Noticeable Judicial Precedents

1. Petition for a retrial and intervention as an independent party by a third party subject to the effects of a final and binding judgment on a petition concerning the organization of a fraudulent company.

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[1] Decision of November 21, 2013 of the Supreme Court (Minshu Vol. 67, No. 8, Page 1686)
[2] Decision of July 10, 2014 of the Supreme Court (Hanrei Times No. 1407, Page 62)

A judicial decision that acknowledges a demand for a petition concerning the organization of a company is also effective against third parties. (Companies Act, Article 838). The question here is whether a third party who is unjustifiably disadvantaged by the confirmation of the judicial decision (hereinafter "res judicata"), where it had been unaware of the pendency of res judicata and thus unable to argue its case, may request a retrial to reexamine the res judicata even though it was not a party to the original action. In other words, does the third party have standing to sue for a retrial? In the case where the said third party has standing to sue for a retrial, the question then is whether grounds for retrial are recognized in the Civil Proceedings Law, Article 338, paragraph 1.

The method used by a third party to demand a retrial was stipulated in the Civil Proceedings Law of Meiji Japan (April 21, 1890), but this provision was removed by the revision of 1926 and was not restored by later revisions. Theoretically, it is a commonly accepted opinion that petitioning for a retrial at the same time the party requests assistance in intervention affirms the party's standing to sue. In this situation, the referenced 2013 Supreme Court decision [1] affirmed, first, that a third

party in a situation such as the above, in requesting intervention as an independent party, institutes a petition for a retrial. The Court's decision is translated as follows:

In a case where the above third party has instituted a petition for the above retrial and at the same time requested intervention as an independent party, the above third party can, by taking litigation action related to the said intervention as independent party after affirmation of the decision to start retrial, influence the judgment of the final and binding judgment through a demand for joint confirmation. In the above case, if a decision to start retrial is made, the litigation related to the final and binding judgment is examined, so that it is possible for there to be a pendency considered necessary to request intervention as independent party.

If this is so, a third party subject to the effects of a final and binding judgment that acknowledges the request for a petition to invalidate the issuing of new shares can obtain standing to sue for a retrial of the above final and binding judgment by requesting intervention as an independent party regarding litigation related to the above final and binding judgment.

A third party such as the above is disadvantaged by a judicial decision on litigation in which the said party was not personally involved, but was not a party to the litigation of the res judicata; thus the third party naturally cannot start litigation on the merits of that prior litigation, even by appealing for a retrial. The Supreme Court therefore demanded that the third party request intervention as an independent party as a step permitting the third party to take litigation action on the merits of the res judicata. It is presumed that, when essential conditions for pendency are presumed, if a request is made for a retrial at the same time as a request for intervention as an independent party and a decision to start retrial is made, the essential conditions for reviving the pendency of the res judicata are thereby satisfied.

The same 2013 Supreme Court decision [1] stated, secondly, the following analysis regarding whether or not the grounds for retrial of the above third party are recognized:

The petition for invalidation of issuance of new shares assumed that only the joint stock company that issued the shares had standing as a defendant (Companies Act, Article 834, item (2)); thus, because the above

joint stock company has conducted a lawsuit concerning the above petition, even assuming that a third party affected by the final and binding decision concerning the above litigation was unaware of the pendency of the above litigation and had no opportunity to participate in the examination of the above litigation, it is impossible to state that the said third party has immediate grounds for retrial of the above final and binding decision under the Civil Proceedings Law, Article 338, paragraph 1, item (3).

However, the parties shall conduct civil suits in good faith (Civil Proceedings Law, Article 2), and, in particular, a joint stock company given standing as a defendant in a petition for the invalidation of issuance of new stocks is in a position where it participates in procedures on behalf of a third party that is actually influenced by the above final and binding decision; thus, the above joint stock company is required to conduct litigation actions in good faith to an even greater degree considering the interests of the above third party. Interpreting the law to mean that, regardless of the character of the litigation by the above joint stock company, the above third party cannot dispute the effects of the above final and binding decision in any way whatsoever, cannot be approved of from the perspective of due process. If that is allowed, the litigation activity of the above joint stock company seriously contravenes good faith. The case where the above final and binding decision affects the above third party cannot be ignored from the perspective of due process, and there must be grounds for retrial of the above final and binding decision under the Civil Proceedings Law, Article 338, paragraph 1, item (3).

