Personal Actions for Remedies by Minority Shareholders in U.K., Japan and Myanmar

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Abstract

The courts in the U.K. have applied the Companies Act (CA 2006), its principles and rules integrally in settling legal disputes between the majority shareholders and minority shareholders of a company. Japan has used the Companies Act (JCA) as its main tool and considers it within the scope of the principles and rules in rendering remedies to shareholders. As for Myanmar, the Company Law (MCL) is considered to be the main tool for the courts to assess when shareholder remedies are to be settled. Initially, a dilemma was seen in the judgements of courts in the U.K. and Japan as to whether to focus on legal rights (non-financial rights, such as the right to vote and the right to participate in decision making) within the Companies Acts or to concentrate on economic rights (financial rights, such as the right to receive dividends and the right to an appraisal with proper value) adopted by the principles and rules in granting such remedies. This pendulum is worthy for Myanmar courts to explore in order to settle the rights-related cases in a company having a corporate personality.

In the U.K., the CA 2006 grants absolute shareholder remedies by way of derivative actions and unfair prejudice actions. Since a derivative action is an action filed by any shareholder on behalf of the company, it is for the benefit the company and not for the sake of shareholders individually. Therefore, an unfair prejudice action opens a right for the individual shareholders to claim remedies related to a legal or economic interest of any shareholder as a member of the company. This research focuses on the U.K. trend of considering the equitable principle of shareholders in a private or public company by using the provision of an unfair prejudice action in the CA 2006.

In Japan, the remedies for an individual shareholder can be claimed under the JCA as an action against unfairness caused to any shareholder. The problems related to such remedies take place when a company has issued new shares or other securities. Case analysis shows that Japanese courts have settled such problems according to the JCA in some cases and principles in others. Even though there are many ways to uncover the remedies, this research focuses on the provisions of the JCA. The problems were seen to be accompanied by the application of the

guidance and principles adopted under the authorisation of the respective government departments. However, some case reviews appeared to be supportive of the courts' judgements which stressed the economic right of the majority shareholders and the whole company.

For Myanmar, the MCL provides derivative actions and unfair prejudice actions in a row. These legal remedies are said to be new-born remedies in the Republic of the Union of Myanmar. Therefore, the application of the law is central for the Myanmar courts in settling the legal remedies of shareholders. Based on the problems in the U.K. and Japan, documents to clarify the legal texts in the MCL might be needed. Thus, the kind of explanatory document which is the most reasonably supported should be discussed. In accordance with the Union Judiciary law, 2010, the supreme court of Myanmar can be focused to issue procedural instructions for the law of unfair prejudice actions and derivative actions. As the court manual is considered to be a supportive document for the trial of all legal cases, the insertion of some sections in the manual will facilitate in the trial of derivative actions and unfair prejudice actions.

In these three jurisdictions, the courts have in common the relief they can give to the concerned directors, but the attributes to commit such acts by the directors are not in common. The JCA provides that directors should not be excused from liability for negligence. However, the business judgement rule prevents directors from liability for judgements in accordance with accounting business. The MCL shares a common theme with the CA 2006 to excuse directors' misconduct associated with negligence without bad faith. The U.K. did not face the problem with the excuse of liability. This research view is that the application of CA 2006 by U.K. courts is valuable to be taken as the ideal, and the element of negligence in the JCA is to be taken into account as well. In a nutshell, for this research, the experiences of the U.K. and Japanese courts are valuable for Myanmar courts in settling newly offered shareholder remedies under the MCL.

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List of Abbreviations

BOD	Board of Directors
CA 2006	Companies Act of the U.K., 2006
CPR	Civil Procedure Rule
DICA	Directorate of Investment and Company Administration
EU	European Union
FIEA	Financial Instruments and Exchange Act, 1948
FSA	Financial Service Authority
JCA	Companies Act of Japan, 2005
MCA	Myanmar Companies Act, 1914
MCL	Myanmar Company Law, 2017
METI	Ministry of Economy, Trade, and Industry of Japan
MOJ	Ministry of Justice of Japan
OECD	Organization of Economic Cooperation and Development
U.K.	United Kingdom
U.S.	United States
Ltd	Limited Liability Company
Plc	Public Company

I General Introduction

Shareholders in a company have the option to claim their remedies when conduct of the company infringes their rights, and they can recover any damages. There are three claims that shareholders can make after the board of directors (BOD) resolves to do an act and the act so resolved is wrongful to shareholders. The first channel is to propose to reconsider that action in a general meeting. The second option is to settle and negotiate under the arbitration system. The third option is to go to court and apply for legal settlements. Due to wrongdoer control of the general meeting or the non-forceful implementation of arbitrators' awards, shareholders usually consider applying to the courts for remedies. Thus, this research focuses on the legal remedies of shareholders granted by the courts under the authorisation of the company laws.

