

pany. However, the benefits should be construed invalid if there would be no description on the articles of incorporation and no resolution at the shareholders meeting, even if there were written internal rules and the practices in the company. In the payment practice, as there is a desire to hide the individual benefit amounts for each director, the board of directors get the discretionary decision right on the benefits by the resolution of the shareholders, and the board of directors, in accordance with the delegation, usually determined the description of the benefits. This custom has been duly recognized by the Supreme Court, and academic society has also construed it as a legitimate method. In this sense, if the amount of retirement benefits payment were specifically determined at the board of directors which is duly delegated by the shareholders resolution, the contract can be understood as established properly, and both parties shall be bound by the contract. Then, it is considered that the company cannot change or abolish the contract unilaterally. This conclusion was also endorsed by the Supreme Court in this case.

However, since the payment period of pension benefits is long by its nature, there may be some risks. These risks can be avoided if there is a pension suspension clause in the internal rules. If there were such a provision, or if not, were the implied agreement among both parties recognized in Y Bank (in Japan, there is a doctrine of “implied agreement”), the judicial decision might be a different one. This point will be carefully verified again and tried at the Tokyo High Court.

7. Labor Law

X v. IBM Japan, Ltd. (Company split)

Supreme Court, 2nd P.B., July 22, 2010

Case No. (ju) 1704 of 2008

1010 RODO HANREI 5

Summary:

This is a decision by the Supreme Court on the case where workers under labor contracts which succeeded to the split-off entity when their

company was split, demanded, among others, that the original company should acknowledge their original status as unchanged, maintaining ineffective succession of their labor contracts. The Supreme Court judged for the first time the effect of a breach of the procedures for succession of labor contracts in cases where a company is split.

Reference:

Article 5 of Supplementary Provisions of the Act for Amending the Part of the Commercial Code, etc. in 2000 (hereinafter referred to as the Supplementary Provisions), and Articles 3 and 7 of the Act on the Succession to Labor Contracts upon Company Split (hereinafter referred to as the Succession Act).

Facts:

Y (respondent, *kyokoku-appellee*) is a company concerned with producing and selling computers, and Xs (plaintiff, *kyokoku-appellant*) served as Y's worker in the Hard Disk Division (hereinafter referred to as HDD Division) of Y.

In 2002, Y planned to move the HDD Division into a joint business with another company, and then split the company Y and succeed the split-off HDD Division to the new company. Y made out a split plan statement in which labor contracts with Xs were written as part of rights and duties to be succeeded to the new company, and Y set the statement in the head office of Y. On the other hand, Y negotiated with the trade union Xs joined over the company split. However, Y did not mention about the management prospect of the new company by reason that it constituted confidential information. Xs notified Y that they would refuse succession of their labor contracts to the new company, demanding that Y should continue to keep their status as Y's worker by transferring or reassigning them to the new company with their membership status retained in Y. However, Y rejected it.

Xs brought before the court to demand recognition of their status as a Y's worker and others, maintaining that succession of Xs' rights or duties under the labor contracts to the new company arising out of the said company split was ineffective, or the like, by reason that i) Xs exercised their right to refuse succession of their labor contracts, ii) Y broke the duty to

negotiate with each worker with his/her labor contracts planned to be succeeded to the split-off entity (Article 5, paragraph 1 of Supplementary Provisions of the Act for Amending the Part of the Commercial Code, etc.), hereinafter referred to as “Article 5 Consultation”, iii) Y broke the duty to make efforts to get understanding and cooperation from workers to be succeeded (Article 7 of the Succession Act), hereinafter referred to as “Article 7 Procedures”.

The points in dispute are as follows: i) whether workers who have engaged primarily in the business planned to be split off have the right to refuse succession of their labor contracts with the split company to a split-off entity upon company split, ii) whether they cannot claim ineffectiveness of the company split itself but question the effect of succession of their individual labor contracts on account of a breach of the duty of Article 5 Consultation, and what conditions lead to ineffectiveness of succession of their labor contracts on account of a breach of Article 5 Consultation 5, and iii) whether they can claim ineffectiveness of succession of their labor contracts on account of a breach of Article 7 Procedures.

The first trial at the Yokohama District Court dismissed Xs’ claim on May 29, 2007 (ROHAN 942 at 5), and the second trial at the Tokyo High Court dismissed Xs’ appeal on June 29, 2008 (ROHAN 963 at 16) as well. Both trials ruled that workers primarily engaged in the split-off business were denied their right to refuse succession of their labor contracts (Point i), whereas, on the other hand, they may question the succession of their labor contracts individually, apart from a claim for ineffectiveness of split itself. However, concerning the causes making succession of individual labor contracts ineffective by reason of a breach of the duty of Article 5 Consultation, the first trial made a strict decision that there should be enough breach to judge the split itself ineffective or to be considered materially identical to it; however, besides that, the second trial expanded the extent of breach to be judged ineffective, saying that succession is judged ineffective in the case of a breach where the behaviour or content of the breach disgraces the intent of Article 5 Consultation, leading the said workers to be put at much more disadvantage than usually expected. However, both trials decided that there was no breach of the duty of Article 5 Consultation making succession of labor contracts ineffective in this case (Point ii). Concerning Article 7 Procedures, both trials decided

that the said procedures were part of effort duty with no impact on the effect of the company split (Point iii).

