interactions must be established. This case was again appended, and we await a sensible judgment of the Supreme Court.

4. Law of Civil Procedure and Bankruptcy

Xs v. Y
Supreme Court 1st P.B., March 10, 2016
Case No. (*ju*) 1985 of 2014
70 (3) Minshu 846

Summary:

A Japanese corporation and its director (collectively Xs) filed an action against a U.S. corporation (Y) to seek tort damages on the grounds that their reputation, etc. had been impaired by an article posted by Y on its website. And the Supreme Court decided that given the facts indicated in the judgment such as that the said action derived from a dispute between X and its director and Y for which a separate action was already pending at a court in the United States at the time of the filing of the said action concerning matters, including the mandatory redemption of Y's shares, and that the evidence concerning the major issues that are expected to be examined during the proceedings on the merits of the said action are mostly located in the United States, it should be said that there are "special circumstances where if a court of Japan conducts a trial and makes a judicial decision on the action, it would harm equity between the parties or impede the well-organized progress of court proceedings" as prescribed in Article 3-9 of the Code of Civil Procedure.

Reference:

Code of Civil Procedure Arts. 3-3, item (viii) & Arts. 3-9.

Facts:

Appellant X1 (hereinafter referred to as the "appellant company") is a Japanese corporation which engages in, among other matters, the development, manufacturing and sale of pachinko game machines as its

principal business, and Appellant X2 is the director and chairperson of the appellant company. Company A, which is a subsidiary of the appellant company, is a corporation under the law of Nevada in the U.S., and it held about 20% of the total number of issued shares of the appellee.

The appellee is a corporation under the law of Nevada in the U.S. which engages in operating casinos as its major business, and holds a gaming license issued in Nevada in the U.S. Appellant X2 also held the office of director of the appellee.

Under the laws and regulations of Nevada in the U.S., a holder of a gaming license may be deprived of the license if the authorities find the holder to be unsuitable for a license for reasons such as that any person concerned with the holder is involved in a crime. The appellee's articles of incorporation contain a provision that the board of directors can decide to mandatorily redeem shares held by a shareholder whom the board independently determines to be likely to threaten the maintenance of the gaming license and therefore be inappropriate.

Company A and the appellants hold multiple agreements with the appellee and other investors in relation to matters including the capital contributions to the appellee. Some of these agreements contain clauses under which actions filed with regard to the relevant agreement shall be subject to the exclusive jurisdiction of a court of Nevada in the U.S. and which designate the law of Nevada in the U.S. as the applicable law. All contractual documents concerning these agreements are written in English.

In 2011, the appellee's compliance committee asked a U.S. law firm to investigate whether there was any evidence to show that Appellant X2 was involved in any act that could threaten the maintenance of the appellee's gaming license.

On February 18, 2012, the law firm submitted to the committee a report stating, inter alia, that Appellant X2 and persons related thereto appeared to have repeatedly committed acts that would violate the Foreign Corrupt Practices Act, which is a federal law of the United States, such as giving bribes to government officials, etc. who were in the position of supervising the gaming business, etc. in the Philippines and South Korea (this report is hereinafter referred to as the "Report"). A number of documents used as materials for the investigation to prepare the Report,

the persons who were involved in preparing the Report, and the persons who were interviewed during the investigation are mostly located in the United States.

On February 18, 2012, the appellee's board of directors, by a unanimous decision of directors except for Appellant X2, determined based on the Report that Company A and the appellants were inappropriate as prescribed in the appellee's articles of incorporation, and adopted a resolution to mandatorily redeem the appellee's shares held by Company A.

On February 19, 2012, the appellee posted an article written in English on its website. The summary of the article (hereinafter referred to as the "Article") is as follows.

A. The Report has proved that Appellant X2 and persons related thereto, in an attempt to gain profit for themselves, engaged in inappropriate activities on at least 36 occasions during a period of about three years, in a manner that is clearly in violation of the Foreign Corrupt Practices Act and in extreme disregard of the appellee's code of conduct.

