

# RECHTSPRECHUNG

## Decision of the Supreme Court First Petit Bench, January 30, 2001<sup>1</sup>

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The Supreme Court ruled for the first time on the matter of whether a company could intervene in the procedure as an auxiliary participant. The Code of Civil Procedure allows an interested party to intervene in the procedure in order to assist the party. The auxiliary participant is not a party, but is a person whose right or legal status is dependent on the outcome of the ongoing litigation between the parties. An auxiliary participant is entitled to effect all procedural acts available to the parties.

There is no explicit provision as to whether auxiliary participation by the company in a shareholder's action should be allowed or not. The problem is that the company benefits by the defendants/directors losing. Why should the company side with the defendants? Lower court decisions were divided. Views of the academics were diverse as well. There is an influential view that in cases where the lawfulness of the decision of a corporate body is at issue, the company should be given an opportunity to defend the legitimacy of the decision<sup>2</sup>.

In the present case, a shareholder of a company initiated a shareholder's action *vis-à-vis* directors for breach of fiduciary duty. Directors had allegedly been either involved in, or overlooked, window dressing. The company applied for auxiliary participation, but the plaintiff objected, and the first instance court dismissed this application on the ground that auxiliary participation was allowed only when the outcome of the decision of the court on the object of litigation (*Prozessgegenstand*) affects the participant, and not the finding of the facts merely referred to in the reasons of the judgment (In a shareholder's action, the object of litigation is the claim for damages *vis-à-vis* directors; lawfulness of the decision of the board is part of the reasons which justify the decision). The court also pointed out that since the purpose of shareholder's litigation is to supervise and if necessary, rectify the enforcement of duties by directors, auxiliary participation by the company on the side of the defendant/directors may lead to the erosion of the effect of this system and may be against the purpose of this institution.

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1 <[www.courts.go.jp](http://www.courts.go.jp)>.

2 S. AOTAKE, *Jurisuto* No. 1196 (March 15, 2001), pp. 129-130.

On appeal, the second instance court also dismissed the application on the following grounds. The system of auxiliary participation is available only when the auxiliary participant benefits by the party with whom the auxiliary participant is to side, winning the case. However, in the present case, if the party with whom the auxiliary participant is to side wins the case, it is to the disadvantage of the participant. Furthermore, in the present case, there is a conflict of interests between the defendant directors and the company. If auxiliary participation is allowed in this case, it means that the company is allowed to act for the advantage of a party, which is denying the claim in favour of the company. This is against the structure of the procedure.

The Supreme Court, however, overruled the lower court decisions. The Court ruled that unless there are special circumstances, in a shareholder's action, the company should be allowed to intervene in the procedure as an auxiliary participant. This is because, if a claim for damages arising from the unlawful decision of the board of directors (not an act of abuse by an individual director) is acknowledged by the court, it may affect the legal status or interest in public law or private law relations of the company built upon this decision. The company has a legitimate interest in preventing the loss of the action by the directors. Whether the company should remain neutral or should intervene in the procedure is a business judgment. Even if auxiliary participation is allowed, it does not necessarily entail abuses, harm fair and appropriate management of procedure, or entail serious delay or complications. On the contrary, it may be expected that materials and evidence may be submitted by the company.

The present case involves a shareholder's action in which a decision of the board to approve the financial documents is at issue. If the defendants lose the case, it will affect the validity of financial documents of the company and may ultimately affect the present and future business relations of the company. There is no special circumstance where the auxiliary participation of the company should be denied.

There was a minority opinion by Justice Machida who supported the decision of the lower court<sup>3</sup>.

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3 For comments, see H. KANSAKU, *Shôji Hômu* 1592 (April 15, 2001), pp. 4-14.