Hence, Xs asked the Supreme Court to honor their appeal, and the Court decided to take in only Point ii and iii.

Opinion:

The Supreme Court dismissed the appeal, judging succession of Xs' labor contracts effective on the following grounds.

1. Breach of Article 5 Consultation and effectiveness of succession of labor contracts

Under Article 5 Consultation, a split company is required to discuss the succession of labor contracts arising out of a company split with workers by the date when the company set a split-plan statement or the like in its head office. The purpose for it is, the Supreme Court said, that since whether labor contracts are succeeded by a company split has an important impact on the status of workers, prior to making out a split-plan statement and deciding on succession of labor contracts of individual workers, a split company is ordered to discuss with individual workers engaged in the business to be succeeded whereby the split company is required to decide on the succession considering requests from the workers concerned so as to protect workers.

This ruling said that once a worker primarily engaged in the business to be succeeded to the split-off entity is described as one to be succeeded in the said split-plan statement, succession of his/her labor contract consequently becomes effective under Article 3 of the Succession Act, the worker is not in a position to argue against the decision. In addition, this ruling is read to mean that it is a condition given under Article 3 of the Succession Act that Article 5 Consultation is done well and protection of the workers concerned is kept, considering the above purpose of Article 5. Accordingly, the decision concluded that when Article 5 Consultation was not carried out at all with specific workers under a situation shown above, the workers concerned may maintain the ineffectiveness of the succession of labor contracts defined in Article 3 of the Succession Act, or that, even if Article 5 Consultation was carried out, it may be considered that the split company broke the duty of Article 5 Consultation when it became clear

that explanation from the said company at such consultations or the detail of what was discussed there was contradictory to the reason why Article 5 Consultation is needed under the Act because of its marked shortage, and hence, the workers concerned may maintain the ineffectiveness of the succession of their labor contracts defined in Article 3 of the Succession Act.

2. Effect of succession of their labor contracts breaking Article 7 Procedures

Concerning the effect of breach of Article 7 of the Act on the Succession under which in conducting a split, the split company shall endeavor to obtain the understanding and cooperation of the workers in its employment, this ruling stated as follows:

It concluded that the Article 7 Procedures defines the duty of efforts to be carried out by a split company; accordingly, the breach in itself does not affect the effect of labor contract succession. However, it did consider that how Article 7 Procedures were taken could be brought into question as one factor in deciding whether the company broke Article 5 Consultation or not, only if there are some particular conditions under which enough information was not provided on the Article 7 Procedures, as a result lacking the substance of Article 5 Consultation.

3. Detail of what a split company should explain under Article 7 Procedures or Article 5 Consultation

This ruling decided that the content of the Guideline prescribed by the Labor Ministry as to this matter (Public Notice No. 127 issued by the Labor Ministry in 2000) in principle makes sense - under Article 7 Procedures, a split company should obtain the understanding and cooperation from its workers concerning the background and reasons of the split, the criteria for judging whether the workers concerned are primarily engaged in the business to be succeeded, or the like, and it is stipulated under Article 5 Consultation that a split company should explain to the workers concerned a summary of the split-off entity where those workers are expected to work after the split, and discuss with them whether labor contracts will be succeeded, the types of employment or the like, after interviewing the workers concerned about their requests. In addition, in deciding whether “Article 7 Procedures” or “Article 5 Consultation” car-

ried out in each case satisfied the requested intent of the Act, much thought should be also given to whether they were carried out in accordance with the Guideline.

4. Decision in this case

This ruling did not state that “Article 7 Procedures” carried out by the split company was not enough, as it complied with the intent of the Guideline because the company explained to a representative of workers the background and reasons of the split, and the criteria for judging labor contracts to be succeeded, created a database for sharing information on the intranet, discussed separately with a representative of workers in the business establishment planned to play a key role in the spin-off entity, and replied in writing to their request.

Concerning Article 5 Consultation, this ruling did not state that the Consultation in this case was not enough, as it complied with the intent of the Guideline because the split company negotiated with workers unwilling to accept the explanation given to each worker and succession, and then, through negotiating with the union branch in place of Xs seven times and exchanging written statements three times, the said company informed the branch about the summary of the split-off entity and the result of the judgement made by the said company that Xs were primarily engaged in the business to be succeeded, and in the end delivered to the branch a reply of refusal to accept Xs’ request for temporary transfer with their current employment status.

Editorial Note:

1. Outline of the Japanese Act on company split, and location of problems in it

The Japanese Act on company split under which one company is split into two or more companies to succeed all or a part of the rights and duties of the business prescribes two ways of succession: succeeding them to new companies or to other existing companies by absorbing the split company into the latter. What part of rights and duties are split and succeeded depends on the detail written in the split plan statement (in cases of incorporation-type company split) or the agreement (in cases of absorption-type company split) without obtaining consent from creditors.

