general meeting of shareholders, ③when the right of share purchase demand was exercised by the opposing shareholder, ④when the right of share purchase demand expired, ⑤when the effect of the reorganization occurred.

In this judgment, it was confirmed that if the increase in corporate value were not confirmed by the reorganization, the "Nakariseba price" should be the "fair price" of the share purchase demand, and as for the reference date for calculation of the "Nakariseba price", the Supreme Court made it clear that No.③"when the right of share purchase demand was exercised by the opposing shareholder" should be employed. In this regard, the judgment of the first instance had adopted No.⑤"when the effect of the reorganization has occurred", and the original decision had adopted No.④"when the right of share purchase demand expired".

There are some opinions as to the theory adopted in this judgment (No.③the exercised date of the share purchase demand). First, it is pointed out that if there were more than one dissenting shareholder, there would be more than one reference price for each exercise date, and that would involve a complexity of procedure. Further, it might be a problem among the shareholders in terms of shareholder equality. On the contrary, it is pointed out that changing the purchase price by the exercised date would be more equitable in terms of shareholder equality, and there are no institutional guarantees under the current law that dissenting shareholders get their shares bought at same price. Further, this approach seems reasonable in this case in which the corporate value has not been damaged, but if it would involve any damage, the share price seems to be considered to fall after the publication and the approval of reorganization. Then, it might be contrary to the purpose of the system if the risk of changes in the share price from the time of publication until the date of exercise was borne by the dissenting shareholders.

7. Labor Law

Z1 v New National Theatre, Tokyo
Supreme Court, 3rd P.B., April 12, 2011

Case No. (gyo-hi) 226 and 227 of 2009
1026 RODO Hanrei 6

Z2 v INAX Maintenance
Supreme Court, 3rd P.B., April 12, 2011
Case No. (gyo-hi) 192 of 2009
1026 RODO Hanrei 27

Summary:

These two decisions were made by the Supreme Court (the 3rd petty bench) on what kind of a person is regarded as a worker covered by the Trade Union Law on the same day. The Supreme Court reversed two appeal court decisions (on the cases of National Theatre, Tokyo concerning a chorus member, hereinafter referred to as Case 1, and of INAX Maintenance concerning persons undertaking the job of repairing products, hereinafter referred to as Case 2) denying the concept of a worker, because the workers fell under the Trade Labor Union, where the Court considered those cases on persons with a different type of work, based on similar factors of judgement.

Reference:

Articles 1, 3 and 7, No. 1 and 2 of the Trade Union Act

Facts and points of issue:

Case 1:

X1 is a foundation which organizes a performance of many operas or the like. Particularly, as for chorus members, X1 made a basic one-year contract for appearance with each of the members picked out among them following the auditions, and in addition, also made an individual contract for appearance with him/her for each performance. A1 had appeared in an opera as a chorus member for four years, following a basic contract for performance between A1 and X1. However, A1 was rejected in the audition on 2003 by X1, and accordingly, the finalization of the basic contract for appearance was rejected. Therefore, Z1 or a trade union A1 belonged to made an offer of collective bargaining to X1; however, X1 wouldn't accept it, insisting that the foundation had no relationship of an employment

contract with A1 and A1 was not a worker falling under the Trade Union Law.

Z1 made a offer of relief to the Labor Relations Commission in Tokyo, maintaining that the said rejection in the audition and of collective bargaining constituted an unfair labor practice under Article 7-2, No. 2, of the Trade Union Law, where the point of issue was whether A1 was a worker covered by the Trade Union Law or not. The Labor Relations Commission in Tokyo recognized that X1's rejection of collective bargaining constituted an unfair labour practice because A1 was a worker covered by the Trade Union Law, and on the other hand, the Commission dismissed other claims. Accordingly, both parties applied for re-examination severally. However, the Central Labor Commission turned down each request for re-examination. Hence, X1 and Z1 filed a suit against the government, demanding repeal of the said administrative order.The Tokyo District Court repealed the order made by the Central Labor Commission on July 31, 2008(ROHAN 967 at 5), deciding that A1 was not a worker falling under the Trade Union Law, and the Tokyo High Court also rejected Z1's appeal and recognized the repeal of the administrative order on March 25, 2009(ROHAN 981 at 13). The latter court said that A1 was not a worker defined under the Trade Union Law because A1 had the freedom to accept or refuse a request of labor services without any legal duties to appear in individual performances, even if A1 made a basic contract for appearance with X1, and A1 was not under the direction or control of X1 in terms of time & dates, places, ways or the like to carry out a task. Against the decision, however, the government appealed to the Supreme Court, which is Case 1 here.

Case 2:

X2 is a company doing business in repairing housing equipment. Originally, it had its own employees engaged in the repairing. In 1985, the company primarily adopted a system under which persons called "Customer Engineers"(herein after referred to as CE)who entered into a subcontract with the company, took on the task of repairing. Under the said subcontract, the company took the following steps to keep a reliable level of technique for repairing. CEs, graded by ability, performance,

experience, or the like, were instructed on the detail of the task and how to serve customers according to manuals or others, and in addition, CEs were obliged to report to X2 on their schedule, process and results for each workday and attend the monthly meeting, although each of them could decide on when and how to carry out their tasks personally. In September, 2004, CEs joined the Z2 trade union, and formed its branch. Z2 and its branch offered collective bargaining on changes in CE's working conditions and others to X2. However, X2 refused it by reason that CE was just a subcontractor, not a worker employed by X2.

