanese citizen if the father or mother is a Japanese citizen at the time of birth. Therefore, if a child has a legal parent-child relationship with a Japanese father or Japanese mother at the time of birth, he/she shall acquire the nationality by birth.

Article 3, para. 1 of the Nationality Act provides that "A child who has acquired the status of a child in wedlock as a result of the marriage of the parents and the acknowledgment by either parent, and who is aged under

20(excluding those who have been Japanese citizens)may acquire Japanese nationality by making a notification to the Minister of Justice, if the father or mother who has acknowledged the child was a Japanese citizen at the time of the child's birth, and such father or mother is currently a Japanese citizen or was a Japanese citizen at the time of his/her death." Para. 2 of the said Article provides that "A person who has made a notification under the provision of the preceding paragraph shall acquire Japanese nationality at the time of notification."

While Article 3, para. 1 of the said Act addresses cases where either the father or mother acknowledges the child, practically, this paragraph is applied only to a child who was born to a couple of a Japanese father and a non-Japanese mother having no legal marital relationship and was not acknowledged by the father before birth.

2. Conformity to the Constitution of the distinction in granting Japanese nationality under Article 3, para. 1 of the Nationality Act

The appeal counsel can be construed to be alleging as follows. Article 3, para. 1 of the said Act provides the requirement of marriage of parents for the child's acquisition of nationality, and causes a distinction between a child who satisfies the requirement and a child out of wedlock but just acknowledged by a Japanese father in that the latter child may not acquire Japanese nationality even when he/she has satisfied the rest of the requirements of the same paragraph(hereinafter referred to as the "Distinction"). This Distinction is in violation of Article 14, para. 1 of the Constitution and, the appeal counsel further alleges, the Article 3, para. 1 of the said Act is unconstitutional and void only with the part which causes the Distinction, the appellant should accordingly be granted Japanese nationality by satisfying the rest of the requirements of the said paragraph.

These points are examined below.

(1) Article 14, para. 1 of the Constitution provides for equality before the law, and as past decisions of the court indicate, this provision should be construed as prohibiting discriminatory treatment by law unless it has a reasonable basis conforming to the nature of the matters concerned.

Article 10 of the Constitution provides that "The conditions necessary for being a Japanese national shall be determined by law." Corresponding

to the provision, the Nationality Act provides the requirements for acquisition of Japanese nationality, and the determination of the requirements should be left to the discretion of the legislative body who specifies them in light of various considerations.

When any distinction caused by the requirements under the Act amounts to discriminatory treatment with no reasonable ground, the question of violation of Article 14, para. 1 of the Constitution occurs.

While Japanese nationality is the qualification for being a member of the State of Japan, and it is also an important legal status in the country, whether to be a child in wedlock as a result of the marriage of the parents is a matter which cannot be affected by a child. It should be considered whether there are any reasonable grounds for causing a distinction on the requirements for acquisition of nationality, based on the parents' marriage.

(2) The current system for acquisition of nationality by notification was introduced upon the revision to the Nationality Act by Act No. 45 of 1984. When in the case of a child born between Japanese father and non-Japanese mother, the article prescribes that the grant of nationality is based on "the acquisition of the status of a child in wedlock" as a result of the marriage of his/her parents and of the acknowledgement by either of them (hereinafter referred to as "legitimation"). Article 3, para. 1 of the said Act necessitates the legitimation taken place and only the acknowledgement by father is regarded as insufficient to allow a child to acquire nationality, this limitation is the cause of the Distinction.

The primary reason of the provision containing the requirement of legitimation could be construed as that, by acquiring the status of child in wedlock, his/her life could be united with the life of the Japanese father and he/she obtains a close tie with Japanese society. That makes it appropriate to grant Japanese nationality to the child.

However, along with the social and economic changes in Japan, the views on family lifestyles have varied, and today, the percentage of children born out of wedlock in the number of newborn children is increasing. Also, as Japan has recently become more international, the number of children born to Japanese fathers and non-Japanese mothers has been increasing. In these cases, the situations are much more complicated and it is difficult to measure the degree of closeness of their ties with Japan

only by examining whether their parents are legally married or not.

The International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, both of which Japan has ratified, also contain such provisions to the effect that children shall not be subject to discrimination of any kind on account of birth or other status. In addition, other states seem to be moving toward scrapping discriminatory treatment by law about children born out of wedlock as many of them have gradually revised their laws requiring legitimation into ones only requiring an acknowledgement.

