78-00 P U D T
Examples of Retrial

(1) An example where an appropriateness of a request is determined based on the time of requesting a retrial (Retrial No. 1, 1962 (July 11, 1962)

When a retrial is filed before the date of making a final and binding trial/appeal decision against which an appeal was filed (hereinafter, referred to as a “trial/appeal decision”), since the request is not only filed within the inalterable period of retrial (Patent Act Article 173) but also filed against a matter that may not be subject to retrial (“not a final and binding decision” under Patent Act Article 171), a request for a retrial is dismissed by appeal decision as an unlawful request with defects that may not be amended .

2. Another example shows an interpretation of Code of Civil Procedure the proviso of Article 338(1) (Old Code of Civil Procedure proviso of Article 420(1)). According to this interpretation, even when an original court decision or an original trial/appeal decision is not finalized at the time of requesting a retrial but is finalized at the time of rendering the court decision or the trial/appeal decision, if a plaintiff or an appellant requests for a retrial without filing an action even if he/she knows the reasons for appeal before the trial/appeal decision becomes finalized, the request for retrial may not avoid dismissal as an unlawful request under the above provision (1958(Mu) 10, Judgment of the Tokyo High Court, Dec 22, 1959, Retrial No. 1, 1962, July 11, 1962).

According to the provision of the Code of Civil Procedure the proviso of Article 338(1), when a party knows the grounds for retrial but did not allege them through filing an appeal, it is apparent that an appeal may not be filed based on these grounds for retrial. In this case, it is natural to consider that among the failures to allege them by filing an appeal, they include the case

where the grounds for retrial could have been alleged through an appeal, but a party failed to file an appeal, in addition to the case where an appeal was actually filed but the grounds for retrial was not alleged in the appeal.

Such being the case, it is obvious in the light of the entire purport of the oral argument that it should be understood that the plaintiff of retrial knew each ground for retrial in the allegation at the same time of service of the original copy of the court decision, and an action was not filed by means of an appeal despite having previously found. Therefore, it should be said that it is not allowed under the above provision that the plaintiff of retrial may not request for a retrial under these same grounds.

3. Against an appeal decision that is not finalized, a suit rescinding the appeal decision is filed before the Tokyo High Court at the same time of filing a retrial. This example shows a dismissal of the request for retrial based on the same reasons as the above item 1. when the two cases are pending respectively (Retrial, No. 1, 1955).

4. This court example shows that the original court decision is illegal due to a lapse in determination regarding important matters, thus it is considered that there are grounds for retrial and then as a result of the proceedings the merits of the case, the determination of the appellate court is appropriate, and the final appeal of the case is groundless (1933 (Ya) 10).

The original court decision has found that the service of the original trial decision was December 13, 1932, from a proof of delivery, and a final appeal filed on January 13, 1933, was dismissed as illegal because the filing was made after the period has passed. According to the proof of delivery issued by the post office, it is clear that the service was made on December 14, 1932, and eventually it is obvious the final appeal of the case was filed within the statutory period. Thereby, the original court decision has the illegality due

to a lapse in determination regarding important matters. Therefore, a request for retrial has grounds.

When the merits of the case have examined whether the final appeal of the case has grounds, well-known facts may be used as court materials without any petitions of the party in a trial for confirmation and it is lawful to find the gist of the invention considering the well-known facts, and thus there is no grounds for the final appeal.

(Note) The main text of this court decision states “A request for retrial of this case shall be dismissed” under the provision of the old Code of Civil Procedure Article 428 (Code of Civil Procedure Article 348(2)). The Patent Act does not apply mutatis mutandis to the provision of the Code of Civil Procedure but most of the provisions regarding the trial/appeal procedures mutatis mutandis apply to retrials. The main text of the appeal decision should be “a request for retrial of the case is groundless” applied mutatis mutandis to a conventional appeal decision of an appeal.

5. An example of a dismissal of a complaint for retrial due to no stamp affixed (1934 (Ya) Order No. 8, Jan 29, 1935).

6. A plaintiff of retrial alleges that the case falls under the old Code of Civil Procedure Article 420 (1)(ix) (Code of Civil Procedure Article 338(1)(ix)), but it is considered that the plaintiff just criticizes the judgement of the original court decision based on the views different from the original court decision. This example shows a dismissal of a request for retrial (1956 (Ya) 12, June 10, 1958).