Hence, Z2 filed a claim for relief to the Labor Relations Commission in Osaka, maintaining that X2's refusal of collective bargaining constituted an unfair labor practice under Article 7, No. 2 of the Trade Union Law. The point of issue there was whether CE was a worker falling into the category of workers defined in the Trade Union Law. The Commission ordered X2 to accept Z's offer for collective bargaining because CE was a worker falling into the category of workers defined in the Trade Union Law. Then, the Commission in Osaka ordered X2 to accept collective bargaining with Z2 and others because CE was a worker falling into workers defined in the Trade Union Law, and the Central Labor Relations Commission turned down X2's request for re-examining the rejection decision made by the Commission in Osaka. X2 filed a suit against the government, demanding repeal of the said administrative order. The Tokyo District Court decided that CE had an attribute as a worker defined by the Trade Union Law, and maintained the said relief order given by the Central Labor Relations Commission on April 22, 2009 (ROHAN 982 at 17). On the other hand, the Tokyo High Court repealed the Central Labor Commission's order, ruling that since CE had the freedom to accept or refuse X2's request for their services, and could perform their duties without any condition of times or places specified and under no specific supervision of X2, and accordingly, CE was inherently a person accepting subcontracting, or just one partner that X outsourced to, CE was not a person falling under the Trade Union Law. (See the pages on this case in the 2009 edition of this Annual Report.) Against the decision, however, the government appealed to the Supreme Court, which is Case 2 here.

Editorial Note:

Case 1:

The Supreme Court repealed the decision made by the Tokyo High Court and remanded the case to the former Court for further consideration of whether there was an unfair labor practice or not, describing the facts on A1, a chorus member, as follows:

The basic contract for appearance was made for the purpose of providing performances in a smooth and reliable manner by securing persons of a certain level or higher skills of singing throughout the year. Accordingly, singers who made a basic contract for appearance were incorporated into the organization of X1 as an essential singer to provide a performance.

In addition, considering what the parties to the contract understood about appearance in opera or how the said contract was working, singers with a basic contract for appearance were in principle supposed to accept X1's offer for individual appearances in opera.

Since singers with a basic contract for appearance rendered their services of singing for each of individual performances and lessons required according to the type of operas specified by X1, and received from X1 instructions on how and what to sing, it was clear that they rendered their services of singing to X1 under the supervision of X1.

A1 went to the X1 theatre to appear in Opera or join lessons some 230 days for a one-year contract. Therefore, A1 was subject to certain constraints in terms of time and place.

In addition, singers with a basic contract for appearance received a payment according to the agreement. When lessons took longer than planned, they were given allowances for extra hours of lessons. Accordingly, the said payment was a consideration for the labor services of singing.

Case 2:

As to CEs, the Supreme Court clarified the following facts, and as to a worker covered by the Trade Union Law in the relationship with X2, the Court repealed the decision by the Tokyo High Court and recognized that

the Tokyo District Court's decision revoking a claim for cancellation of an order of relief from unfair labor practice was justified.

The task of repairing, managed under the grade system based on ability, performance and experience, was done by CEs assigned in their own area of responsibility. X2 specified CE's workdays and holidays, and CEs were incorporated into the organization of X2 as an essential workforce for carrying out its business so as to secure them constantly.

The detail of the subcontracting agreement between CEs and X2, ruled based on the memorandum defined by X2, was set by X2 one-sidedly, with no room to change it individually even if CEs demanded it.

In addition, CEs received a payment of the amount billed to X2's customer in advance by X2 and multiplied by the rate of each CE grade set by X2 with an overtime premium added to. Therefore, the payment had a nature of consideration in return for their labor services.

Furthermore, in fact, the percentage of CEs who refused X2's request for repairing was less than one percent, and X2 was supposed not to renew the contract(one year)with a CE if X2 was not satisfied with the CE. Accordingly, considering what the parties to the contract understood about the task or how the said contract was working, even if CEs had no responsibility for default arising from their refusal to accept X2's request, CEs were in principle in a position to accept X2's request.

CEs did their task at the customer's home in areas of their responsibility designated by X2. In principle, during the time from 8:30 to 19:30, CEs accepted an order from X2, wore a X2's uniform and carried a name card with them, turned in their report to X2 at the close of their task, and followed every type of manual for repairing made out by X2. Hence, it may be true that CEs followed the method of carrying out their task designated by X2, and rendered their services under the supervision of X2, and were subject to certain constraints on their task in terms of place and time.

On the other hand, in terms of corporate nature, Mutsuo Tahara, or a Supreme Court judge said additionally that CE's corporate nature might be denied because there was no corporate CE.

