Case

Case concerning the order of payment of 30% of the husband's retirement mutual pension in the distribution of property in a divorce

(Sendai High Court, 22 March, 2001 ; Hanrei-Jihō, No.1829, p.119)

Keywords : Distribution of Property in Divorce, Division of Pension

[Facts]

The plaintiff, 'X', the wife, and the respondent, 'Y', the husband, entered into a marriage in 1967, and thereafter they lived on a double income. They had two children. 'A' was born in 1968 and B was born in 1970. X and Y purchased land in 1977, which was registered in Y's name, as was the building they had built on that land that same year. Although the contract for the loan listed Y as the obligor, repayments were made from the incomes of both X and Y. When Y retired in 1997, he received a retirement allowance of a little more than 24,460,000 yen, of which 8 million yen was distributed to X, with the remainder having been spent. Moreover, that the loan had been repaid in full in the same year.

In October 1998, Y started having an affair with 'Z', and from around January, 1999, he was frequently away from home. In March, 1999, X learnt about the relationship between Y and Z. Upon being asked to end the relationship, Y became both verbally and physically abusive, and threw items at X that led to her injury. From June of that year, it had reached the state that Y hardly ever returned home, and so X applied to the Sendai Family Court for the commencement of marital relations conciliation. Following this, it seemed likely that Y would become ever more violent towards X, and caring for her safety, X started living in A's apartment from December of that same year. Also, given that relationship between Y and Z continued, when X filed for a divorce, she also claimed compensation for marital infidelity from both Y and Z.

Although Y had been unemployed since his retirement, he was receiving an annual retirement mutual pension of a little more than 2,830,000 yen, of which the spouse's supplemental payment pension was a little more than 260,000 yen. Since X's retirement in 1995 and transition to a homemaker, she was being paid an annual old age pension of a little more than 960,000 yen. With respect to the property acquired after their marriage, the land and the building were valued at 16,300,000 yen, and the deposits and savings were worth 1,580,000 yen. In the distribution of the liquidated property, X claimed from Y half of the current market value of the land and building (9,150,000 yen) and the total half amount of half of the retirement allowance, less 8 million yen from (4,390,000 yen). From the total amount to be paid from the retirement mutual pension for the next 18 years

(10,220,000 yen), being Y's life expectancy, X further claimed from Y half of the current amount obtained after deducting the amount X would receive during that 18 years period from the old age pension scheme, and the amount of midterm interest. In total, X claimed 23,770,000 yen.

[Judgment]

The Court accepted X's claim for the following reasons:

1. "As the old age pension scheme of X and the retirement mutual pension of Y ought to be regard as proprietary rights formed during the period of the marriage, they shall be accepted as being subject of liquidation in the divorce. When the supplement payment is deducted from the retirement mutual pension of Y, the total amount is 2,566,900 yen. When X's old age pension scheme is further deducted from this reduced amount, it will amount to 1,606,600 yen. This amount is approximately 62.6% of the above 2,566,900 yen, and therefore, 60% of the retirement mutual pension of Y shall be subject to the post-divorce distribution of the property."
2. "Furthermore, X claimed that the property should be distributed on the basis of the total amount of the retirement mutual pension under the assumption that Y survives the life expectancy period. In tort law, the purpose of which is to provide the fair assignment of damages, although the lost profits of a victim are calculated on the basis of a fixed number of years and a fixed amount of money, it is a characteristic of this system that the lost profits can only be calculated on the basis of a presumption. By contrast, in a distribution of property system, it is actually possible to distribute the pension each time it is received, and as this would be sufficient, it is unnecessary to make the estimation as claimed by X. Rather, it is clearly inappropriate to make such an estimation."
3. "In this case, the Court does not accept that the contribution to the formation and maintenance of the joint property made by either X or Y exceeded that of other, and as such, the percentage of distribution is presumed to be 50%."
4. "The total amount of 8,944,928 yen, comprising 8,154,500 yen, which is half of 16,309,000 yen (the value of the land and building), and 790,428 yen, which is half of the deposits and savings of 1,580,856 yen, shall be distributed from Y to X."
5. "Y shall distribute half of the 60% (30%) of the retirement mutual pension to X each and every term it is received after the divorce. The execution of which is set as the last day of the month in which the retirement mutual pension has been paid to Y."

Moreover, in this case, the Court accepted that 5 million yen in compensation be paid from Y to X, and 3 million yen in compensation be paid from Z to X.

[Commentary]

In cases related to the distribution of property in a divorce, there is debate as to

whether a pension can be subject to the distribution. Furthermore, judicial authorities concerning the distribution of property and pensions are undergoing significant change. In this case, where the pension is already being paid, it is important to note that the future portion of the pension shall be subject to an order for 50% distribution, as is the case for the distribution of an actual pension.

The distribution of property is deemed to possess the following legal elements—"liquidation of property acquired during the marriage", "maintenance" and "compensation". Having affirmed that the pension is subject to the distribution of property, the question as to whether this should be considered as "liquidation of property during the marriage" or "post-divorce support" remains to be settled. The major difference for the two parties is the following point. :

If the pension is to be considered as "maintenance", the respective circumstances of the claimant for maintenance and the person obliged to provide said maintenance shall be considered, and if it is established that the claimant has other property and does not require maintenance, the distribution of the pension will be deemed unnecessary and therefore denied. Moreover, if the life circumstances of the person obliged to provide the maintenance become such that he/she is incapable of providing adequate maintenance, it will be either reduced or cancelled. By contrast, if it is to be considered as "liquidation of property acquired during the marriage", then the pension will be distributed without consideration for the respective circumstances of the wife and the husband.

In this case, the pension was deemed to be an object of "liquidation of property acquired during the marriage," and the Court ordered the payment of a fixed amount of the pension. This is one of few officially reported cases (Decisions of the Tokyo District Court, 19 May, 2002, and the Sendai District Court, January 24, 2003, are both unreported). In both cases, as a pension itself was deemed to be formed from post-divorce cooperation, it was ordered that a fixed amount of the pension that the husband receives in periodical installments is to be paid to the wife, until her death. However, it is noteworthy to point out that in these cases, the court approximated distribution of property as "maintenance", and not purely the "liquidation of property acquired during the marriage". These cases held that, on the presumption that the husband is in receipt of a pension, the money payable in periodical installments will cease after the death of the husband. Also, there are instances wherein the division of the pension has been comparatively reduced, as a pension has become the source of one's livelihood, and the circumstances of the parties after a divorce have been taken into account. This type of problem results from the fact that the "liquidation of property acquired during the marriage" is not the division of the right to receive the pension, but rather it is the distribution of it.

Although the "liquidation of property acquired during the marriage" was ordered, several problems remain unaddressed. The Court, in ordering periodical payments, stated

that "Y shall distribute half of the 60% (30%) of the retirement mutual pension to X each and every term it is received after the divorce. The execution of which is set as the last day of the month in which the retirement mutual pension has been paid to Y." However, the plaintiff sought a lump payment instead of periodical installments. The method of payment becomes a serious problem when one considers the difficulty associated with ensuring performance. The 2003 amendments to the Law of Civil Execution provide that, in terms of periodical maintenance between husband and wife, the duty to share marital expenses, expenses associated with custody of children, the duty to provide maintenance to children and other family members, have yet to lapse. This, however, will correspond to a negligibly small sum of money.

Although it was decided that a Pension Divorce Division System shall be established, in accordance with the Pension System Reform Bill approved in a cabinet meeting on February 2, 2004, the deadline for its introduction has been set for 2007. Until the introduction of the Pension Divorce Division System, this should be regarded as an important case pertaining to the distribution of property and pension, in that it is a judgment that anticipated prospective legislation.

(MATSUHISA Kazuhiko)

"Olympus" case concerning an employee's invention

(Supreme Court, April 22, 2003 ; Hanrei-jihō 1822, p. 39)

Keywords : employee's invention, reasonable remuneration, statute of limitations

[Facts]

The following is a case where 'X', the employee of Olympus Corp., 'Y', is seeking reasonable remuneration for his assignment of the patent to Y on the basis of Article 35 (3) of the Patent Law.

Y is a company that manufactures and sells optical apparatuses. X commenced employment at Y in May 1969, and from 1973 to 1978, X was assigned to the Research and Development Division and was engaged in the research and development of videodisc apparatuses. In November 1994, X retired from Y.

In 1977, X invented a "pickup apparatus". As designated by Article 35 (1) of the Patent Law, the invention in question is regarded as the employee's invention as it falls within the scope of Y's business activities and is part of X's duties.

With regards an employee's invention, Y devised an "instruction guideline on inventions and utility models" (hereinafter referred to as "Y's regulations"). The following articles are provided in Y's regulations :

— The right to obtain a patent on the employee's invention shall be assigned to Y.

— Y shall pay the employee remuneration at the time that revenue is obtained from the industrial property right.
— In cases where Y continuously receives revenue from a third party resulting from the industrial property right on an employee's invention, up to a period of 2 years from the commencement date of receiving that revenue, Y shall pay the employee remuneration at the time of receiving the revenue from the industrial property right up to a maximum of 1,000,000 yen in a single payment.

In accordance with Y's regulations, Y obtained the right to obtain a patent for the employee's invention. Y then lodged an application, and was subsequently granted the patent. Since October 1990, Y concluded license agreements with several companies manufacturing the pickup apparatus, and has been continuously receiving license fees on multiple patent rights and utility model rights.

With regard to X assigning to Y the right to obtain a patent on the invention, X received 3,000 yen as compensation for the application on January 5, 1978 ; 8,000 yen as compensation for registration on March 14, 1989 ; and 200,000 yen as remuneration at the time of receiving revenue from the industrial property right on October 1, 1992 in accordance with Y's regulations.