In this way, the Supreme Court affirmed grounds for retrial under the Civil Proceedings Law, Article 338, paragraph 1, item (3), to protect the above third party. The clause explicitly prescribes a case without power of attorney as grounds for retrial, and the Supreme Court has interpreted that broadly. In cases where the litigation participants' opportunity to participate in the process was improperly taken from them, the Court stated that under Civil Proceedings Law, Article 338, paragraph 1, item (3), "there are no grounds for handling it in a manner different from a case where there was no power of attorney." (See Supreme Court Sept. 10, 1992, Minshu Vol. 46, No. 6, Page 553 and Supreme Court March 20, 2006, Minshu Vol. 61, No. 2, page 586). The case of judicial decision [1] differs

from these past precedents because there the question is whether there are grounds for retrial for a third party who is not a party to litigation under Article 338, paragraph 1, item (3). Even if it is recognized that only the company that is the subject of the petition has standing to be a defendant concerning a petition regarding the organization of the company (Companies Act, Article 834), the court must consider the fact that the decision recognizing the said litigation also affects a third party who was not a party to the litigation. That is, the company with standing as defendant is in a position to represent the interests of such a third party, so it is necessary that the litigation action fully consider the interests of the third party affected by the judicial decision. It can probably be stated that in a case where such consideration is neglected and the litigation action was taken with malicious intent to infringe the interests of the third party, the situation is identical to that of lack of power of attorney. It must be kept in mind, however, that the judicial decision confirming grounds for retrial applies only to exceptional cases.

In judicial decision [2], as in decision [1], the question was whether a third party who was not a party to the petition concerning the organization of a company, but was affected by the judgment accepting a petition of the said litigation, can petition for retrial. An additional question was whether, because the third party did not make a demand of any kind on the participants in the res judicata by requesting intervention as an independent party at the same time it requested retrial, the third party is allowed to request intervention without establishing any such demand.

Judicial decision [2] quotes a Supreme Court decision of January 22, 1970:

To request intervention as an independent party, the participant must submit a request that can be given a judicial judgment in litigation for which intervention is requested, and a request for intervention only to request one party for a decision to dismissal shall not be allowed.

On this basis, the Court in decision concludes that it is necessary to establish a request for intervention as a party to the litigation.

As stated in the 1970 decision quoted above, a characteristic of intervention as an independent party is that the third party is impleaded as another party to existing litigation. Because the litigation is already

existing, it is appropriate that, even where reexamination of the original petition is necessary, the Supreme Court requires the third party to join in the action as a first step to revisiting res judicata.

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2. Supreme Court judgement on the constitutionality of Article 750 of the Civil Code, which requires a husband and wife to adopt the surname of either spouse at the time of marriage.
Supreme Court Grand Bench, December 16, 2015, 69 (8) Minshu 2586

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1. Introduction

On final appeal in this case, the appellants alleged that Article 750 of the Civil Code, stipulating that "a husband and wife shall adopt the surname of the husband or wife" at the time of their marriage (hereinafter referred to as "the Provision"), breached the Constitution.

Since Japan has no way to ask the court directly whether a statute is unconstitutional, the claimants sought damages against the state under Article 1, paragraph (1), of the State Redress Act. Their claim is that the state failed to take legislative measures to amend or abolish the Provision, and this must be illegal under the Act.

This article provides the outline of the facts and the summary of the judgement. Then it shows the background of the case and makes a brief commentary about the judgement.

2. Outline of the facts

Under the Provision, a couple is not allowed to marry if they do not choose a surname from the surname of either of them. The form for