Labor contracts which may also become a target for split and succession are succeeded without the consent of workers in the same way as the above. However, since company split has a serious impact on worker's status or working conditions, protection of workers is required. Accordingly, rules for discussion with worker's representatives are defined in Article 5 of the Supplementary Provisions of the Act for Amending Part of the Commercial Code, etc., and then, rules for succeeding labor contracts are stipulated in the enacted Succession Act.

When a worker primarily engaged in the business to be succeeded is excluded from the list of targets for succession or a worker not primarily engaged in the business to be succeeded becomes a target for succession, the Succession Act stipulates that the split as to the labor contract concerned has no effect when the worker files an objection (Article 4, paragraph 1, item 4, Article 5, paragraph 1, item 3). It shows the intent to allow a worker to continue to work without being separated from his/her job by the company split. On the other hand, there are no rules that a worker primarily engaged in the business to be split and succeeded could file an objection to succession, demanding that he/she should stay in the split company. Therefore, the problem is whether such a worker has the right to refuse succession or not (Point 1).

In addition, both the Supplementary Provisions and Succession Act define the procedures to negotiate with two types of worker or the representative of workers to protect workers. In planning a company split, a split company must endeavour to obtain the understanding and cooperation from workers through negotiation with the majority union or the representative of majority workers or otherwise (Article 7 Procedures). The split company must negotiate with workers engaged in the business to be succeeded before the split plan statement and split contract are disclosed in advance (Article 5 Consultation). Hence, the problem is what condition constitutes a breach of the above Article 7 Procedures or Article 5 Consultation or what becomes of legal effect in cases of a breach of such steps (Point of issue: ii, iii).

Considering this case from a viewpoint of company split and labor contract succession, the problems are whether a worker has no way of dispute but to file a suit of nullity to demand no effect of succession of his/her labor contract and company split itself, whether a worker could

dispute over them, maintaining the nullity of only the succession of his/her individual labor contract, and if he/she could, whether there is a difference between a breach making company split itself null and one making the succession of his/her individual labor contract null.

2. Significance of Supreme Court's decision in this case

This is the first decision of the Supreme Court on this type of company split and succession of labor contract, and it has a theoretical and practical significance in the following respects.

The first point of significance is that the Supreme Court did not accept the petition for final appeal, arguing the decision of the High Court denying the right of a worker primarily engaged in the business to be split to refuse succession of his/her labor contract, and the Supreme Court also concluded that such a worker had no right of refusal. Seemingly, the Supreme Court found that the Succession Act had no rule allowing a worker primarily engaged in the business to be succeeded to argue its succession, and rather, more importance would be put on ensuring smooth corporate reorganization.

The second point is that the Supreme Court accepted the effect of the nullity of labor contract succession on account of a breach of Article 5 Consultation, because succession is in itself subject to carrying out Article 5 Consultation, and accordingly, succession without the consent from this kind of worker is ineffective, and, concerning the legal process, the Court acknowledged a suit for nullity of succession of individual labor contracts, apart from suits for nullity of the company split itself. In addition, it is also important that as the causes for a breach of Article 5 Consultation making succession of individual labor contracts null, the Supreme Court specified no Article 5 Consultation and remarkably poor explanation of split company or the nature of negotiation at the time obviously found to be against the purpose of Article 5 Consultation, and that the Court decided that the Guideline of the Labor Ministry (Public Notice No. 127 issued by the Labor Ministry in 2000) should be referred to to make a clear judgement.

In this manner, this decision read that the causes for nullity of succession of individual labor contract on account of a breach of Article 5 Consultation are broader than those for the nullity of a company split. While the High Court added one element of inconvenience incurred by a

worker besides the content of the procedures in judging a breach, this decision used only the content of the procedures as an element of judgement.

The third point is that the Court decided that Article 7 Procedures is just a duty of efforts, not affecting the effect of labor contract succession, and forms just one condition for considering a breach of Article 5.

Many theories support the framework of judgement taken by the Supreme Court, and, however, they are very critical of the decision about how to apply a specific framework, that is, rejection of a breach of Article 5 Consultation in this case.

8. International Law and Organizations

Xs v. Ys

Kumamoto District Court, January 29, 2010

Case No. (wa) 1711 of 2007 and 660 of 2008

2083 HANREI JIHO 43; 1323 HANREI TAIMUZU 166; 1002 RODO HANREI 34

Summary:

The Court upheld that the Labor Standards Act and the Minimum Wages Act could be applied to trainees (Xs) who came to Japan and worked in the framework of the Technical Intern Training Program. In the light of these Acts, the Court recognized the tort liability of the companies (Y_1 and Y_2) running the sewing plants where Xs had worked and that of the cooperative association (Y_3) which had the duty to supervise these companies for placing Xs under cruel working conditions and depriving Xs' passports and bank books.

Reference:

Labor Standards Act, Articles 9 and 10; Minimum Wages Act, Article 2; Immigration Control and Refugee Recognition Act (prior to revision by Act No.79 of July 15, 2009), Article 19, paragraph 1, Appended Tables I (4) and I (5); Civil Code, Article 709.