

Noticeable Judicial Precedents

1. Treatment of the Commercial Retention of Lien on Bills in Civil Rehabilitation Proceedings

Judgment of the Supreme Court 1st P.B., December 15, 2011, 3
SAIBANSHO JIHO 1546

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1 Summary of the Case

The facts of the case are as follows:

(1) X concluded a *banking contract* (Ginko-Torihiki Yakujo, die Bankgeschäftsabmachung) with Bank Y. (2) X transferred an endorsed bill to Bank Y as part of the service of entrusting the collection of payments for bills. (3) Thereafter, Tokyo District Court granted X the commencement of civil rehabilitation proceedings. (4) Therefore, Bank Y collected payment for the bill as described in item (2) above and appropriated the said funds for payment of the debt of X in accordance with the *banking contract*. (5) X filed a suit against Y for a refund of unreasonable profit, which Y gained from the appropriation listed in item (4) above. (6) With regard to the above litigation, the judgment of the Tokyo District Court of January 20, 2009 (76 HANREI JIHO 2040) accepted the claim of X, and the judgment of the Tokyo High Court of September 9, 2009 (28 KINYU- HOMU JIJO 1879) was to dismiss the appeal. Bank Y lost the suits in every case.

2 Summary of Judgment

First of all, banks have the commercial retaining lien (das Kaufmännisches Zurückbehaltungsrecht) of entrusted bills for collection under § 521 of the Commercial Law. In addition, the commercial retaining lien creditor may retain all funds collected as payment for the said bills. The commercial lien creditor may retain the collected funds after the commencement of civil rehabilitation proceedings as the exercise of the right of separate satisfaction (das Absonderungsrecht) pursuant to § 53 (2) of the Civil Rehabilitation Act.

Second, such funds are usually not considered as government funds for payment regarding the rehabilitation plan nor are they considered funds for the business of a rehabilitation debtor. A *banking contract* stipulating that “the money collected may be appropriated for payment of a debt without the procedures prescribed by the law” is effective in civil rehabilitation proceedings as an agreement accompanying the exercise of the right of separate satisfaction.

Therefore, Bank Y may appropriate the funds collected for the payment of the debt of X.

3 Comments

The issue in this case is the treatment of the commercial retaining lien of entrusted bills for collection in civil rehabilitation proceedings. Specifically, the commercial retaining lien “is the right of separate satisfaction, but does not have priority,” thus the problem is the ambiguous nature of how the commercial retaining lien is reflected in civil rehabilitation proceedings.

As indicated in the judgment rendered by the Tokyo District Court of January 20, 2009 (76 HANREI JIHO 2040), priority is not given to the commercial retaining lien, and the appropriation of the money collected for payment of a debt based on a *banking contract* is not justified as a business custom. Surely, the essential effect of the commercial retaining lien is only in effect to retain the subject and priority is not permitted. In addition, any claim secured under the commercial retaining lien is only a rehabilitation claim, and the principle is to distribute pursuant to the rehabilitation plan (§ 85(1) of the Civil Rehabilitation Act). Furthermore, the *banking contract* is a contract with a bank governing transactions, but if a bank has priority under the contract, the status of the commercial retaining lien creditor can be easily changed by prior agreement, which is unfair.

However, as pointed out under the concurring opinion of the judgment, since bills shall be realized on the due date at the clearinghouse, it is not reasonable to consider that a bank reserves collection, and if a bank reserves collection, such reservation may violate the due care of a prudent manager (§ 298(1) of the Civil Law). If retention of the funds collected by the commercial retaining lien creditor is permitted, it may give the parties an opportunity to resolve any dispute by negotiation, but from the viewpoint of banking practice, the contents of

such incentive for negotiation is not clear.

Consequently, the reasons for the judgment are convincing. If banks may retain the funds collected as the exercise of the right of separate satisfaction, such funds are usually not considered as government funds for payment regarding the rehabilitation plan nor are they considered funds for the business of a rehabilitation debtor. Even if the retention of the funds collected is permitted and if it is still not adequate as an opportunity to resolve a dispute by negotiation, the *banking contract* shall be deemed an “agreement accompanying the exercise of the right of separate satisfaction”. However, it should be determined very carefully whether it is against the purpose and objective of the Civil Rehabilitation Act (§ 1 of the Civil Rehabilitation Act) permit appropriation of the funds collected for payment of a debt (Cf. the judgment of the Supreme Court 3rd P.B., December 16, 2008, 2561 MINSHU 62-10).

(on 2 August 2012)

2. Supreme Court Judgment on the Treatment of Subrogation Rights by Performance under the Bankruptcy Proceedings

Judgment of Third Petty Bench of the Supreme Court of November 22, 2011 (MINSHU (Collection of Civil Precedents) vol. 65 No. 8, p. 3165)

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Article 501 of the Civil Code provides that a person who is subrogated to the claim of the obligee may exercise any and all rights possessed by the ex obligee to the extent the subrogee may seek reimbursement under its own right to take such action. Therefore, in the event a person is subrogated to the claims for which the priorities of proceedings are recognized (claim on the estate in bankruptcy proceedings and a common benefit claim in civil rehabilitation proceedings) in reference to the bankruptcy proceedings, it will become a problem whether the subrogee