At both the first instance (Tokyo District Court, April 16, 1999 ; Hanrei-jihō 1690, p. 145) and the second instance (Tokyo High Court, May 22, 2001 ; Hanrei-jihō 1753, p. 23) the following was decided :

1. In cases where the remuneration for the employee's invention, as calculated using the regulations of the employer, is less than the reasonable amount provided under Article 35 (3) and (4) of the Patent Law, an employee is entitled to demand reasonable remuneration according to the said article, irrespective of the amount calculated by the employer.
2. The reasonable remuneration in this case is 2,500,000 yen.
3. Until X was paid remuneration in accordance with Y's regulations, X was not in the position where he could expect to exercise his right for reasonable remuneration. The statute of limitations had not yet expired at the time X had filed a lawsuit (Y was ordered to pay X approximately 2,300,000 yen, being the reasonable remuneration of 2,500,000 yen less the 200,000 that X had already received.).

[Judgment]

The Supreme Court rejected Y's appeal on the following grounds :

1. Article 35 of the Patent Law, which presumes that the right to obtain a patent belongs to the employee who is responsible for the invention (Patent Law, Art. 29 (1)), aims to protect the interests of both the employer and the employee, and settle their conflicting interests concerning who has the right to obtain and use the patent (hereinafter referred to as the "right to obtain a patent"). Specifically, the Law stipulates (1) that the employer

has a non-exclusive license to the patent right of the employee's invention (Patent Law, Art. 35 (1)) ; (2) that the right to obtain a patent on an invention that is made by an employee, but outside of the scope of their duties, is necessarily null and void (Patent Law, Art. 35(2)), and conversely, the right to obtain a patent on an invention made within the scope of the employee's duties is valid ; (3) that when an employee assigns the right to obtain a patent to the employer, the employee has the right to receive reasonable remuneration (Patent Law, Article 35 (3)) ; and, (4) that the amount of such remuneration shall be decided according to the profits that the employer will make from the invention, and depending on the employer's contribution to the actual invention (Patent Law, Art. 35(4)).

According to this, the employer can incorporate in advance a number of provisions into regulations (hereinafter referred to as "service regulations"), purporting that the right to obtain a patent shall be assigned to the employer, irrespective of whether the employee has the intention of assigning this right to the employer. Moreover, these provisions can also specify the amount of the remuneration and the date of payment for the succession of this right.

However, it is clearly apparent that the amount of remuneration cannot be determined until the item has been invented by the employee, and the content and the value of the right to obtain the patent for that invention has been realized. Therefore, even in light of the purpose and content of the above articles, such an interpretation cannot be permitted. That is to say that although the remuneration provided in the service regulations may, in part, satisfy the 'reasonable remuneration' requirement for the purpose of Article 35 (3) and (4), we cannot instantly deem it as being wholly equivalent to 'reasonable remuneration'. Not until the amount of the remuneration fully corresponds to the purpose and content of Article 35 (4) can it be said that it is equivalent to the reasonable remuneration provided for under Article 35 (3) and (4). Therefore, although regulations concerning the remuneration to be paid to the employee may exist, the employee, who assigns to the employer the right to obtain a patent on the employee's invention in accordance with the aforementioned regulation, can demand, in accordance with Article 35 (3), the difference when the amount of the remuneration provided under the regulations is less than that stipulated under Article 35 (4).

In this case, when the amount of remuneration as stipulated under Article 35 (3) and (4) exceeds the amount provided under Y's regulations, X can claim the difference.

2. In the case where the service regulations provide that the right to obtain a patent on an employee's invention shall be assigned to the employer, the employee shall have the right to reasonable remuneration at the time of the assignment of the said right (Art. 35 (3)). Article 35 (4) stipulates the amount of the remuneration. When the amount calculated in accordance with the service regulations is less than that stipulated in Article 35 (4), it shall be adjusted to match the stipulated amount, though there is no provision

regarding the date of the payment. Consequently, when the services regulations stipulate the date of payment, the employee can not demand reasonable remuneration until the stipulated due date, owing to legal obstacles. Therefore, it is appropriate that the statute of limitations for that right commences from the day of payment, as stipulated in the service regulations.

In this case, Y's regulation stipulated that in cases when Y received revenue continuously from a third party for the industrial property right—the scope of which is limited to 2 years from the commencement date of receipt of the said revenue—Y shall make a single payment to the employee as remuneration, whereas Y had received license fees for the invention since October 1990. Therefore, the statute of limitations for the right to reasonable remuneration begins from the date that remuneration was paid in accordance with Y's regulations. It is apparent that the statute of limitations for X's right had not yet expired on March 3, 1995, when X filed the lawsuit.

[Commentary]

The issues in this case are (1) whether or not an employee can demand the difference between the remuneration provided by the company and that provided under Patent Law as "reasonable remuneration" when the service regulations devised by the company had stipulated in advance that the company can be assigned the right to obtain a patent on the employee's invention, and determine the amount of remuneration, (2) determination of the sufficient amount in this case, and (3) whether the statute of limitations with regards to X's right has expired or not.

Concerning issue (1), there can be no debate that this case was properly decided in accordance with the Patent Law. On this point, Y not only insisted that Y can be assigned the right to obtain the patent, but also that Y can stipulate the precise amount of the remuneration. Y stressed that it is under no obligation to pay any more than a nominal amount, as the amount calculated under its regulations is comparatively equal to that of other companies in the industry. Also, as a matter of standard practice, many companies have, for many years, considered it to be sufficient to pay the amount set by that company. In this case, it was held that such practices were impermissible violations of Article 35 of the Patent Law. It is believed that this will greatly influence future business practices.

Concerning issue (3), in both instances, it was held that the statute of limitations for X's right does not commence until the day that X receives the remuneration provided in accordance with Y's regulations, as X was unable to exercise the right to receive reasonable remuneration. In principle, the statute of limitations will apply unless there exist legal obstacles. However, in exceptional cases, wherein one cannot be reasonably expected to exercise a right, in light of the nature of that right, there is a precedent that assumes that the statute of limitations will not commence (Supreme Court Assembly, July 15, 1970; Hanrei-jihō 597, p. 55). In contrast, although the decision was sustained, the

reasoning was somewhat different. That is to say, the date of payment provided by the companies' regulations becomes a legal obstacle when an employee intends to demand reasonable remuneration.

In addition, although this case did not refer to the length of the statute of limitations, there are two possible theories : 10 years (as it is based on Article 35 (3) of the Patent Law), and 5 years (as it is based on Article 522 of the Commercial Law). In this case, it was not necessary for the Supreme Court to address this issue as 5 years had not yet elapsed since the commencement of the period. This point will be considered further in future.

Society has come to take a keen interest in recent reports of lawsuits filed in quick succession claiming vast amounts. This issue has been widely debated, and has included the drafting of new Acts. This case is extremely significant in terms of the Supreme Court's interpretation of the current law.

(HIROMINE Masako)

Case of a principal offender in a concerted action absent explicit conspiracy

(Supreme Court, P.B.1 ; May 1, 2003 ; Hanrei-jihō No. 1832, p. 174)

Keywords : principal offender, concerted action, conspiracy, aid, abet

[Facts]

The defendant, 'X', is the cadre of gang 'A', related to the Yakuza. He was prosecuted for instructing his bodyguards, referred to as SWAT (named after 'Special Weapons and Tactics' in the USA), to carry handguns whenever he visited Tokyo for leisure activities.

X had often brought along members of SWAT when he went to Tokyo. On receiving information that SWAT were in possession of handguns, the police initiated a criminal investigation.

The police arranged and obtained search warrants for the automobiles of X's bodyguards, and then proceeded to conduct searches of those automobiles that they had stopped within the city limits. It was then discovered that SWAT were in possession of handguns.

During the first and second trials, there was no dispute concerning SWAT's possession of handguns. The issue in this case was whether X was the principal offender in a concerted action (possession of handguns). Specifically, as the evidence was unable to definitively and clearly establish that X had commanded SWAT to carry the handguns, the issue was whether X could be considered the principal offender in a concerted action absent explicit conspiracy.

During the first and second trials, X was found guilty as a principal offender in a

concerted action of possession of a handgun, and was sentenced to seven years of penal servitude. X appealed to the Supreme Court.

[Judgment]

The Supreme Court denied the appeal and affirmed the decision of the High Court.

"Although X did not directly instruct SWAT to carry handguns, he did have actual knowledge that SWAT had, on their own accord, taken to carrying handguns whilst in service of guarding him, and both X and the SWAT bodyguards had accepted and consented to this practice as a matter of course. Based on this, it can be said that there existed an implicit understanding between X and SWAT. Under these circumstances, SWAT would, in the service as an escort, act as an accomplice to X in his activities. In light of X's status and position in authority to command SWAT, it can be properly regarded that X did, in fact, direct SWAT to carry the handguns. Therefore, the original judgment rendered, which affirmed the verdict of the first trial, declaring X guilty of gun possession in a concerted action with SWAT, is correct."

Justice Fukazawa issued a concurring opinion.

"X was in an overwhelmingly dominant position over SWAT, and SWAT had conducted their criminal activities under this strong influence. As a result, X had directly benefited by the assurance of his safety. In this case, although it could not be shown that there was a specific time and place that X and SWAT had conspired to carry the handguns, this had gradually become the standard practice within the organization. The defendant had general, but definite, knowledge that SWAT was in possession of handguns. In these circumstances, it shall be deemed as though X had committed the crime himself, when there is an acknowledged agreement to collaborate in the commission of a criminal act, even if X is not directly involved in the commission of an act by another member of the group. In such cases where the principal offender's intention is identified, his participation in a concerted action is established."

[Commentary]

Prior to this judgment, there had never been an instance whereby the Supreme Court had declared a principal offender to be guilty of a concerted action absent explicit conspiracy. In affirming this principle, and articulating the elements that must be considered in such cases, this judgment has very important implications.