Editorial Note:

1. Location of issues and significance of this decision

Nowadays, many Japanese companies tend to outsource their business. As a result, persons who render their services without an employment contract and live on remuneration given there, like the subcontractors in Case 2, are increasing in number. Besides, skilled professional persons who render their services in a special manner are also increasing in other industries, accompanied by industrial advances, though such a type of service has often been seen in the field of art or sports, like the choral society in Case 2. Could the Trade Union Law protect such persons who render their services? Recently, the range of workers covered by the Trade Union Law is becoming an important point of issue under labor laws, while types of work are becoming diversified. The concept of a worker is also used in the Labor Standards Law. Whether there is a difference of the range or criteria of workers between the Trade Union Law and the Labor Standards Law, or if any difference, what the criteria of judgement on the concept of a worker under the Trade Union Law, is disputed now.

Both decisions in Case 1 and 2 do not present any general criteria to consider the concept of a worker. However, considering two cases whose working situations are entirely different, based on common factors including ones not used by the judgment criteria of the concept of a worker covered by the Labor Standard Law, the Supreme Court affirmed the concept of a worker. The Court made a judgement on two cases, considering that the scope of a worker covered by the Trade Union Law should be independent of that by the Labor Standards Law.

2. Current handling by the Labor Relations Commission, and its rejection in the former court

From the viewpoint of whether it should recognize the necessity and relevance of coverage of protection by collective bargaining, the Labor Relations Commission has recognized a broader range of persons who render their services than defined in the Labor Standards Law, as workers in the Trade Union Law, by adding factors of economic dependence in addition to subordinate relationship and applying a criteria of subordinate

relationships in a moderate manner.

As for cases with a special type of work professional chorus members were concerned in, the Supreme Court ruled in the Case on the CBS Orchestra Trade Union (Supreme Court 1st P.B., May 6, 1976, 252 RODO Hanrei at 27) that each member of the Orchestra had no freedom to accept or refuse tasks because he/she was incorporated into the organization of business, the company had the power to exercise supervision over the handling of the workforce, and he/she was paid for his/her services, and accordingly, each member was a worker as defined in the Trade Union Law. However, in this case, there was no reference to the difference in the definition of a worker between the Trade Union Law and the Labor Standards Law. In addition, the above criteria of judgement showed two possible interpretations; that is, it might be based on some criteria close to the concept of a worker under the Labor Standards Law, or otherwise.

As a result, the lower courts tended to recognize workers covered by the Trade Union Law within the broader range of workers, using the criteria of workers defined in the Labor Standards Law, though they were actually applied in a moderate way, based on a subordinate relationship, to judge workers defined in the Trade Union Law (for instance, the first trial decision in Case 2). However, there have been recently a series of decisions which revoked a relief order under which the Labor Relations Commission recognized the concept of a worker by stringently applying a subordinate relationship to the case: for instance, the Tokyo District Court's decision in Case 1, the Tokyo High Court's decision in Case 1, and the Tokyo High Court's decision in Case 2.

Many theories have the common view that the legislative purpose is different between the Trade Union Law and the Labor Standards Law, and accordingly, each concept of a worker is different. In addition, they consider that whether or not a worker falls into the category of a worker defined under the Trade Union Law - it should be judged from the viewpoint of whether or not the person should be protected by the Trade Union Law, and therefore, the former decisions in Case 1 and 2 that interpreted both laws equally and stringently triggered strong criticism. However, there are different opinions on specific criteria for a worker defined in the Trade Union Law, particularly from the critical positions on

former decisions.

3. Features of this Supreme Court's decision

Each of the two decisions was nothing but a judgement following its case only, without presenting a general standard for deciding the concept of a worker covered by the Trade Union Law, as mentioned above. However, they recognized respectively the concept of a worker covered by the Trade Union Law in Case 1 or 2 where the type of work is different, picking up similar factors of judgement : i) incorporation into the organization of business, ii) relationship between the parties to the contract in terms of the acceptance of the offer - that is, whether A1 or CE had the freedom to accept or reject the offer, or not, iii) unilaterally setting the detail of the contract, iv) whether or not he/she is particularly supervised on his/her services, v) whether or not he/she is subject to designated times and places, and vi) whether or not payment is a consideration for his/her services. Therefore, it could be said that the Supreme Court adopted a method where the necessary and proper range covered by the collective decision of working conditions prescribed under the Trade Union Law should be defined through regarding an organizationally (i) or economically subordinate relationship (ii, iii, vi) as a central factor of judgement, and at the same time, considering other factors of judgement on subordinate relationships (iv, v) additionally.

And the Supreme Court ruled in Case 2 that whether or not there was such relationship between the parties to the contract as they had the freedom to accept or reject the offer should be considered based on the actual situation, while the High Court rejected the concept of a worker because it was lawfully possible for CEs to refuse the offer.

Hence, the Supreme Court considered in Case 1 and 2 that a worker covered by the Trade Labor Law should be distinguished from the one covered by the Labor Standards Law, and demonstrated factors of judgement on each of the cases respectively. However, the theoretical framework or general criteria of judgement of the concept of a worker still remains ambiguous, and further development will be expected in the lower courts.