

premise that it is the best interests of children generally that the hearing and decision regarding child custody should be considered on the merit in the court of their habitual residence before their removal, and therefore that they should be summarily returned to the country of habitual residence. However, when the court of the home country determines a taking parent as the primary carer, the child returned on the Hague Convention in order to receive the decision on the merit may experience again the international transfer. Therefore, it is obvious that the same careful consideration is necessary from the point of view of the welfare of children as in this case. Further consideration is expected in the future to achieve the welfare and best interests of children by a cross-procedural approach.

4. Law of Civil Procedure and Bankruptcy

X v. Y

Supreme Court 2nd P.B., December 21, 2012

Case No. (*jyu*) 1626 of 2011

1571 SAIBANSYO JIHO 4;

2175 HANREI JIHO 20;

1965 KINYU HOMU JIJOH 123

Summary:

A claimant brought a claim for restitution, on the basis that the respondent obtained unjust profit from *res communis* which he rented to a third party. The Supreme Court determined that an action for future performance in this case, that is, a claim for damages after the last day of oral argument in a case cannot be made, thus the claim is not allowed.

Reference:

Article 135 of the Code of Civil Procedure

Facts:

This case began with a family dispute concerning land which was used

as a fifty-car parking lot. According to the deeds of title, the property was registered as a property jointly owned by X1, the husband of Y's sibling, X2, who was the child of X1 and Y's sibling, and Y. However, from the commencement of Court proceedings, Y insisted that the property belongs solely to Y and that the deeds of title ought to be amended to show this. Whereas X1 and X2, asserted that they had an interest in the property, and thus should share in the profits (rental fee) from the land. X1 and X2 claimed from Y entitlement to reimbursement on the basis of unjust enrichment. Although X1 and X2's claim included future performance, the original court accepted the claim of unjust enrichment which was made after the conclusion of oral argument.

Opinion:*Partly quashed and decided by the Supreme Court*

A member of the public brought a claim for restitution, on the basis that another member of the public obtained unjust profit from *res communis* which he rented to a third party. The Supreme Court determined that an action for future performance in this case, that is, a claim for damages after the last day of oral argument in a case cannot be made, thus the claim is not allowed.

Editorial Note:

Action for future performance is restricted by Article 135 of the Code of Civil Procedure which states that '[a]n action to seek future performance may be filed only where it is necessary to make a claim therefore in advance.' This provision does not mean that all claims in respect of performance which can happen in the future are automatically accepted. It is widely understood that such a claim is allowed exceptionally, only applying to certain types of action for future performance such as a claim with due date or a conditional claim. The topic of action for future performance has been discussed not only academically but also the Courts have set out their various positions. In the case this article examines, the Supreme Court maintained its position on this matter but a concurring opinion, given by Judge Chiba is appended and is noteworthy.

Japanese law requires people to satisfy certain conditions, that is to say, a legitimate interest or necessity when bringing their case to court in order to solve their dispute through a civil proceeding as a Court ought not to be applied to without good cause (a pointless lawsuit should be avoided) and a defendant should not be forced to answer an unnecessary complaint filed by a malicious plaintiff. Such justification is called 'legitimate interest' or 'necessity to protect a legal right', and this is believed to be one of the central conditions to be satisfied to bring a case to court. An action is classified into three categories according to the remedy a plaintiff seeks; action for performance, action for declaratory judgment, and action for formation. The action in this case was for performance, in which a plaintiff seeks a Court order requiring a defendant to perform his/her obligation. There are two aims when bringing an action for performance; to confirm the plaintiff holds *res judicata* on the right of performance in dispute, and to obtain the title of obligation, which justifies execution of a judgment. In order to be accepted by court, a claim needs to exist based on the substantive law, the time of its performance must have already arrived, and factors justifying refusal of its performance must not exist.

An action for future performance is an exception legally accepted as one of the forms of action for performance. This is a lawsuit seeking a judgment ordering a defendant in advance to fulfill his/her obligation when the time of its performance comes to pass. The law provides under Art.135; 'An action to seek future performance may be filed only where it is necessary to make a claim therefore in advance.' This type of action is brought, aiming to obtain a clear judgment in advance before the estimated time of its performance has arrived, that is, when a general action for performance becomes available. Therefore, this type of action is acceptable only when its 'necessity' is approved. The question arises; under what circumstances, is this 'necessity' approved? All the relevant factors, such as the nature and details of a legal obligation, will be examined on an individual basis. The prevailing view suggests that in the following situations, a claim for future performance would be accepted.