The Nerima case (Supreme Court, May 28, 1958) addressed the issue of a concerted action, and outlined the requirements to satisfy such a charge. The Nerima case concerned a manslaughter set against the background of a labor dispute, in which the defendants were prosecuted for inflicting bodily injury resulting in the death of a police officer. All the defendants were found guilty as a principal offender, although two of them were absent from the scene of the crime. According to the judgment in the Nerima case,

in "the commission of a specific crime, whereby two or more people intend to collaborate as one, each person, in reliance of the action of the other, shall be deemed to have intended to 'conspire'".

Counsel for the defendant cited the *Nerima* case as authority, claiming that there was no specific conspiracy between X and SWAT. However, the Supreme Court rejected this argument, stating that in the Nerima case, the defendant was not present at the scene of the crime at the time it was committed, and thus, did not conspire in the commission of that crime. In the present case, however, the defendant had acted in concert with SWAT, and therefore, it can be said that the defendant was also carrying a handgun.

I am of the opinion, however, that there is a tendency to too readily declare a defendant as a principal offender in a concerted action. The concepts of "concerted action" and "conspiracy" are both vague and obscure, and as each judge adjudicates by different criteria, I am concerned that the scope of punishment can be unreasonably broad. Furthermore, it is doubtful that these concepts would readily be recognized in terms of criminal law theory or due process of law. As such, these requirements should be seriously considered. In this case, although the crime was committed by the Yakuza, an underworld organisation, it appears that the defendant could have been found guilty of aiding and abetting, which must fulfil strict requirements, and not as a principal offender in a concerted action, which is quite problematic. As expressed above, "concerted action" and "conspiracy" were already ambiguous concepts, and they both became even more obscure as result of this case. I believe that the requirements of conspiracy should not have been relaxed. Although this has already been established from a practical perspective, it should be reconsidered in light of this particular problem.

(SAGAWA Yukako)

Case concerning the ownership of the obligation-right to an ordinary deposit account, opened in the personal name of an attorney-at-law, who was appointed by the mandator as the mandatory for debt adjustment affairs to deposit the money which was entrusted by the mandator in order to conduct delegated affairs

(Supreme Court, P.B.1, June 12, 2003 ; Minji-hanrei-shū Vol. 57, No. 6, p. 563 ; Hanrei-jihō No. 1828, p. 9)

Keywords : Contract of Mandate, Debt Adjustment Affairs, Ownership of the Deposit Obligation-Right, Contribution, Objective Theory

[Facts]

'X1' (Unlimited Partnership Company) and 'X2' (Attorney-at-Law) concluded a

contract of mandate in September 1997. Both X1 and X2 are joint appellants to the Supreme Court. This contract stated that X2 was to adjust X1's debt affairs.

On October 8, 1997, X2 opened an ordinary deposit account in his name in order to manage the affairs listed in the contract, and on the same day, X2 entrusted X1 with 5,000,000 yen to deposit into this new account. X2, the Supreme Court appellant, retained the bankbook and the registered seal used for this account from the time the account was opened.

'A', a representative of the X1 company, sold a number of company stocks, the proceeds of which amounted to 200,000 yen. This was transferred from X1 to the new account on December 22, 1997. These stocks were a part of A's personal property. On February 27, 1998, A paid X2, the mandatory for X1, citizen tax and income tax, etc., on his remuneration as a director. The amount of these taxes was 132,000 yen. Incidentally, X1 had paid this amount on behalf of A, and X2 proceeded to transfer the 132,000 yen into the above account.

In addition to this, various "funds" were transferred into this account, including proceedings from the sale of both immovable and movable property, X1's account receivables and proceeds from work contracts, tax returns, etc. X2 believed that it was necessary for him to safeguard these funds, and upon X2's request, X1's debtors transferred funds into the account. Thus, in accordance with X2's request, the debtors remitted the proceeds of sales and work contracts into this account.

Conversely, various "funds" were withdrawn from this account, including dividends payable to X1's creditors, associated transfer costs, salaries payable to X1 employees, social insurance premiums, taxes, etc.

X1 delayed payment on (1) the excise tax and local excise tax due to be paid on December 1, 1997, (2) the excise tax for the year of 1997, (3) local excise tax, and (4) corporate tax (taxes (2) to (4) which were due to be paid by March 2, 1998). Y (Head of the Tax Department), impounded the Deposit Obligation-Right (right to withdrawal) to the account by issuing a writ of attachment. However, on October 9, 1998, Y revoked this attachment from the taxes in (2) to (4).

In this case, both X1 and X2 sought that the attachment on the Deposit Obligation-Right be revoked. Y believed that the Deposit Obligation-Right was the property of X1, and so Y levied the Deposit Obligation-Right in order to collect the first set of taxes, (1) consumption tax and local consumption tax. However, the ordinary deposit was opened by X2, and the deposits and withdrawals were conducted by X2.

Regarding the attachment, the Court of first instance (Miyazaki District Court, June 25, 1999 ; Minji-hanrei-shū Vol. 57, No. 6, p. 582) dismissed X1's suit and denied X2's claim. The reason for the court's decision is as follows, With regard to X1, X1 does not have the legal interest required to seek the invalidity and cancellation of the attachment. Further, with regard to X2's claim, the deposit contributor, i.e. the person who actually

contributed to the deposit, is X1. Therefore, the Deposit Obligation-Right belonged to X2, and not X1.

X1 and X2 filed an appeal.

The Court of the second instance (Miyazaki Branch of the Fukuoka High Court, July 13, 2001 ; Minji-hanrei-shū Vol. 57, No. 6, p. 590) denied the claims of X1 and X2. The reason was similar to that cited by the Court of first instance. The Court of second instance additionally provided the following reason : when the facts in this case and the contents of this contract of mandate are taken into consideration, it is recognized that the deposit contract for this account was concluded with the intention that the contributions made by X1 are the deposits of X1. Moreover, according to the deposit contract, X2 is the messenger and agent of X1. The Deposit Obligation-Right belongs to X1, and not X2. The funds entrusted to X2 (mandatory) by X1 (mandator) do not come into the possession of X2. Therefore, the attachment in this case is not illegal.

Subsequently, X1 and X2 appealed to the Supreme Court, and they filed a motion for seeking a statement of receipt of the appeal.

[Judgment]

The Supreme Court accepted the appeal, reversed the decision of the Court of Appeal, and revoked the decision of the Miyazaki District Court. Moreover, the attachment in question was voided by the Supreme Court.

"The money received in advance by the attorney-at-law from the mandator as expenses for the debt adjustment affairs corresponds to the "advance expense payment" described in Article 649 of the Civil Code. Once the advance is delivered to the attorney-at-law, the money is no longer that of the mandator, and becomes the possession of the mandatory. The mandatary controls and manages the money, guided by his own sense of responsibility and judgment. However, he is obligated to use the money according to the intent specified in the contract of mandate. On the other hand, the mandatary is also obligated to return the money to the mandator, in the same amount as the advance. However, this advance is allocated for the transaction of affairs listed in the contract of mandate, and the fulfilment of this duty exempts the mandatory from having to return the balance to the mandator. Upon the expiration of the contract, the mandatory should return the unused balance to the mandator. In this case, after X2 received the sum of 5,000,000 yen from X1, the money belonged to X2. X2 proceeded to open an account in order to distinguish between the purchased property (5,000,000 yen from X1) and the other property he owned. X2 was to utilize the advance according to the intent specified in the contract of mandate. X2 opened an account in his own name for use of his own property, such that he would be able to manage it himself. The person who concluded this deposit contract with the bank was X2. In other words, X2 possessed the Deposit Obligation-Right for this account. Therefore, X1's debt with X2 can be levied to collect the taxes that

X1 did not pay, though X2's Deposit Obligation-Right with the bank cannot be levied."

"The judgment of the appellate Court conflicts with the law. This conflict clearly influenced the judgment. Therefore, as regards the attachment, the judgment of the Court must be reversed. There is a legal basis to the claim for voidance by X1 and X2. Therefore, the judgment of the Miyazaki District Court should be revoked. We (the Supreme Court) shall accept the claim of X1 and X2."

Two of the five judges who heard this case offered concurring opinions. Specifically, they discussed (a) the method of managing the money by the attorney-at-law, and (b) an alternate interpretation of the contract.

With regard to (a), they stated that the property of the attorney-at-law must be clearly distinguished from the funds received, and that this will be suitably reflected where the account is registered in his name.

With regard to (b), they stated that the contract between X1 and X2 in this case is likely a trust agreement, and not a contract of mandate (or a contractual fusion of the two). A trust agreement describes the legal relationship in clearer terms than a contract of mandate. If the trust Act is to be applied to such a case, the number of disputes regarding transferred money will decrease. However, these concurring opinions did not influence the final judgment in this case. Furthermore, the parties to this case neither testified nor asserted that there was a trust agreement.

[Commentary]

The Supreme Court concluded that the Deposit Obligation-Right belonged to X2, and not X1. The Supreme Court did not affirm the attachment on the Deposit Obligation-Right. I agree with this decision, though I have doubts regarding the logic.

This judgment concluded that the funds in the deposit account belonged to the mandatory, X2. In other words, according to the logic of the Supreme Court, when the mandatory receives an advance for the mandate from the mandator, the money belongs to the mandatory. Thus, the Deposit Obligation-Right also belongs to the mandatory. However, the Supreme Court obscured the relationship between "belonging to" and "owning".