From a gender equality perspective, the provision is somewhat inconsistent with the basic stance of the Act. Because, while the Nationality Act provides that a child shall acquire Japanese nationality if the father or mother is a Japanese citizen at the time of birth (Article 2, item 1), children born out of wedlock to Japanese mothers can acquire Japanese nationality by birth, and children born out of wedlock who satisfy only the requirement of being acknowledged by Japanese fathers after birth are not allowed to acquire Japanese nationality even by making a notification.

(3) For the reasons above, we should conclude that although the legislative purpose itself from which the Distinction is derived had a reasonable basis, reasonable relevance between the Distinction and the legislative purpose no longer exists due to the changes in social and other circumstances at home and abroad. The provision of Article 3, para. 1 of the Nationality Act imposes an excessive requirement for acquiring Japanese nationality and the Distinction involves another distinction which causes considerable disadvantage to a child born out of wedlock who satisfies only the requirement of being acknowledged by a Japanese father after birth.

Consequently, it can be construed that the Distinction, by the time the appellant submitted a notification to the Minister of Justice, at the latest, had lost reasonable relevance with the legislative purpose. And, we must conclude the provision of Article 3, para. 1 of the Nationality Act was in violation of Article 14, para. 1 of the Constitution in that the provision caused the Distinction.

3. Whether or not it is permissible to grant Japanese nationality to the appellant on the presupposition of the unconstitutional condition arising from the Distinction

Although we concluded the provision of Article 3, para. 1 of the Nationality Act has been in violation of Article 14, para. 1 of the Constitution, if the whole part of the provision of the said paragraph is made void, the chance to acquire Japanese nationality by making a notification will be denied even for a child who is legitimated, and will even ignore the purpose of the said Act. Therefore, while presupposing the existence of the provision of the said paragraph, to give relief to people who are treated in a discriminatory way will correct the unconstitutional condition arising from the Distinction.

In light of the demand of equal treatment under the Constitution and the principle of *jus sanguinis* under the Nationality Act, we should conclude that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth shall be allowed to acquire Japanese nationality under Article 3, para. 1 of the Nationality Act if the child satisfies the requirements prescribed in the said paragraph, except for the requirement of acquiring the status of a child born in wedlock as a result of the marriage of the parents.

According to the facts legally determined by the court of prior instance, the appellant satisfies all of the requirements prescribed in Article 3, para. 1 of the Nationality Act based on the interpretation above, and it is appropriate to construe that by submitting the notification to the Minister of Justice, the appellant has acquired Japanese nationality pursuant to the said provision.

Editorial Note:

For these several years, the Article 3, para. 1 of the Nationality Act had been regarded as unconstitutional by some judges of other cases or by some scholars of nationality law. In this case, the Supreme Court did not mention clearly whether the requirement of legitimation of the said Act was in violation of human rights treaties, which is called the indirect application of treaty, and some argue this stance of the Court as passive and that it could have been mentioned much more clearly.

These human rights treaties do not specifically provide the denial of

discrimination based on the birth out of wedlock. After the Human Rights Committee adopted General Comment No. 17 in 1989, the trend of denial of discrimination seems to have established gradually with the globalization of international society and with a gradual change of peoples' minds.

While the status to be protected and the status of a member in a country are different, the judgment took seriously the nationality as a foundation of human rights. The Court adopted the complete principle of *jus sanguinis*, and the formality based approach rather than seeking for a genuine link with the state of nationality, as accords with the international current of the day.

The Nationality Act was amended in December 2008, which enables the child out of wedlock with acknowledgement by a Japanese father to acquire Japanese nationality by notification to the Minister of Justice.

Xs v. Y

Intellectual Property High Court, December 24, 2008

Case No. (*ne*) 10012 of 2008

1376 JURIST 321

Summary:

The Intellectual Property High Court denied the claim for a prohibition of broadcasting and compensation by an administrative organ under the umbrella of the Ministry of Culture of the Democratic People's Republic of Korea (DPRK) and a company entitled to deal with the movies and pictures in question. This claim is related to the use of the films, the copyright holder of which is a national of DPRK. Japan and DPRK are parties of the Berne Convention for the Protection of Literary and Artistic Works, but DPRK is not recognized by Japan as a sovereign state.

Reference:

Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), Article 3; Copyright Law of Japan, Article 6 (iii).

Facts:

The appellants (the plaintiffs) are the Korean Film Export and Import Corporation, which is an administrative organ under the umbrella of the

Ministry of Culture of DPRK (X_1) and a limited company, which is entitled comprehensively to deal with the movies and pictures made by that Corporation (X_2).

DPRK acceded to the Berne Convention on April 28, 2003, and Japan has not recognized DPRK as a sovereign state.