B. On February 18, 2012, the appellee's board of directors, by a unanimous decision of directors except for Appellant X2, determined that Company A and the appellants were inappropriate as prescribed in the appellee's articles of incorporation, and adopted a resolution to mandatorily redeem the appellee's shares held by Company A.

On February 19, 2012, the appellee filed an action with the court of Nevada in the U.S. against Company A and the appellants, to seek a declaration that the appellee acted legally and faithfully in accordance with the articles of incorporation, etc., and also sought damages for Appellant X2's breach of fiduciary duty. In response, on March 12, 2012, Company A and the appellant company filed a counterclaim against the appellee and its directors, alleging the invalidity of the above mentioned resolution of the appellee's board of directors, and demanding, among others, the suspension of the execution of the resolution and payment of damages (hereinafter the action and counterclaim mentioned herein are collectively referred to as the "separate action in the U.S.").

Through the discovery proceedings in the separate action in the U.S., the parties produced about 100 witnesses in total and disclosed about 9,500 documents in total. Most of the disclosed documents are written in

English, and most of the witnesses reside in the United States or other countries and do not understand Japanese.

In August 2012, the appellants filed this action with the Tokyo District Court.

The major issues that are expected to be examined in the proceedings on the merits of this action include whether the matters alleged by the Article are true or false and whether or not the appellee has reasonable grounds for believing that the alleged matters are true. This action and the separate action in the U.S. seem to have much in common or have relevance with each other in terms of the facts and legal issues.

Opinion:

Dismissed

We examine whether or not "special circumstances where, if a court of Japan conducts a trial and makes a judicial decision on the action, it would harm equity between the parties or impede the well-organized progress of court proceedings, while taking into consideration the nature of the case, the degree of burden that the defendant is to bear by making an appearance, the location of evidence, and other circumstances" as prescribed in Article 3-9 of the Code of Civil Procedure can be found with regard to this case. According to the facts mentioned above, the separate action in the U.S., which was already pending at the time of the filing of this action, is a case between the appellee, on one side, and Company A and the appellants, on the other side, with regard to the measures taken by the appellee, a U.S. corporation, including mandatory redemption of the appellee's shares held by Company A, which is a subsidiary of the appellant company where Appellant X2 serves as director and chairperson, on the grounds that Appellant X2 and persons related thereto had repeatedly committed acts in violation of the Foreign Corrupt Practices Act. On the other hand, this action is a case in which the appellants seek tort damages against the appellee, alleging that their reputation and credit have been impaired by the Article that described matters such as the developments leading up to the mandatory redemption mentioned above. Thus, this action can be deemed to be related to a dispute that was derived from a dispute addressed in the separate action in the U.S. In light of the state of the separate action in the U.S., which has much in common or has

relevance with this action in terms of the facts and legal issues, the evidence regarding the major issues that are expected to be examined in the proceedings on the merits of this action are mostly located in the United States. Furthermore, both the appellants and the appellee seem to have expected that any dispute arising in relation to the appellee's management would be negotiated, brought to court or otherwise handled in the United States. Actually, the appellants not only responded to the separate action in the U.S. but also filed a counterclaim. The appellants would not face an excessive burden even if they were to file an action anew in the United States to make a claim that they made in this action. In addition, in light of the location of the evidence as mentioned above, among other matters, the appellee would face an excessive burden if all the evidence is to be examined in a court of Japan. In consideration of all these circumstances, it should be concluded that "special circumstances, where if a court of Japan conducts a trial and makes a judicial decision on the action, it would harm equity between the parties or impede the well-organized progress of court proceedings" as prescribed in Article 3-9 of the Code of Civil Procedure can be found with regard to this case.

Editorial Note:

Art. 3-9 of the Code of Civil Procedure was established in 2011. Regarding whether or not there is international jurisdiction, the former precedent (the Supreme Court 3rd P. B., November 11, 1997, Case No. (o) 1660 of 1993, 51 (3) Minshu 4055) stated that "If one of the territorial jurisdictions as provided by the Code of Civil Procedure of Japan can be found in Japan, in principle, it is appropriate to subject the defendant to the jurisdiction of the Japanese court in an action brought to a Japanese court. However, if there are special circumstances where handling of the proceedings in Japan is against the ideas of fairness of the parties, ensurance of just and speedy adjudication, the jurisdiction of the Japanese court should be denied." Based on this precedent, Art. 3-9 was established.