Owing to this judgment, the "objective theory" on determining the debtor of the deposit has undergone reconsideration. This is a commonly accepted theory supported by the doctrine of precedent. Who is the debtor of the deposit? There are three theories available for determining this—(a) the "subjective theory", (b) the "objective theory", and (c) the "eclectic theory". According to theory (a), unless it is indicated that the deposit is made on behalf of another person at the time of that deposit, the person who deposits the money into the bank is the depositor. According to theory (b), where a person (or their messenger or agent) concludes a deposit contract with the bank, and their contribution is made with the intention of it being their own deposit, then he/she is the depositor. In

principle, theory (c) is identical to theory (b). However, an exception to this is that when the person who deposits the money expressly or impliedly indicates that he/she is the depositor, the person who makes the deposit is the depositor.

It is unclear as to which of these three theories the Supreme Court adopted. The courts of first and second instance clearly adopted theory (b). However, the Supreme Court reversed these judgments, and then concluded that the Deposit Obligation-Right belongs to the attorney-at-law (mandatory). So did the Supreme Court reject the "objective theory"? Some scholars assert that this judgment did not adhere to the "objective theory", whilst others maintain that the judgment was, in fact, in line with it. I am of the opinion that the Supreme Court still adheres to the theory. It is true that the Supreme Court adopted a stance that contradicted the judgments of the courts of first and second instance. However, I believe that the Supreme Court associated the concept of "contribution" with the legal nature of the advance provided under a contract of mandate, such that the theory has been reformulated. According to the judgments of the Miyazaki District Court and the Court of Appeal, the "contributor" was X1. However, according to the Supreme Court, the "contributor" was X2.

"Once the advance is delivered to the attorney-at-law, the money is no longer under the control of the mandator, and belongs to the mandatory." I believe that this part of the judgment implies that the Supreme Court has not rejected the "objective theory". However, in this case, the holder of the account was the attorney-at-law (X2), and he was in charge of the bankbook and the registered seal. I believe that these were factors by which the Court reached the conclusion that the "contributor = X2 = depositor". However, to what extent were these factors considered? This is quite a difficult problem.

The possibility of terming it a trust agreement is an intriguing proposition advanced in the concurring opinions. However, there was no debate as to the requirements to support this proposition. Therefore, we must be cautious in associating this case with trust agreement.

Finally, I would like the add that this case, in conjunction with the judgment of the Supreme Court decided 4 months prior to this one (Supreme Court, P.B.1, February 21, 2003 ; Hanrei-jihō No. 1816, p. 47), should be considered as one "set".

(FUKUMOTO Shinobu)

Case concerning the acquisition of Japanese citizenship based on post-birth recognition

(Supreme Court, June 12, 2003 ; Hanrei-jihō, No. 1833, p. 37)

Keywords : Nationality Law Article 2 (1), Post-birth Recognition, the Judgment of 1997, Special Circumstances

[Facts]

On December 3, 1990, a Korean woman 'A' married a Japanese man 'B', and gave birth to their firstborn daughter on February 4, 1991. In January, 1995, A separated from B, having been issued with a duly signed and executed divorce notice. However, the parties were not able to register the divorce as they could not agree on matters of parental authority and the upbringing of the child. In August, 1997, A was able to reach an agreement with B on the aforementioned matters. However, around this time, A was unable to contact B, and could not ascertain his address. Consequently, A could not confirm that this was B's 'final intention'. A registered the divorce on September 25, 1997, without confirmation from B.

In May, 1995, A became acquainted with another Japanese man, 'C', with whom she later became pregnant with child 'X' (plaintiff, then High Court respondent and then Supreme Court appellant). Following the day of registration of the divorce, on September 26, 1997, A delivered X by Caesarean section. After the delivery, A was admitted to the hospital for about two weeks. She continued her recuperation at home after being discharged and continued to run errands, such as taking her eldest daughter to and from school. In March 1998, she consulted a lawyer and inquired into B's location in order to initiate proceedings to establish the non-existence of a parental relationship between X and B. However, B's whereabouts could not be established. Notwithstanding this, A filed a lawsuit against B on June 15, 1998, in order to confirm the non-existence of a parental relationship between X and B, and to annul B's parental authority over X. On October 20, 1998, after B had been served notice, the Court handed down the verdict that there was no parental relationship, and this decision came into force on November 5, 1998. C filed a notice recognizing X as his child four days later, on November 9, 1998.

X filed a suit against Y (the Government of Japan, defendant, then appellant, and finally Supreme Court respondent) seeking confirmation that X possessed Japanese citizenship. In the first instance (Ōsaka District Court, May 19, 2000 ; Shōmu-geppō Vol. 47, No. 12, p. 3754), the Court considered the three requirements provided in the judgment of the Supreme Court, P. B. 2, October 17, 1997 (hereinafter referred to as "Judgment of 1997"), and recognized X's claim due to "special circumstances". Y objected to this verdict, and subsequently appealed. The second instance (Ōsaka High Court, November 15, 2000 ; Shōmu-geppō Vol. 47, No. 12, p. 3744) was also based on the *Judgment of 1997*. In cases where the mother gives birth to a child after her divorce and these events are temporally proximate, it is acknowledged that there are inherent timing difficulties in making a claim for the recognition of the foetus. However, commencement of the legal proceedings to confirm the non-existence of a parental relationship between X and B were delayed well after the birth, and from an objective standpoint, it cannot be said that there were "special circumstances". Consequently, the High Court reversed the judgment of the lower court, and dismissed X's petition. X then appealed to the Supreme

Court.

[Judgment]

The Supreme Court reversed the original decision, and dismissed the appeal.

"Within the original judgment, [the first half of the judgment] can be approved, but [the latter half] cannot."

"Generally speaking, even if the legal proceedings to establish the non-existence of a parental relationship had been initiated about eight months after the birth of the child, it is difficult to regard the proceedings as having been initiated without delay."

"However, according to the above facts, A had given birth to X by Caesarean section, and had been raising her eldest daughter whilst recuperating at home. Also, around August 1997, with the birth close at hand, A was waiting on B to contact her, as she could not establish any contact with him. In March, 1998, A consulted with a lawyer and inquired into B's whereabouts for about three months in order to commence legal proceedings to establish the non-existence of a parental relationship between X and B. However, as B's whereabouts could not be ascertained, A filed a suit against B on behalf of X on June 15, 1998, for the confirmation of the non-existence of a parental relationship, and notice was subsequently served on B. In light of these circumstances, it could not be helped that the abovementioned suit required about eight months from the birth of X, and in this case, it is reasonable to regard the legal proceedings to have been initiated without delay."

"It is clear that the filing of the above notice of recognition was promptly undertaken four days after the judgment confirming the non-existence of a parental relationship between B and X came into force. As such, from an objective standpoint, there is no cause in this case to question the existence of special circumstances. One can surmise that, if not for the presumption of legitimacy accorded to the family registry, C would have filed notice of his recognition of the unborn child . . . Therefore, it is appropriate to hold that X has acquired Japanese citizenship under Article 2 (1) of the Nationality Law."

Judge Kazuko Yokoo issued the following dissenting opinion :

"According to the purport of the above judgment, the [*Judgment of 1997*] held that after the birth of the child, legal proceedings to establish the non-existence of a parental relationship shall be initiated without delay . . . irrespective of the circumstances, it cannot be seen here that, following a set period after the birth of the child, that the proceedings were initiated without delay. In this case, the suit was filed after eight months and twenty-one days had elapsed, which is significantly more than three months. Hence, even though the mother was in a poor state of health, it cannot be held that the legal proceedings were initiated after the birth of X without delay."

[Commentary]

I disagree with this judgment.

The central issue in this case, which has been argued before in other such cases, is whether or not there are special circumstances, as provided in the *Judgment of 1997* (Minji-hanrei-shū Vol. 51, No. 9, p. 3925).

The *Judgment of 1997* held that "when, objectively speaking, there are special circumstances under which, if not for the presumption of legitimacy accorded to the family register, it can be assumed that [the Japanese father] would recognize the unborn child, it is reasonable to interpret Article 2 (1) of the Nationality Law to apply in the same manner as if the unborn child had been recognized and naturally acquired Japanese citizenship." In order to apply Article 2 (1), the following three requirements must be satisfied : ① where the unborn child is presumed to be the legitimate child recorded in the family registry, and the notice of recognition of the unborn child would not be accepted, ② after the birth of the child, legal proceedings shall be initiated without delay to establish the non-existence of a parental relationship between the husband and the child, ③ after the aforementioned non-existence of paternity is established, the filing of a notice for recognition shall be promptly filed. However, the case of the *Judgment of 1997* can be distinguished from the present case in that the child was born when the parents were separated but still married, the legal proceedings to establish the non-existence of a parental relationship were initiated approximately three months after the birth of the child, and the father filed a notice of recognition twelve days after the decision was entered to confirm the non-existence of the parental relationship. This decision is noted as a case in which the Supreme Court relaxed ① and ② of the three requirements needed to establish "special circumstances" as provided in the *Judgment of 1997*. This article will attempt to address these three requirements.

First, as to the fulfilment of requirement ①, that is, in terms of whether or not the "proceedings for the recognition of the unborn child can lawfully proceed", the establishment of parental relationship with an illegitimate child is problematic under the Nationality Law. In this respect, according to the conflict of law rules of the forum, the national law of the 'recognizing person' is Japanese law, and the national law of the 'recognized person' is that of the country of which the mother is a national, in this case Korean law. In addition, according to Article 18 of the Act Concerning the Application of Laws, the parental relationship with an illegitimate child shall be established if it is so recognized under the national law of the 'recognizing person' at the time of the child's birth or recognition, or the national law of the 'recognized person' at the time of the recognition. With regard to the notice of recognition of the unborn child prior to the birth of the child, although there is a view that only Article 18 (1) of the Act Concerning the Application of Laws can be applied, the intention of the Article is the protection of recognition, therefore, it is thought that Article 18 (2) should also be applied, and thus the law governing the notice of recognition is the law of the country of which the child is a national, namely Korean Law. Both the Japanese Civil Code (Article 783) and the Korean

Civil Code (Article 858) will acknowledge a notice of recognition of an unborn child by a father, though it is generally viewed that both these countries require the acceptance of the notice of recognition as a requirement for effective acknowledgment.