Nippon Television Network Corporation, the appellees (the defendant, Y), broadcast the North Korean films in a news program without Xs' pre-authorization. Alleging that Y's act was a tort infringing Xs' copyright and license, Xs claimed for the prohibition of broadcasting and compensation.

In the first trial of the present case, the Tokyo District Court dismissed all of the plaintiffs' claims. Xs appealed the decision of the district court.

Opinion:

The appeal is dismissed.

X_2's alternative claim is affirmed-in-part among the additional claims.

The present court decides that all the appellants' claims are unreasonable. The reason for this decision is the same as that of the prior instance.

1. The effect of a multilateral treaty under international law in the case of a non-recognized state's acceding to that treaty.

It is not acknowledged that there are any particular treaties and established laws of nations that provide the character and effect of the recognition of states under international law. Given the fact that the competence of managing foreign affairs and concluding treaties belongs to the Cabinet under the Constitution of Japan, the present court considers that it should respect the official view of the Government of Japan with regard to the effect of the recognition of states and Japan's rights and obligations under international law vis-à-vis DPRK as a non-recognized state. DPRK which is not recognized by Japan is not the subject under international law in relation to Japan, and shall not have a comprehensive legal capacity under international law.

2. Application of Article 6 (iii) of the Copyright Law of Japan

The appellants allege that the present court should first recognize DPRK as a country of the Union under the Berne Convention, and that, if

that point is recognized, the court then should decide that the works of the nationals of DPRK are protected under the Copyright Law of Japan.

However, since the rights and obligations under the Berne Convention are not generated between DPRK and Japan as far as DPRK is a non-recognized state for Japan, the mere recognition that DPRK is the country of the Union under the Berne Convention cannot let the present court decide that the works of the nationals of DPRK are the "works to which Japan has the obligation to grant protection under an international treaty" under Article 6(iii) of the Copyright Law of Japan.

Editorial Note:

In the present case, the issue is whether the works of the nationals of DPRK, which Japan does not recognize as a sovereign state, should be protected or not under the Copyright Law of Japan.

Article 3(1) of the Berne Convention provides that "[t]he protection of this Convention shall apply to (a) authors who are nationals of one of the countries of the Union, for their works, whether published or not." The Copyright Law of Japan enumerates several works to be protected and indicates the "works to which Japan has the obligation to grant protection under an international treaty."

With regard to the recognition of states, two theories have been in a state of confrontation. One view, the Constitutive Theory, says that a new state has no status and legal capacity under international law vis-à-vis other states which do not recognize it. According to another view, the Declarative Theory, a new state obtains the status and legal capacity under international law when it comes into existence, and the acts of recognition by other states merely suggest the confirmation or the declaration of their intent of establishing the diplomatic relations with that new state. From a theoretical point of view, the Declarative Theory is recently dominant. However, as no state is obliged to recognize a state under international law, it is possible for Japan to adopt the policy that it shall not recognize DPRK as a sovereign state.

The prior instance found that it could not be denied that a state, which was not recognized as a sovereign state, still had a certain legal capacity under international law, but it also pointed out that there were no rights and obligations between the non-recognized state and the state not

recognizing that state like those existing between sovereign states of general relation. Assuming this, the prior instance found that even if the non-recognized state accedes to the multilateral treaty, such a non-recognized state cannot have the rights and obligations under that multilateral treaty in relation to the state which was a party to the treaty but did not recognize that state. The present court, as an appellate court, follows this reasoning and conclusion.

As to this issue, the court of original judgment asked the opinions of the Ministry of Foreign Affairs (MOFA) and the Ministry of Education, Culture, Sports, Science and Technology (MEXT). In response to this request, MOFA expressed its opinion that "Japan cannot consider the relation to DPRK as the same as normal parties concerned under the Berne Convention because Japan has not recognized DPRK as a sovereign state. Consequently, Japan does not consider that Japan has the obligation to protect the works of 'nationals' of DPRK as the works of nationals of the countries of the Union under the Berne Convention." The MEXT submitted a similar opinion to the court.

Furthermore, MOFA answered that "Japan does not consider that DPRK cannot have any legal capacity even on the provisions of multilateral treaties that can be considered as providing the subject matters relating to the rights and obligations to the international community (conventional community) as a whole." Taking Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide and Article 2 of the UN Convention against Torture for example, the prior instance found that these provisions "are applicable between the non-recognized state and the state which does not recognize that state." This statement seems, relying on the concept of the obligation *erga omnes*, to have applied it to the legal effect of multilateral treaties on the relation with non-recognized states. Pointing out that the copyright was to be protected within the framework of state parties of the Union and not as natural rights of authors of non-Union states, the prior instance denied that the obligations under the Berne Convention were of *erga omnes* nature. The present court follows this opinion.