This case has an important significance in theory and practice because the Supreme Court for the first time made a judgment about the "special circumstances" (*tokubetsu-no-jijo*) of Art. 3-9.

1. Is there an international jurisdiction in Japan in this case?

In this case, Xs filed an action against Y to seek tort damages on the grounds that their reputation, etc. had been impaired by an article posted by Y on its website. An action for a tort may be filed with the Japanese courts, "if the place where the tort occurred is within Japan" [Art. 3-3, item (viii)]. "The place where the tort occurred" includes the place where the wrongful act was committed or the place where the direct result of the wrongful act occurred. The article posted by Y on its website contains the claim that Xs and persons related thereto had repeatedly committed acts in violation of the Foreign Corrupt Practices Act. With this Y's act, the direct result of the defamation of Xs has occurred in Japan because the article by Y could be viewed in Japan.

Therefore, this case falls under "if the place where the tort occurred is within Japan", so the international jurisdiction of the court of Japan may be accorded by Art. 3-3, item (viii).

2. The factors and criteria to find "special circumstances".

Art. 3-9 provides that even when the Japanese courts have jurisdiction over an action as in this case, the court may dismiss the whole or part of an action if it finds that there are special circumstances. And "the nature of the case, the degree of burden that the defendant would have to bear in responding to action, the location of evidence, and other circumstances" are specified as the factors to find special circumstances in the article.

The Supreme Court judged that "special circumstances" can be found with regard to this case, and pointed out five things considered in judging special circumstances as follows: (1) this action can be deemed to be related to a dispute that was derived from a dispute addressed in the separate action in the U.S., (2) the evidence regarding the major issues that are expected to be examined in the proceedings on the merits of this action are mostly located in the U.S., (3) both Xs and Y seem to have expected that any dispute arising in relation to Y's management would be negotiated, brought to court or otherwise handled in the United States, (4) Xs not only responded to the separate action in the U.S. but also filed a counterclaim, so Xs would not face an excessive burden even if they were to file an action anew in the United States to make a claim that they made in this action, and (5) Y would face an excessive burden if all the evidence

located in the U.S. were to be examined in a court of Japan. The content of (1) corresponds "the nature of the case", (2) "the location of evidence", (3) concerns the predictability of parties, (4) the degree of burden of the side of plaintiff, and (5) means "the degree of burden that the defendant would have to bear in responding to action" (*see* Case Comment, 1424 Hanrei Taimuzu 110, 112 (2016)).

As seen above, the Supreme Court judges whether "special circumstances" can be found or not by considering a variety of circumstances and does not state a standard criterion. Therefore, it is assumed that "special circumstances" are decided according to each individual case.

5. Commercial Law

X et al. v. Y

Supreme Court 1st P.B., July 1, 2016

Case No. 4 (*kyo*), 5 (*kyo*), 6 (*kyo*), 7 (*kyo*), 8 (*kyo*), 9 (*kyo*), 10 (*kyo*), 11 (*kyo*), 12 (*kyo*), 13 (*kyo*), 14 (*kyo*), 15 (*kyo*), 16 (*kyo*), 17 (*kyo*), 18 (*kyo*), 19 (*kyo*), and 20 (*kyo*) of 2016

70 (6) Minshu 1445

Summary:

When majority shareholders squeeze out minority shareholders after a tender offer by using Class Shares subject to Wholly Call, fair compensations to the minority shareholders should be the same amount as the bidding price in the tender offer, as long as the majority shareholders had taken procedures which ensured that the bidding processes were fair, unless there are special circumstances.

Reference:

Companies Act (Act No. 86 of 2005, prior to the revision by Act No. 90 of 2014), Article 172, Paragraph 1.