Unlike the case of the *Judgment of 1997*, in this case, where the child was born after the divorce, it cannot be determined whether or not there arises a presumption of legitimacy of the child of the former husband, and as such, the registrar of the family registry must accept the notice of recognition of the unborn child. Where it was established that there was a presumption of legitimacy at the time of the birth of the child, the process for acceptance was withdrawn, and the filing of such notices was rejected by the family registry. As such, I wonder if there was a way in which C, the recognizing person, could have filed a notice of recognition. In this respect, this case can be distinguished from the *Judgment of 1997* in that the necessary requirements for "special circumstances" have not been satisfied.

Secondly, with regard to requirement ②, regardless of whether or not the legal proceedings can be said to have been initiated without delay in order to confirm the non-existence of a parental relationship, this case took almost three times longer compared to the *Judgment of 1997*. In this respect, the purport of this judgment is that the period should be flexibly interpreted owing to the unavoidable circumstances which did not allow for the initiation of such proceedings. The importance of the remedy in this particular case was stressed, as it will likely influence judgments in lower courts. However, from the intention of the provision of Article 2 (1), which requires that there exist a paternal relationship between the child and a Japanese father at the time of the birth, for how long a period should this requirement be interpreted flexibly? This is a delicate matter, and the existence of unavoidable circumstances must be judged and determined on a case-by-case basis. It is likely that there will be divided judgments in future.

Finally, in this case, it is clear that the requirement outlined in ③ is satisfied as the notice of recognition was filed four days following the determination of the proceedings to confirm the non-existence of a parental relationship.

(KATAOKA Masayo)

"Resona Holdings, Inc." Shareholders' Derivative Suit

(Osaka District Court, September 24, 2003 ; Hanrei-jihō, No. 1848, p. 134)

Keywords : Derivative Suit, Settlement of a Lawsuit, Business Judgment Rule

[Facts]

Daiwa Bank and Asahi Bank became wholly owned subsidiaries of Daiwa Bank Holdings, Inc. through a share transfer and share exchange conducted between 2001 and

2002. In October 2002, the holding company changed its business name and became "Resona Holdings, Inc.". Furthermore, in the process of reorganization in March 2003, Daiwa Bank changed its business name to "Resona Bank", and proceeded to merge with Asahi Bank.

The plaintiff shareholders, 'X', acquired Asahi Bank shares in both 1990 and 1998, and then became shareholders in Resona Holdings after the share transfer with Daiwa Bank Holdings, Inc.

In addition to the Daiwa Bank incident, the shareholders brought a suit in order to recover from 18 members of the former management of Resona Holdings, 'Y', approximately 160 billion yen in reparations for the losses resulting from both Nippon Credit Bank underwriting a capital increase in 1997, and the losses incurred from the Asahi Bank—New York Branch Scandal in 1996. X asserted that there was a duty of care and a duty of loyalty on a representative director to initiate a shareholders' derivative suit and to issue a notice on the officers of the Daiwa Bank and the Asahi Bank, that there was a duty of care and a duty of loyalty on the supervising directors to ensure that the representative director initiate the lawsuit, and that there was a duty of care on the statutory auditors to initiate a suit claiming damages and issue a warning on the directors to ensure that they execute their jobs.

In addition, this derivative suit examined the respective responsibilities of the directors of the former Daiwa Bank in the context of the Daiwa Bank incident. On September 20, 2000, the Osaka District Court affirmed part of the plaintiff shareholders' claim, and ordered 11 people (defendant directors) to pay reparations totalling approximately 700 million dollars. Later, on December 10, 2001, a compromise was reached in the Osaka High Court, whereby the defendants would jointly pay an amount of 250 million yen. Their dispute was therefore completely resolved.

[Judgment]

The Osaka District Court rejected X's claim on the following grounds:

"It is acknowledged that in the separate settlement, there was a declaration of intent by Daiwa Bank to forgive those separately-charged defendants the portion of damages exceeding at least 250 million yen. . . . In terms of a settlement, shareholders may join a derivative suit already initiated by other shareholders, and although an exemption from responsibility can be reached through settlement without agreement from all the shareholders, this does not dissolve the right of a shareholder to file a suit. Therefore, in light of the nature the abovementioned activities and the purpose of Article 266 (5) of the Commercial Code, it is considered that Article 266 (5) is inapplicable in terms of a declaration of intent to exempt responsibility by way of a settlement. . . . "

"In the separate settlement, there was a declaration of intent by Daiwa Bank to forgive those separately-charged defendants the portion of damages exceeding at least 250

million yen. As Article 266 of the Commercial Code is inapplicable, Daiwa Bank's right to claim damages from the separately-charged defendants has been limited, in accordance with the separate settlement, to claims of up to 250 million yen. Hence, Daiwa Bank no longer posses the right to claim for damages in excess of 250 million yen. Consequently, it is not necessary to rule on the remaining points, as Y, the directors and representative directors of Resona Holdings who did not initiate the shareholders' derivative suit against the separately-charged defendants, were clearly not in breach of their duty of care and their duty of loyalty."

"It cannot be accepted on the facts that there was, as stressed by X and others, a duty of care incumbent upon the directors of Asahi Bank at the time of the scandal, and that this duty was breached. Therefore, without ruling on the remaining points, it is accepted that Resona Holdings does not have the right to claim damages from directors of Asahi Bank for the Asahi Bank—New York Branch Scandal. As such, it is held that the defendant representative directors, Y, were not in breach of their duty of care and their duty of loyalty with regard to the failure to initiate a shareholders' derivative suit, on behalf of Resona Holdings, as against those who were directors and auditors of Asahi Bank at the time of the scandal."

"It is not accepted that, at the time when the then directors had decided on the Nippon Credit Bank capital-increase underwriting, that they were seriously and recklessly negligent in their understanding of the facts upon which that decision was based. Furthermore, it cannot be said that the either the decision-making process or the contents of the decisions made in the capacity as corporate officers were either irrational or inappropriate, or that there was any deviation from the scope of the discretion afforded to the then directors of both banks. Therefore, it cannot be accepted that the then directors are in breach of the duty of care and the duty of loyalty."

[Commentary]

The primary points of contention in this case are (1) the effect of the separate settlement, (2) the existence of a responsibility incumbent upon the management of Asahi Bank to make reparations for the Asahi Bank—New York Scandal, and (3) the existence of a responsibility incumbent upon the management of both banks to make reparations with regard to the Nippon Credit Bank underwriting.

This case is possibly the first in which a court indicated its perspective on the settlement of a shareholders' derivative suit. Although the settlement of a shareholders' derivative suit is a rather frequent occurrence, it has conventionally been argued that the relation to Article 266 (5) of the Commercial Code cannot be established an exemption from directorial responsibility does not have the consent of all the shareholders.

The peculiar aspect of this case lies in it being a case where a company, a party to a settlement, accepted the exclusion of the application of Article 266 (5) of the Commercial

Code without imposing any particular limitations. This means that the company will have lost its right to claim damages. However, as to this problem, Article 268 (5) regulates the purport of the non-application of Article 266 (5) with regard to suits investigating directors' duties. As such, shareholders' derivative suits initiated on or after May 1, 2002 have been resolved through legislation. When the company is not a party to a settlement in a shareholders' derivative suit, the court notifies the company regarding the contents of the settlement, and it shall have two weeks in which to raise any objections (Article 268 (6)). A settlement shall be deemed to have been reached if the company does not raise an objection within the specified period (Article 268 (7)). There is no application of Art. 266 (5) in this case.

The reason for settling as per the statutory provisions is that it is an expedient and appropriate method of dispute resolution, it is beneficial to the interests of both the company and the shareholder, and the contents and the procedure of the settlement ensure that justice is granted to both parties. However, there is caution about giving legal effect to these settlements. It is pointed out that, in the United States, it is possible that a lawyer representing a plaintiff shareholder may choose to increase their own remuneration rather than advance the interests of the shareholder by negotiating a settlement that lowers the compensation payable the company. In the United States, where this problem was recognized rather early, other shareholders are notified of the contents of the settlement, and measures are taken to ensure that the court approves the fairness of the settlement. It is likely that this problem frequently occurs in our country also. I believe that, in future, it will be necessary to establish a system whereby a court will examine and approve the contents of a settlement.

It cannot be accepted on the facts that there was a breach of duty, as asserted by X, with regard to the Asahi Bank—New York Branch Scandal, when one considers the compliance system at the time, and the response to the scandal. In a suit claiming damages on the grounds of a breach of the duty of case and the duty of loyalty by the directors, the party investigating the responsibility of the director must present proof verifying that the actions of the concerned director, in their capacity as a director, where not in accordance with the financial obligations of the company (Supreme Court, July 7, 2000 ; Kinyū-shōji-hanrei, No. 1096, p. 3). This case is also based on this understanding.

It has recently become difficult to apply the Business Judgment Rule in terms of the duty of care owed by a director (Tokyo District Court, September 16, 1993 ; Hanrei-Times, No. 827, p. 39, Osaka District Court, February 20, 2002 ; Hanrei-Times, No. 1109, p. 226, etc.) The Business Judgment Rule refers to the principle of not pursuing responsibility to make reparations for the executive decision of a director, who exercised considerable care, although it resulted in damage to the company. This is a principle of law that originated in the United States during the 19th Century. If reparations are pursued after the event, it is possible that a director will be burdened with severe

responsibilities. As already indicated, this may lead to the decay of corporate management. Therefore, it is necessary to permit a director to exercise a certain amount of discretion. On the other hand, it is also dangerous to permit excessively broad discretion. Generally, for the Business Judgment Rule to be applied, sufficient information must be collected for the making of an executive decision, it must be a decision made in the best interests of the company, it must be a decision made by a person usually a member of the corporation, and there must be no conflict of interest.

