

5. Commercial Law

X v. IHI Corp.

Supreme Court 1st P.B., October 11, 2018¹

2017 (*Ju*) 1496

72(5) MINSHŪ 477²

Summary:

In a suit for damages based on FIEA art. 18, para. 1, the court may determine the amount of reduction from damages owed by a person who submitted securities registration statements containing false statements on important matters defined in FIEA art. 19 para. 2, based on all oral arguments and the result of the examination of evidence, through the application by analogy of art. 248 of Code of Civil Procedure.

Reference:

Financial Instruments and Exchange Act (Act No. 25 of 1948, amended by Act No. 109 of 2006), art. 18 & 19

Code of Civil Procedure (Act No. 109 of 1966), art. 248.

¹ As analyses of this judgment, *see, e.g.*, Masahito Monguchi, *Case Note*, 2106 KINHŌ 58 (2019); Hiroyoshi Kawanaka, *Case Note*, 24 SHIN-HANREIKAISETSU WATCH (SPECIAL EDITION OF HOUGAKU SEMINAR) 151 (2019).

All above cited literatures are written in Japanese, and the name(s) of author(s) and the titles of the documents have translated into English by the authors of this article. The same shall apply to all the following footnotes.

² The Supreme Court of Japan offers an English translation of this judgment, which is provisional and subject to revision, on its website; *available at* http://www.courts.go.jp/app/hanrei_en/detail?id=1603

It is somewhat different from the one presented here made by the authors of this note; the latter contains some free translations for want of space and corrects the former's misunderstandings on the grammatical relation of the sentences in the original judgment text.

Facts:

A listed corporation on Tokyo Stock Exchange, IHI Corporation (hereinafter “Y”) submitted semiannual reports containing false statements on important matters. Subsequently, Y planned to issue new shares and submitted securities registration statements in the “reference method,” hence containing false statements in themselves. Before the existence of the false statements became public, some persons (hereinafter “X”) got Y’s shares in the primary market on a price set based on Y’s secondary market share price formed on the assumption that there did not exist false statements. When Y simultaneously revealed the existence of false statements (hereinafter “the Revelation”) and announced its pessimistic performance forecast (hereinafter “the Announcement”), its share price declined in the secondary market. X and some other investors, e.g., who got Y’s shares in the secondary market after the false statements affected Y’s share price but before the Revelation and kept holding them, suffered economic losses and filed petitions for damages. The Supreme Court judgment introduced here only relates to X, i.e., investors who got Y’s shares on the primary market. Hence, this note narrows down to the issue of the damages to be paid to X.

Under the Financial Instruments and Exchange Act (hereinafter cited as “FIEA”), a listed corporation which submitted securities registration statements containing false statements (hereinafter “issuer”) owes a duty to compensate investors who got its shares on the primary market not knowing the existence of false statements before the existence of false statements become public [FIEA art. 18, para.1]. The amount of liability is basically calculated as a difference between the amount paid by the claimant to get the shares and (1) the secondary market price at the point of time when a claimant demands payment from the issuer based on art. 18 of FIEA if the claimant keeps holding the shares³, or (2) proceeds from the sale if the claimant has sold off the shares [FIEA art. 19 para. 1]. If it is proved that some part of the difference calculated as above contains a share decline caused by any reason other than the revelation of false

³ Stock price movements after the time of claiming will not be reflected in damages.

statements, that amount is subtracted from the damages [FIEA art. 19 para. 2] (hereinafter “the Reduction”).

Concerning the burden of proof of the Reduction, there are no rules in the FIEA. This is contrasted with the liability of a corporation which submitted an annual securities report containing false statements against investors who bought its stocks on the secondary market, where the FIEA states that “when the court finds that all or part of the damage sustained by the person who is entitled to claim damages was caused by any reason other than the decline in value of the Securities that should arise from the Fake Statement, etc. in the document, but it is extremely difficult to prove the amount of the damages arising from such other reason due to its nature, the court may, based on the entire import of oral argument and the result of examination of evidence, determine a reasonable amount of the damages for which the person liable for damages is not liable.”⁴ [excerpted from FIEA art. 21-2, para. 6].