- (1) When an obligor and an obligee do not share a common understanding of their contract in terms of the existence or the period of the contract. In other words, it is readily apparent from an obligor's attitude that he/she would not discharge his/her

obligation even when the estimated time of its performance arrives, or even when a condition is achieved.

- (2) A case which only immediate performance can achieve the true aim of the contract, otherwise an obligee might suffer irrecoverable damage and an obligation which requires an obligor to perform an action in an appropriate way as agreed in a contract (e.g. . a contract to give a live performance on a fixed due date) and a legal obligation where an obligee's life would be threatened if the obligation is not satisfied, such as a duty to support his/her family, will be included in this category.
- (3) A compensatory claim. Assuming that a claim for the original obligation exists at the time of the request, compensatory damages are allowed to be combined with the original claim for performance, as the performance of the obligation will not be possible in the future. This type of claim is accepted as performance of the original obligation is delayed.
- (4) A claim to fulfill an obligation to abstain from doing a particular act is a type of action for future performance. It is possible to make a claim for future performance in advance against an obligor who has already broken his/her duty, or cannot reasonably be trusted to fulfill his/her obligation.

The most remarkable case concerning this topic is the Osaka International Airport case; a judgment made by the Supreme Court G.B., December 16, 1981 Case No. (o) 395 of 1976, 455 HANREI TAIMUZU 171, 761 JURIST 152, 54 HORITSU JIHO 43, and 1025 HANREI JIHO 39, which has had a significant influence on similar cases subsequently. The judgment of 1981 provided that an action for future performance would be accepted as long as the following conditions are satisfied. The first condition is 'the claim for damages which will occur in the future is based on continuous torts. The facts and legal position on which the claim is based exist and it can be readily envisaged that the unlawful situation will be continuing. For example, a claim for damages equal to market rent against an unlawful possessor of a property until the date he/she vacates the property.' The second condition is as follows. 'The future advantages to the obligor need to be clearly estimated. Discontinuance of possession by an obligor and an

acquisition of title of possession are possible eventualities to consider in this regard.’ The third condition is that ‘it is not too onerous to demand an obligor to accept the risk that he/she can only prevent undue execution via defense of the claim. This will be successful only when an obligor has succeeded in proving the existence of undue execution.’ A judgment made by the Supreme court 1st P.B., March 31, 1988 Case No. (o) 1293 of 1984, 668 HANREI TAIMUZU 131, and 1277 HANREI JIHO 122, and another made by Supreme court 3rd P.B., May 29, 2007 Case No. (jyu) 882 of 2006 (Yokota Base Case), 1248 HANREI TAIMUZU 117, 1978 HANREI JIHO 7, 1436 SAIBANSHO JIHO 1, quoted the judgment of 1981, thus the position of the Supreme Court in respect of action for future performance has been underpinned.

A judgment made by the Supreme Court 1st P.B., March 31, 1988 Case No. (o) 1293 of 1984, is quite similar as both of these cases consider the question of unjust enrichment from a lease contract of parking lots. The judgment, reversed the decision of the original court a dismissing the plaintiff’s claim. A concurring opinion by Judge Chiba is of interest. Judge Chiba indicates that there are two types of interpretation of the judgment of 1988. The first one is that it applies to all types of claim for undue profit from shared property, regardless of whether the rent in question is the fee for parking lots or not. The second one is that it is dependent on the facts of each case, examining the detail and nature of rent, such as a rental fee for parking lots in this case. Until then, all the judgments are understood to have proceeded on the first interpretation. However, Judge Chiba insists; ‘It is too wide and general to apply the first interpretation to the 1988 case in terms of range.’ and ‘in order not to unreasonably limit eligibility’ the judgment of 1988 should have proceeded on the second understanding.

5. Criminal Law and Procedure

X v. Japan

Supreme Court 1st P.B., February 20, 2012

Case No. (a) 1136 of 2008

1550 SAIBANSHO JIHO 26; 1383 HANREI TAIMUZU 167