From this perspective, the process by which the decision was made by the directors of both banks with regard to the Nippon Credit Bank underwriting issue, was thoroughly considered, and the wide discretion for the directors executive decision is accepted.

However, we must take note of the different purposes for which the Business Judgment Rule is used in our country—whether an executive decision made by a director who is usually able to make the decision, given their position as a manager, is within rational limits. The Business Judgment Rule as used in the United States, has the effect of entirely eliminating judicial review of the executive decision of a director.

X objected to this decision, and has filed an appeal with the Osaka High Court.

(MURAKAMI Koji)

Case concerning extinctive prescription in an insurance contract

(Supreme Court, P.B. 1, December 11, 2003 ; Minji-Hanreishū, Vol. 57, p. 2196)

Keywords : Life insurance, Extinctive prescription

[Facts]

'X' took out two life insurance policies on her husband, 'A', with an insurance company, 'Y', nominating herself as the beneficiary. Contract (1) was a whole life insurance contract with a term policy (including special double indemnity clauses) concluded on May 1, 1990. Contract (2) was a whole life insurance contract with a term policy (including special double indemnity clauses) concluded on November 21, 1991.

The insurance contracts provided that the right to claim insurance is rendered void when no claim is made within 3 years from the day (inclusive) following that on which cause of payment comes about (hereinafter referred to as "extinctive prescription").

The contracts provided that the cause of payment for the whole life insurance contract with a term policy is the death of the insured, and that the cause of payment for the special double indemnity clauses is the death of the insured proven to be directly caused by an accident, though the period between the date of the accident and the date of the death of the insured must not exceed 180 days.

On May 17, 1992, A left his residence driving a car. He did not return home, and

went missing. X submitted a "missing person report" to the local police station two days after the incident. However, no information could be obtained regarding A's whereabouts, or as to whether he was alive or dead. Time passed, but no information came to light.

On January 7, 1996, more than three years after A went missing, his car was unexpectedly discovered in Ashinoko Sky Line (Sangaku Leisure Highway) when another person fell down a cliff. The skeletal remains of A were discovered near the car. It was established that A had died around May, 1992.

Y had paid only a certain amount of insurance (whole life insurance and term policy in Contract (1)), and denied payment on the other insurance claims (whole life insurance and term policy in Contract (2), as well as double indemnity in both contracts). The reason is explained in the [Commentary].

On November 7, 1996, X initiated legal action seeking the payment of residual insurance from Y. Citing the extinctive prescription, Y claimed that X's right had been rendered void as three years had elapsed since A's death without there being a claim for insurance.

The court of first instance and the appellate High Court both acknowledged that A's fall was not a suicide attempt, but rather was caused by a driving error on A's part. The courts admitted X's claim on the grounds that the period of the extinctive prescription did not commence until the discovery of the dead body.

Y appealed to the Supreme Court.

[Judgment]

The appeal was dismissed.

"According to the finding of fact lawfully decided by the High Court, it may be presumed that A was fatally injured in the car accident, and as a result of severe injuries, he had died around May 1992. Notwithstanding that A had been suffering severe financial hardship prior to going missing, it cannot be correctly assumed that his death was a suicide. Therefore, it is acknowledged that A's fatal accident was caused by an error on his part."

"Referring to the extinctive prescription, Y claimed that the right of X to claim insurance was rendered void on the grounds that three years had elapsed since the day of A's death without any claim being made by X."

"The Commercial Code provides that the right to claim payment against damage insurance and life insurance is rendered void when two years have elapsed (Articles 663 and 683 (1)). The conditions of the life insurance policy extended the period provided in the Commercial Code to three years because, in the case of life insurance, an event which is insured against may occur without the knowledge of the beneficiary. In this case, it is clear that the conditions of the insurance policy provide that the period of the extinctive prescription commences from the day following that of the death of the insured."

"However, Article 166 (1) of the Civil Code, also applicable to this case, establishes

that the extinctive prescription commences at "the time when the right can be exercised". The purpose of this is to provide that not only must there be no legal impediment to the exercise of the right, but also that until one can realistically expect to be able to exercise the substance of that right, the extinctive prescription shall not commence (Minji-Hanreishū, Vol. 24, p. 771). The bases for the aforementioned conditions are as follows : if the cause for payment (death of the insured) occurs, then the exercise of the right to claim insurance under this contract is usually expected to begin from that time. Although there may be special circumstances in which one could not realistically expect to exercise their right, in light of the objective situation prevailing at the time, this is not to purport that the extinctive prescription commences on the date of the occurrence of the cause of payment. In this case, the conditions of insurance must be understood to mean that the extinctive prescription commences at the time when the right is realistically able to be exercised."

"According to the above finding of fact, in the period between A's death (cause for payment) and the discovery of his remains, in light of the circumstances at the time, there existed special circumstances in which it could not realistically be expected that X would exercise her right. Therefore, it must be understood that the extinctive prescription does not commence during this period. The extinctive prescription commences after January 7, 1996. Thus, it is clear that the period of the extinctive prescription had not yet lapsed when X initiated this suit claiming payment of the residual insurance amount on November 7, 1996."

"Hence the judgment of the High Court can be affirmed as correct."

[Commentary]

The question as to when the extinctive prescription for claims on insurance commences has been the subject of theoretical debates. Regulations have been laid down in Articles 663 and 683 (1) of the Commercial Code. However, it does not specify any exceptional regulations with regard to the point of commencement. Although the automobile insurance policy has specified detailed regulations as to the commencement point of an extinctive prescription, especially regarding procedures to be followed in cases where there is no claim, the problem with the life insurance policy is that there are no similar specified regulations. As a problem has surfaced in this case due to the absence of detailed regulations in the policy, the problem must be solved using general theories on prescriptions.

Article 166 (1) of the Civil Code provides that the commencement point of the extinctive prescription is "the time when a right can be exercised". A number of theories in insurance law consider the commencement point of the extinctive prescription to be the time of the occurrence of the event insured against (Time of Occurrence Theory). For instance, in life insurance, as in this case, it is understood that the right of the beneficiary

can be exercised when the insured dies, at which point the extinctive prescription commences. According to this theory, clarity and uniformity of legal relations are important. However, provisions such as "payment is made within 30 days of the claim" are usually specified in the policy. This period for the performance of payment is extended in order to allow insurance companies to investigate whether the matter falls within the exemption from responsibility clause, leading to the result that only the period for performance is extended. It is a common view that this period is not a legal impediment, as contemplated by Article 166 of the Civil Code (that is, that prescription will not commence if the legal obstacle exists), but rather, it is deemed a de facto impediment. On the other hand, unlike the present case, it was held in an older precedent (Former Supreme Court, February 19, 1925 ; Shinbun, Vol. 2376, p. 19) that prescription commences upon the arrival of the performance (Lapse of Extension Theory). However, this older case can be distinguished from the present case in that the claim was made before completion of the prescription. There is a great deal of support for this theory, as it considers fairness to the concerned party to be important.

There exists another theory that states that the "extinctive prescription period commences from the time when the insured (beneficiary) becomes aware of the occurrence of the event insured against" (Recognizable Time Theory—a traditional German theory, and interpreted in exceptional cases under the French Insurance Code, L. 114-1).

It is not necessarily the case that there is a relationship between the Recognizable Time Theory, the Time of Occurrence Theory and Lapse of Extension Theory. For example, in principle, in adopting the Time of Occurrence Theory, if the circumstances are such that the beneficiary could not, from an objective standpoint, possibly know of the occurrence of the insured event, then the extinctive prescription shall commence upon the beneficiary becoming aware of the occurrence. Also, to prevent the beneficiary from being disadvantaged in terms of the value judgment should the insurer postpone payment on account of the prescription, the Lapse of Extension Theory is adopted, in principle. Even in circumstances where there is no claim, such as in the present case, the extinctive prescription commences from the day on which it could have been claimed. On this interpretation, it is possible to consider it as a special circumstance that no one was aware of the death of the insured.

The significance of this judgment is that it was held that where there are "special circumstances", where no one was aware of the occurrence of the insured event, there is scope for adopting the Recognizable Time Theory. However, for reasons peculiar to this case, we should note that this judgment adopts the Recognizable Time Theory not in its entirety, but as an exception.

This then begs the question : which of these two theories was adopted by the Supreme Court—the Time of Occurrence Theory of the Lapse of Extension Theory? Unfortunately, we cannot arrive at a conclusion as this judgment was not a direct ruling on

the time of commencement of the extinctive prescription. It only held that "under special circumstances", as in this case, the extinctive prescription had not commenced to begin with.

At any rate, this is a case in which there were "special circumstances" such that the beneficiary was not only subjectively, but also objectively, unaware of the occurrence of the insured event. The Supreme Court's judgment is a conclusive statement on the many theories that separate the beneficiary's recognition or non-recognition from the viewpoint of prescription commencement, as these theories complicate the issue of subjective non-recognition.

I approve the conclusion made by this judgment.

Moreover, although this judgment arrived at its conclusion by way of introducing an interpretation of Art. 166 (1), it is also correct in its legal reasoning. With regard to the right of the beneficiary to make a claim, which posed a problem in this case, it can only realistically be expected to be exercisable after confirmation of the death of the insured. Certainly, in cases such as this where it is unclear whether the insured is alive or deceased, the beneficiary can formally exercise their right on the basis of the provision in the contract that "insurance shall be paid upon admission by the insurance company of the death of the insured, even where life or death is undetermined". However, it is doubtful that the insurance company that receives a claim will immediately pay the insurance, as in most cases, the insurance company will only go so far as filing for the adjudication of disappearance. As such, until there is an acknowledged presumption of death (Civil Code, Art. 30 (1)), which takes at least seven years, the beneficiary cannot realistically exercise their right.