In this case, both the Revelation and the Announcement may lower the market price of Y. The amount of decline caused by the latter and the burden of it mattered among other things, and one of the points of dispute is the application to the case of art. 248 of the Code of Civil Procedure, which declares that “If damage is found to have occurred, but, due to the nature of the damage, it is extremely difficult to prove the amount of damage that occurred, the court may reach a finding on the amount of damage that is reasonable, based on the entire import of oral arguments and the results of the examination of evidence.”⁵

The first trial court⁶ decided that art. 248 of the Code of Civil

⁴ This translation is copied from JAPANESE LAW TRANSLATION, provided by Ministry of Justice. The translation of FIEA, which does not reflect recent amendments at the time of completion of writing of this article (hence the article number of the cited article in the text is represented as art. 21-2, para. 5), is *available at* <http://www.japaneselawtranslation.go.jp/law/detail/?vm=04&re=01&id=1911>

⁵ This translation is also copied from JAPANESE LAW TRANSLATION. The translation of the Code of Civil Procedure, which does not reflect recent amendments at the time of completion of writing of this article, is *available at* <http://www.japaneselawtranslation.go.jp/law/detail/?id=2834&vm=&re=>

⁶ Tokyo District Court, November 27, 2016 (2008 (Wa) 27292, 2008 (Wa) 31456, 2008 (Wa) 37903, 2009 (Wa) 20847, 2009 (Wa) 34020). For an analysis of this judgment, *see, e.g.*, Daichi Fujibayashi, *Case Note*, 1521 KINHAN 2 (2017).

Procedure is applicable to this case and determined the amount of damages as 30% of the difference between Y's share price just before the Revelation and the price X sold Y's shares on, in consideration of the impact of the Revelation and other factors. Both X and Y appealed. The second trial court⁷ also permitted the application of art. 248 of the Code of the Civil Procedure to the case and decided the amount of damages as 40% of the difference. X appealed.

Opinion:

Appeal dismissed.

Current rules on the liability of an issuer whose securities registration statements contain false statements as noted above are understood that (1) “they were established for policy purposes aiming to compensate the claimants and to ensure the fairness of securities markets through deterrence of false statements, by charging a person who submitted securities registration statements containing false statements on a strict liability basis and by mitigating the burden of proof of the claimants in light of the difficulty for them in verifying the damage,” and (2) “they are aiming to calculate damages on a case-by-case basis meanwhile achieving the aims” stated in (1) “by adapting the calculation system in which firstly the certain amount easy to prove for the claimants is defined as the damages, and secondly the amount of” stock price decline proved by the obligor to be caused by any reason other than the revelation of the existence of false statements “is subtracted from the amount of damages defined above”.

“In this respect, from the view point of equity among the parties and the legal intent stated above, it is not appropriate not to allow reduction in cases where the burden of the amount of decline of stock price which constitutes the damages caused by any reason other than the Revelation is extremely difficult due to the nature of the damage.”

And, in a suit for damages based on FIEA art 18, para. 1, where the damage claimants suffered contains a share price decline caused by any reason other than the revelation of the fact that the corporation made false

⁷ Tokyo High Court, February 23, 2017 (2015 (*Ne*) 1789). As analysis of this judgment, *see, e.g.*, Etsuro Kuronuma, *Case Note*, 2149 *SHŌJI* 4 (2017).

statements, and the proof of that amount of decline is extremely difficult as a nature of damage caused by those reasons, it is rational to comprehend that the court may determine the amount of reduction of damages as defined in art. 19 para. 2 of FIEA, based on all oral arguments and the result of the examination of evidence, through the application by analogy of art. 248 of the Code of Civil Procedure.

The fact that art. 19 of FIEA lacks a rule like art. 21-2 para. 6 of FIEA does not affect the interpretation stated above.

Editorial Note:

Some scholars argue that the goal of compensation for primary market investors who suffered losses by false statements is to realize restitution and regard the Reduction as an improper system⁸, and hence the application of art. 248 of Civil Procedure Code is also inappropriate from this point of view⁹.

Others claim that the Reduction is appropriate in consideration of the equity among the parties and permit the application of art. 248 of Civil Procedure Code on the ground of difficulty of the providing proof¹⁰. From this perspective, some support the Supreme Court's judgment in this case, arguing that the interpretation of legislative intent of this liability system as restitution is insufficient to deny the Reduction¹¹.

6. Labor/Social Security Law

X v. Hamakyorex

Supreme Court 2nd P.B., June 1, 2018

Case No. (*jyu*) 2099 of 2016

72 (2) MINSHU 88

⁸ *E.g.*, ETSURO KURONUMA, THE FINANCIAL INSTRUMENTS AND EXCHANGE ACT 211 (Yuhikaku, 2016).

⁹ Kuronuma, *supra* note 7, at 8.

¹⁰ Fujibayashi, *supra* note 6, at 7.

¹¹ Monguchi, *supra* note 1, at 60; Kawanaka, *supra* note 1, at 153.