The actions which shareholders can claim under the company laws are varied. To be specific, derivative actions and unfair prejudice actions are considered to be more useable than any other legal actions against an act of a company done by the BOD. Due to the nature of the actions, only the unfair prejudice action provides a remedy to an individual shareholder. According to the literature, this type of legal provision flows from the law of other business associations. The U.K. courts have settled and rendered the remedy in accordance with the common law rule. The action has been statutorily provided in the Companies Act of the U.K and is inherited when the Act is upgraded from time to time.

The JCA has provisions on the same footing with the legal action for unfair prejudice in the U.K. The Japanese brand of the unfair prejudice action is designed to be an action based on any disadvantage to a shareholder. The Japanese courts have focussed on the unfair action of a company undertaken according to a resolution by defined shareholders or a BOD in considering whether a disadvantage to any shareholder has been committed. However, reaching the conclusion that the shareholders were legally or financially damaged based on that unfairness has not been straightforward. According to the decided cases, Japanese courts have drawn upon and considered other principles and rules collaterally with the JCA.

Similar to the English courts, Japanese courts have tended to cite the principles in some cases; but not all of the Japanese courts have referred to the principles in all analogous cases. However, the adoption of the principles by the courts from the two countries has not been in the same way. Formerly, the principles were set following the uniform application of a practice of the courts in the U.K. After that practice had been affirmed by the House of Lords, the highest executive authority of the Crown, those principles had a binding force with the Companies Act of the U.K. By now, the power to adopt such principles resorts to the Supreme Court of England. In Japan, the principles which the courts implicitly referred to were those set by the two ministries of the government department. Despite that the non-binding nature of the principles was made known, the attitude of the Japanese courts was to integrate those principles as one of the factors for the whole interest of a company in considering the legal cases.

For Myanmar, far from whether to use the principles and rules that are one of the characteristics of the common law system, the principles and rules for shareholder remedies were unknown. According to the traditional rule reflected in Myanmar legal cases, the remedies were traditionally granted by the general meeting of the corporation and by the winding up process in an extreme case. The statutory remedies are now provided in the MCL. As the law is said to preserve the common law principles, Myanmar courts will have to explore the shareholder remedies adopted under common law principles. On the other hand, the essence of the principles created by the U.K. and Japan is worthy of analysis.

Learning from the experiences of the courts in the U.K. and Japan, Myanmar requires some guidance to enforce the provisions in the MCL with regard to shareholder remedies for derivative actions and unfair prejudice actions. Therefore, the endeavours of the U.K. and Japan to upgrade shareholder remedies are worthwhile to observe. The two countries have tried to upgrade from decade to decade. Thus, in Myanmar Republic, as an emerging country, the promotion of shareholder remedies is considered to be a preventive mechanism of corporate malfunction and can institute an effective way of monitoring corporate governance.

II Research Background

Based on comments about the MCL by lawyers and executive authorities in Myanmar, the thesis analyses which parts of the law need development. As the Myanmar traditional style is to model the common law system, the ways in which the U.K. settles shareholder remedies both within the purview of the CA 2006 and the judicial procedures are explored. The ideologies of the U.K. judges in settling the individual shareholder rights actions are useful for Myanmar courts. On the other hand, a variety of the cases related to shareholder remedies have not taken place in the U.K.; such legal cases were usually brought before the courts in Japan. This trend prompts this research to explore both the U.K. and Japan in order to assist Myanmar courts in considering the cases related to shareholder remedies.

The impressive point of the U.K. with regard to shareholder remedies is the unfair prejudice action. The practices of the courts prior to enactment of the relevant statutory provision, the application of the common law principles and rules relating to this action and the kinds of remedies rendered case-by-case are considered to be valuable. Nevertheless, even in U.K. corporate society, the minority shareholders in a public company continue to struggle to be successful in claiming a remedy by this action, as discussed by HOLLINGTON QC, JOFFE QC ET AL. and others. The granting of individual shareholder remedies can mistakenly be presumed to be shareholder primacy in the extreme. As the strong point of forming a business corporation is beyond shareholder value, this trend has to be linked with the assertion forwarded by NYOMBI.

NYOMBI asserted that the corporate takeover was not beneficial to all of the corporate stakeholders and was biased on the part of shareholders; indeed, how the U.K. handled either hostile takeover issues or friendly takeover issues needs to be studied. However, caution has to be exercised, as the takeover process and the market for corporate control are not of the same genesis. They have to be understood so because takeover regimes are a takeover of all of the belongings of a company whilst the market for corporate control focuses on the abstract management only. This trend will not be consistent with the capitalism of Adam Smith and with Coarse Theorem; but it will be consistent with the theory developed by Noam Chomsky as

asserted by KARIYA HIROSATO. This process is valuable for Myanmar corporate society to observe.