I do not agree with the view that the Court should have drawn the same conclusion based on the principle of good faith and trust, to prevent the invocation of the prescription. The reasoning in this opinion is that, as the insurance company was operating on the assumption that the insured was alive, the use of the extinctive prescription by the insurance company violates the principle of good faith and trust. However, operating on the assumption of survival suggests the non-occurrence of the insured event, and therefore this implies that the company was operating on the assumption that the opportunity to for the beneficiary to exercise their right had not yet arisen. I fail to understand how this could be connected with the problem of the principle of good faith and trust when the opportunity had actually arisen, such as in this case.

Also, cases where there has been a violation of the principle of good faith and trust or an abuse of rights, such as wherein the obligor prevents the obligee from exercising their right by seeking approval for the application of the extinctive prescription (Fukuoka High Court, May 24, 2004), would imply the existence of special circumstances and would be deemed to be socially unacceptable. Therefore, given the facts of this case, it is difficult to deny the use of prescription on the basis of violation of the principle of good faith and

trust.

Finally, it is necessary to explain why the insurance company which respects trust resorted to the application of the "fair regulation" prescription in this case. Although application of the prescription is beneficial to the company, it will usually not invoke the prescription—"fair regulation". However, where there are strong suspicions of violation of the duty of disclosure, suicide, etc., the insurance company will apply the prescription from the viewpoint of the elimination of moral hazard. Thus, it is clear that in this case, the insurance company had suspected that the insured had committed suicide. Therefore, with respect to the contracts that related to the exception of suicide within one year from the conclusion of the contract (whole life insurance with special clauses of term policy—Contract (2)), as well as those clauses that related to the exception of suicide (double indemnity in both contracts), the insurance company applied extinctive prescription and refused payment.

Certainly, when a considerable length time passes after the actual death, as in this case, it becomes difficult to judge whether or not it falls under the exemption from responsibility for suicide. On this point, consideration may be had for the interests of the insurance company. However, if the insurance company is to understand the prescription system, and the importance of eliminating difficulties associated with proof, it should first reconsider the extension of the period of prescription, in that it negatively affects its own interests. As this is not the case as yet, it is unconvincing in that it lacks consistency. However, as suicide has been ruled out in this case, both the rationale and the conclusion of this judgment are correct.

(DOKI Takahiro)

A doctor was found liable based on breach of contract for the death of a patient with scirrhous gastric cancer based on his failure to conduct an appropriate examination and there was a considerable probability of survival had the examination been conducted.

(Supreme Court, January 15, 2004; Minshū Minji 213, Hanrei-jihō No. 1853, p. 85)

Keywords : medical malpractice cases, breach of contract, negligence, considerable probability of survival

[Facts]

A 30-year-old female, 'A', consulted with defendant, 'Y', a practical physician in Shiga Prefecture, on June 30, 1999, complaining of choking during meals and vomiting. On July 24, Y conducted a gastrofiberscopic examination, 'GF', on A. Although the examination was not completed due to the large amount of residual food in the patient's stomach, Y

made a diagnosis of chronic gastritis, and did not recommend re-examination.

After three months, A visited another hospital, as her symptoms had persisted. She received computer tomography of her stomach and GF together with other examinations, and was diagnosed as having scirrhous gastric cancer with bone metastasis. Although chemotherapy treatment had begun immediately, A died on February 4, 2000.

X and other members of A's immediate family filed a claim for damages against Y alleging that Y was in breach of contract for failing to appropriately conduct the examination which would have found cancer in its earlier stage, and that had this been done, A would have had a considerable probability of survival at that time.

Both the Otsu District Court (September 26, 2001, 2000 (Wa) No. 268) and the Osaka High Court (September 13, 2002, 2001 (Ne) No. 3604) rejected the claim of X et al., although acknowledgment was given to the fact that Y was at fault for neglecting to conduct a GF re-examination. The reasons for rejection were: (1) Even if X has sufficiently performed a GF examination and found the gastric cancer, A's death was inevitable, as even at that time a curative therapy was impossible; (2) Assuming that the metastasis was not diffuse at the time, and that the chemotherapy treatment had begun immediately, she may have lived longer. However, this speculation is dependent on the effectiveness of the chemotherapy. Hence, the Courts found there was no "considerable probability of survival" even if appropriately examined by Y.

X et al. appealed to the Supreme Court.

[Judgment]

The Supreme Court reversed and remanded to the lower court with directions to enter judgment accordingly.

The reasons are as follows:

(A) The decisions of the lower courts finding that there was no "considerable probability of survival" at the time of A's death were determined contrary to law.

(1) Even if causation of the patient's death and the doctor's negligence cannot be proved, the Supreme Court on September 22, 2000 (Second Minor Court, Minshū 54 (7), p. 2574) acknowledged the tort liability of a doctor, provided one can prove a "considerable probability of the patient's survival" had the doctor performed the examination appropriately.

(2) This could also be adapted to breach of contract in respect to medical contracts.

(B) As "earlier detection and earlier treatment lead to a better result" for any kind of disease, it is quite reasonable to assume a better outcome for A if her cancer had been found and treated earlier. Therefore, if A's cancer had been promptly found and had been treated earlier by Y, her chances for survival would have been considerably greater.

[Commentary]

1) Judgment of the Supreme Court on February 25, 1999 (First Minor Court, Minshū 53 (2) p. 235): Causation based on the doctor's negligence and the patient's death is determined by the fact that the negligence was the cause of the death; in other words, causation can be found when the patient's survival at the time of his/her death is proved to be highly probable had the doctor appropriately conducted his/her practice with diligence. Therefore, even if the patient's death is inevitable notwithstanding appropriate medical treatment, if there is a high probability of his/her prolonged survival, causation based on the doctor's negligence and the patient's death will be acknowledged.
2) Judgment of the Supreme Court on September 22, 2000 (Second Minor Court, Minshū 54 (7), p. 2574): Even if causation based on the doctor's negligence and the patient's death cannot be proved owing to lack of a high probability of his/her prolonged survival, the Supreme Court acknowledged the tort liability of a doctor when there was a considerable probability of the patient's survival. In this case, the doctor has the responsibility to compensate for damages caused by the preclusion of the aforementioned probability.
3) Although the judgment of the Supreme Court on September 22, 2000, is a case involving tort liability, the same logic can be applied to a breach of contract, as in this case. The problem is the degree of probability: what degree of probability is necessary to constitute "considerably probable"? As there are so few cases on this point, there are no definite criteria presently available.
4) This judgment is significant as it is a model on the issue of "considerable probability" using the logic stated in reason (B). As this may affect future judgments in medical malpractice cases, this was introduced in Hanrei-jihō No. 1853.

(NAKAGAWA Katsumi)

Case concerning a petition for the acknowledgment of a child who was born through assisted reproductive measures

(Matsuyama District Court, November 12, 2003 ; Hanrei-jihō No. 1840, p. 85)
(Takamatsu High Court, July 16, 2004 ; Hanrei-jihō No.1868 p. 69)

Keywords : Acknowledgment, Birth of a Child through In Vitro Fertilization

[Facts]

'X', the plaintiff, is a child who was conceived through in vitro fertilization using frozen sperm of his deceased father, 'A'. This case concerns a plea by the mother, 'B', to the public procurator for the acknowledgement of X in accordance with Article 787 of the

Civil Code and Articles 32 (2) and 2 (3) of the Law of Procedure in Actions Relating to Personal Status.

A married B on May 8, 1997. A, however, was soon diagnosed with leukaemia and he proceeded to undergo treatment by way of an anti cancer agent. When a bone marrow donor was found, it was decided that he would then undergo a bone marrow transplant. Such a procedure involves intensive and prolonged exposure to radiation, and A was concerned this could potentially affect his ability to reproduce. As such, he stored his sperm in a sperm bank prior to the operation.

Although the couple had been attempting AIH (Artificial Insemination using the husband's semen) since the beginning of the marriage, they had been unsuccessful. Toward the end of August 1999, they approached a doctor and expressed their desire to undergo artificial insemination using the sperm that had been frozen before the bone marrow transplant.

However, A died on September 19, 1999. After his death, B consulted with, and obtained consent from, A's parents to proceed with the artificial insemination. The frozen sperm was transferred to another hospital which could perform the fertilization procedure. B gave birth to a boy, X, on May 10, 2001. After the delivery, B submitted a notification of the birth to the city office, stating that X was the legitimate child of A and B. However, the office rejected the notification, as where the date of birth of the child exceeds 300 days from the death of the father, that child shall not be deemed to be a legitimate child.

B proceeded to register a complaint against this decision with the Family Court, which was subsequently dismissed. She immediately filed an appeal, which was also dismissed on January 29, 2002.

The notification of X's birth was accepted on May 23, 2002. Although X was entered into the family register, with A listed as the head of the family, the 'father' column remained empty. At which point, B appealed once again, and brought an action for acknowledgement.

[Matsuyama District Court Judgment]

Matsuyama District Court dismissed B's appeal on November 12, 2003, on the following grounds :

> "It must be decided not only whether legal recognition of a paternal relationship would ensure the welfare of the child, and provide harmony and order in terms of succession law, but also whether the similarities between the assisted reproductive measure used and natural reproduction would generally be well-received by society."
>
> "AIH by an agreement between the couple is a viable option for couples experiencing difficulty in conceiving through sexual intercourse. It is not substantially different from natural reproduction in terms of the development of the child.