7. Both persons A and B jointly filed a utility model registration application and then filed a request for an appeal against the reasons for refusal of the subject application, and followed by these, only A filed an appeal and a final

appeal. The appellate court and the final appellate court both applied the old Code of Civil Procedure Article 62 (Code of Civil Procedure Article 40) for the reason that "it should be interpreted that in a suit against the appeal decision whether to rescind the appeal decision should be determined to be as a unified matter for all persons who jointly owned the rights to obtain a registration and it is required that the suit should be jointly filed by all right's holders" and the appeal was dismissed and the final appeal was rejected raised by the plaintiff respectively. Against these, however, a plaintiff of retrial alleged that there are illegal acts that the original court decision has a lapse in determination and an error of applying the interpretation of the laws and regulations. A court decision against a request for retrial is however "the statement in a complaint of the retrial does not state the previous court decision has a ground for the old Code of Civil Procedure Article 420 (Code of Civil Procedure Article 338(1)), therefore, an appeal for retrial of the case is unlawful and cannot avoid a dismissal" (1961 (Ya) 33, Oct 27, 1961).

8. Only the problem of a lapse in determination is occurred against the facts that a party alleges, thus even if the determination on matters that a party did not allege in the original determination was not made, it cannot be said there are illegal acts of lapse in determination (1939 (Ya) 133, Feb 2, 1940).

9. An example shows that a service of a duplicate of a complaint, a writ of summons for an appearance date, an original of court decision to a defendant are all invalid due to lack of requirements of a substituted service and a court decision was made without involving a defendant in the proceedings. The court decision has an external form determined after 2 weeks have passed from a date of service stated in a service report and when there is a risk that the court decision will be handled on that basis, said court decision falls

under “a final judgment that has become final and binding” (2000 (Tsu) 3, Judgment of Takamatsu High Court, Nov 27, 2000, Hanrei-Jiho No. 1759, p76).

10. Examples of Determination Whether There Are Grounds for Retrial Under Code of Civil Procedure Article 338(1)(iii)

(1) When a court decision is rendered without giving an opportunity for a defendant to be involved into the suit due to no service of a valid complaint, since there is no reasons to handle this case in a different way as the case where the authority of an agent of a party has a defect, the grounds for retrial may be accepted under Code of Civil Procedure Article 338(1)(iii) may be ((1991 (O) 589), Judgment of Supreme Court, Sept 10, 1992, Min-shu Vol. 46, No. 6, p553).

(2) Even if there is a de facto conflict of interest for the suit between a person living together having served a substituted service of a complaint, etc. and an addressee (a person living together is an obligor in a loan contract and takes the seal away without the appellant’s permission, and made a joint guarantee contract), the substituted service served to the addressee is valid but if the person living together does not actually deliver the complaint, etc. to the addressee and a court decision is rendered without the addressee knowing the institution of the suit, the grounds for retrial under Code of Civil Procedure Article 338(1)(iii) may be accepted since the addressee was not guaranteed an opportunity to be involved in the procedures of the suit ((2006 (Kyo) 39) Judgment of Supreme Court, Mar. 20, 2007, Min-shu Vol. 61, No. 2, p586).

11. An Example Holding an Interpretation of Code of Civil Procedure the Proviso of Article 338(1) and Grounds of Retrial (Article 338(1)(ix))

(2007(Gyo-ke)10407, Judgment of IP High Court, May 28, 2008, Website of the Court)

It should be understood when there are the grounds provided in the Code of Civil Procedure the proviso of Article 338(1), the request is dismissed under Patent Act Article 135 applied mutatis mutandis to Patent Act Article 174, and when the grounds for retrial provided in the Code of Civil Procedure Article 338 (1) each item are not accepted, an appeal decision to the effect that a request for retrial is groundless is rendered. It should be interpreted "The appeal to the court of second instance or the final appeal" (Code of Civil Procedure the provision of Article 338(1)) refers to "filing a suit rescinding a trial decision or a final appeal against the suit" according to Patent Act, and "lapse in determination (judgment)" refers to the case where a determination was not shown in reasons of a trial decision for matters related to allegations and evidence lawfully submitted by a party that naturally affected the conclusion of a trial decision.

12. An Example Where Documents Related to Trials Were Served to a Bankrupt of a Company in the Proceedings in Bankruptcy (Retrial 2011-950001, Nov 30, 2011)

Under Bankruptcy Act, a right to manage and dispose the properties belonging to a bankruptcy estate is exclusive to a bankruptcy trustee (Bankruptcy Act Article 78) and a bankruptcy trustee has a right to pursue a lawsuit regarding a bankruptcy estate (Bankruptcy Act Article 80), and a bankrupt loses a right to manage and dispose the property and a right to pursue a lawsuit. This case is found that the documents related to the trial were served to the bankrupt and the trial decision was rendered and finalized without giving the bankruptcy trustee an opportunity to be involved in the trial procedures. It would have to say that the final and binding trial decision of the original decision lacks a guarantee of a substantive process. Then,

there is no reasons to handle this case distinct from the case where there is a defect on an authority of representation for a person pursing an act of lawsuit as an agent of the party. Therefore, it is reasonable to interpret this case that it has a ground for retrial under the Code of Civil Procedure Article 338(1)(iii) as applied mutatis mutandis pursuant to Trademark Act Article 57(2).

(Revised Feb 2015)