Furthermore, from the perspective of the child's welfare, it is unlikely that any serious problems will arise as one can expect the parents will provide good upbringing and support to the child. However, the Family Court could not regard the abovementioned scenario as similar to a case where the child was conceived and born through artificial insemination using stored sperm after the donor had died. This method of artificial reproduction is quite distinct from the process of natural insemination and gestation. In light of what is socially acceptable, there is a general lack of social understanding in recognizing the deceased father as a sperm donor. As such, in these circumstances, the Family Court was hesitant in considering the deceased donor as the legal father."

"In this case, the court cannot acknowledge that the sperm's donor had agreed to the use of artificial insemination after his death."

"The plaintiff emphasized the welfare of the child. As stressed by the plaintiff, the non-existence of a legal father can certainly result in social disadvantages, and this is, by no means, an insignificant matter. Therefore, even in circumstances where the frozen sperm was used after the death of the father, it is clearly apparent that he is the biological father, and also, that there is a reasonable basis for the claim that socially recognizing this man as the father benefits the welfare of the child."

"The right of the child to know their origin, and the social disadvantages that would ensue from a blank 'father' column in the family register, ought to be seriously considered."

"However, it cannot be conclusively said that legal recognition of a father—son relationship whereby the father could not obtain custody, participate in the upbringing and support of the child, would necessarily suit the welfare of the child."

"A clear social consensus on this point has yet to emerge owing to the rapid progress of assisted reproductive technology. Rather, social consensus will only begin to emerge following expert studies and a national debate. However, reports by the Japan Society of Obstetrics and Gynaecology (JSOG) and trends in legislation, etc., indicate strong disapproval of conception and birth of a child using the frozen sperm of a deceased man. There has yet to emerge a general positive perception that would acknowledge the child as the child of the deceased sperm donor. It cannot be shown that there is a great deal of positive opinion supporting the recognition of the child as a child of the deceased sperm donor. Social understanding has yet to reach that state that it would approve such a claim for recognition."

"Difficult problems, such as the duration for which the sperm can be used after the death of the donor, and the conditions under which the child will be recognized, must be dealt with. The current three year limit for a petition for post-mortem recognition is nothing more than a technical limitation that was established to provide for early determination of a biological relationship between a father and a child. This limit was

established at a time when the scientific means to establish a biological relationship had not been developed. The problem posed is whether this three year limit is applicable in the case of assisted reproductive measures."

The plaintiff, "B", appealed the District Court ruling.

[Takamatsu High Court Judgment]

On July 17, 2004, Takamatsu High Court overturned the District Court's ruling and recognized 'X' as the child of the dead father. The court cited the following reasons for its decision :

"In assisted reproduction cases, a petition for acknowledgment requires the fulfilment of two conditions : the child and the father must be related biologically, and the father must have consented to the conception."

"In an action for acknowledgment under the Civil Code, there is a system that establishes legal parenthood by providing objective recognition to the existence of a biological relationship between the father and the child in cases where the father does not recognize children born out of wedlock. On this point, pregnancy and birth by means other than natural pregnancy were not contemplated, and hence, there is no reason why a child born through artificial insemination cannot bring an action for acknowledgment. From the same perspective, there is no reason to make it a condition that the father must be alive when the mother becomes pregnant."

"In natural pregnancies, it is recognized that the conception is based on the intention of the father. However, the court will have to permit the possibility that a legal parental relationship can also occur in cases of stored sperm. Such a situation is unsatisfactory as it imposes a serious unexpected responsibility. It is therefore appropriate to obtain the father's consent in cases of pregnancy and birth by artificial insemination."

"Although the respondent insists that there is no practical benefit that flows from allowing a child born after its father's death the right to petition for acknowledgment, it is apparent that there arises the question of a succession right when a familial relationship is established between the child and the relatives of the father. The arguments of the Legislative Council and other such bodies should not be considered as a guideline for interpretation of the action for acknowledgment under the current Civil Code as it appears that the legal relationship between a child and parent will undergo further legal development in future."

"As the wife conceived the child through in vitro fertilization using her husband's stored sperm, there is a biological relationship between the father and the child, and as the husband had consented to his wife giving birth to a child after his own death using stored sperm, this petition should be accepted."

"It is sufficient that the husband sincerely wanted his wife to become pregnant if she

so desired, even after he had died. Although the wife did not report the matter of her husband's death to the hospital that stored his sperm and to the hospital that carried out the in vitro fertilization, it appears that the hospitals did not make any inquiries. Also, there is no evidence to suggest that the wife hid the fact intentionally."

"Although the Legislative Council and other such bodies have been debating the form of consent, under the current law in force, as a condition to the acknowledgment of a child conceived after the death of the father, it is irrelevant to make a determination as to whether the father had consented or not. It is satisfactory to assume that the husband consented to his wife's pregnancy."

[Commentary]

This is the first case concerning AIH, and the High Court accepted a petition for acknowledgment of a child who was born through in vitro fertilization using the husband's frozen sperm after his death. The debate regarding the determination of the legal status of a child born through assisted reproductive measures has become more active, especially after two AID (Artificial Insemination by Donor's semen) cases appeared in 1998 (Tōkyō High Court, Sept. 16, 1998 ; Kasai-Geppō 51, 3, p. 165, Ōsaka District Court, Dec. 18, 1998 ; Kasai-Geppō 51, 9, p. 71). The possibility of having a biological child is increasing due to the progress in the development of assisted reproductive measures, even when the couple had previously given up on the prospect of giving birth to a child. In such cases, couples can achieve their dream of raising their own child both in fact, and in the legal sense. On one hand, it is very important in terms of the child's protection and upbringing that the legal relationship between a child and the parents is established from birth.

Although there is a presumption under Article 772 (1) of the Civil Code that the husband is the father of the child during the marriage, it cannot be said that, in this case, the child was conceived during the marriage as the artificial reproduction was carried out after the husband had died. The law in force does not contemplate cases where gestation is significantly different from the process of natural pregnancy. Under Article 772 (2), a child born two hundred days or more after the day on which the marriage was registered, or within three hundred days from the day the marriage was dissolved or annulled, shall be presumed to have been conceived during the marriage. In this case, however, the date of the husband's death was registered as September 19, 1999, and the date of the child's birth was May 10, 2001. As more than three hundred days had lapsed since the child was born, the above provisions were not be applicable in this case, and the child could not be presumed to have been conceived during the marriage. According to Article 787 of the Civil Code, a child can bring an action for acknowledgment within three years from the day of the father's or mother's death. In this case, although the requirement with regard to the three year limitation has been satisfied, a problem arises when considering whether a child conceived and born after the death of the sperm donor becomes the subject of the

acknowledgment. The law does not address this problem, and as such, it must be judged according to socially accepted norms. This is the first decision where an action was dismissed due to the lack of social recognition of the sperm donor as the father of a child, general deficiencies in the law, and so forth.

Judicial precedent imposes a restriction on the time period in which an action for acknowledgment after the death of a mother/father can be brought before the courts, as it is desirable to quickly determine one's personal relationships (Supreme Court, July 7, 1955 ; Min-shū 9, 9, p. 1122). In instances where the sperm of the deceased father has been frozen and stored, and then used through assisted reproductive measures, there is doubt as to whether this sperm should be used when the period in which the action can be brought has lapsed. (Following this decision, the Japan Society of Obstetrics and Gynaecology is reconsidering its policy with regard to the storage of frozen sperm.) Although it has been proposed that this restrictive provision be repealed, the possibility that the frozen sperm of the father can be used for artificial insemination after his death needs to be considered from the viewpoint of the child's welfare. The social impact on a child who is born in the context of such legal deficiencies should also be considered.

In addition to this, determining whether the father had the intention to have a child at the time is very difficult, particularly when the child was conceived after the death of the father. In this case, the major factor that encouraged the Takamatsu High Court to overturn the District Court's ruling is the fact that the dead father, A, consented to birth though in vitro fertilization using his frozen sperm, during his lifetime. However, it appears to me that the harmonization between the regulation of medical care technology and the welfare of a child born by this technology was necessary, particularly in this case. As medical technology develops, the need for fixed regulations becomes essential in order to protect human dignity. Even though the laws are inadequate at present, it is necessary to secure the welfare of the child, which is a basic principle in family law.

Moreover, the doctor from the Obstetrics and Gynaecology department of the hospital that preserved the sperm had reached an agreement with the couple that the sperm would be preserved only during the lifespan of the donor, and that the hospital reserved the right to dispose of the sperm after the death of the donor. However, in this case, the wife did not inform the hospital of her husband's death, and the hospital did not seek to confirm the husband's consent to the procedure. According to a report by a conference on assisted reproductive measures dated April 28, 2003, a policy decision was made that "the donated sperm, etc., would be disposed of when the death of the donor was confirmed". Generally, a hospital will exchange a written agreement with the client for "the destruction of donated sperm after the death of the donor". However, there is also the opinion that the use of frozen sperm after the death of the donor may be permitted on condition that the donor had consented to it during his lifetime. Nevertheless, the rules with regard to the preservation and destruction of sperm had not yet been formulated, and experts have

not yet fully debated the issue. This case highlighted the fact that a suitable consensus had not yet formed, and the preparation of a system to address such issues was still far from completion.

Originally, when an action for acknowledgment was incorporated into the Civil Code under Article 787, a father who had a blood relationship with a child was clearly recognized as the person who impregnated the mother through sexual intercourse. However, as assisted reproductive measures impact upon the concept of a father who has a blood relationship with the child, the prerequisites for acknowledgment are likely to be amended. Special legislation is expected to address problems that may arise from such medical advances. However, at the present stage, when neither medical guidelines nor legal preparations have been formulated, I believe that it was appropriate to recognize the relationship between the child and the parent as an "exception", even though the Civil Code does not contemplate pregnancy after the death of the father. In terms of the child's welfare, the recognition is necessary in order to avoid a situation wherein a child who was born through assisted reproductive measures has no father. This is also true in light of the fact that the child is growing up with the blessings of his relatives.

(SASAKI Takeshi)