With regard to the takeover issues, some Japanese companies apprehended the hostile takeover and installed its defence. As Japan is an advanced country in the corporate industry, there is no doubt that so many of the problems are associated with the investors as shareholders in this industry. Japan is considered to input Anglo-American thoughts in business deals between a company and its shareholders, and there were more problems of a different genesis than those in the U.K. Diet, the legislative organisation of Japan, discussed a proposal relating to the rights of minority shareholders as an amendment to the Companies Act; but it was not all implemented, as asserted by HIROSHI ODA.

Apart from the Diet, the Ministry of Economy, Trade and Industry (METI) and the Ministry of Justice (MOJ) issued the guidance for installing the takeover defence. Despite the non-binding nature of the guidance, the principles within that guidance impliedly guided the courts to consider the defence as necessary to preserve corporate value. The guidance tended to hinder the minority shareholders to take part in the market for corporate control. With regard to the market for corporate control, RAMSEYER pointed out that the Supreme Court and Tokyo High Court in reaching their conclusion did not recognise that the corporate or shareholder value would increase when there was a market for corporate control.

On the other hand, ICHIRO KAWAMOTO ET AL. expounded that the management team in a company in Japan was vested with strong power. Therefore, it was hard for the dissenting minority shareholders to design the control of the management system of the BOD. Based on this background, there were also many arguments relating to the equitable treatment of shareholders. Such propositions have been transposed in a Report to Congress on Japanese Capital Markets and Global Finance. However, BUCHANAN ET AL. discussed that shareholder activism was an unwelcome approach in Japan. Therefore, the research explores how to limit the aggressive behaviour of minority shareholders. This behaviour can be checked based on what was pointed out by DIGNAM & LOWRY and WHITTAKER & DEAKIN. They stated that the

Company Act as a hard law adopted the principle of communitarian or the aggregate theory of companies in Japan. In addition, there were some signs that many lawyers in Japan were worried that the interest of the whole company would be affected if the interest of an individual shareholder was favoured. Therefore, a balance between shareholder value creation and the whole of a company's interest is required. However, as shareholders in Japan have become dispersed as discussed by BRUNER, the equitable treatment of shareholders might draw the interest of those who do not possess the wealth to invest as shareholders. The equality treatment will end the worry to be the minority shareholders.

SUZAKI HIROSHI, UEMURA TATSUO and AOTAKE SHOICHI commented in a constructive way on the principle of shareholder equality provided in the JCA. Whether the reluctance to use the equality principle was an unfairness and disadvantage to shareholders depended on the circumstances of the cases. It was not a straightforward settlement. Therefore, the approach of Japanese courts to the settlement of shareholder remedy-related issues with the joint application of the principle of shareholder equality is of interest in this research.

In essence, within the community of shareholders, there are more powerful shareholders who control the affairs of a company. It is popular in a democratic world to protect the weaker group and this bears a brand in inviting investors from dispersed geographic conditions. This point pushes this research to trace the legal imposition between a company and a shareholder. The ultimate objective of this research is to gain in Myanmar a strategic way of promoting the legal remedies of individual shareholders. The other objective is to build a legal understanding of the dilemma of the economic interest of the whole company and the legal rights of shareholders individually.

III Research Structure

The research mainly tries to resolve the theoretical problems of the provisions in the MCL. In order to resolve the legal problems within the purview of the MCL, the conceptual and legal contexts from the U.K. and Japan are analysed. Hence, as the first part of the research, the nature, scope, concept and remedies of the action against unfairness to specific shareholders

in the U.K. are elaborated. In the second part, the same contexts from Japan are analysed. The questions for the U.K. and Japan are repeated questions; but the questions for Myanmar are theoretically new ones. Therefore, for the third part, the provisions related to the actions of members of a company against oppression or unfair prejudice are included. The experiences of the U.K. and Japan in settling the issues of unfairness to shareholders are also drawn upon for Myanmar in the fourth part.

In the U.K., the CA 2006 provides the unfair prejudice action. The nature of the unfair prejudice action and its distinction from a derivative action are clarified by exploring the principles and rules adopted through court case precedents. Next, the time limitation to file cases before the courts, who is responsible to pay the legal cost and the barriers to plaintiff shareholders to make a successful claim are specifically elaborated.

In the Japanese case, this research focuses on how the Japanese courts have settled the legal cases involved with shareholder remedies. Grounded on the various reviews, this research traces the questions related to the issuance of new shares or other securities. Shareholder remedies in terms of financial loss or prejudice due to management control are analysed in a broad sense. Similar to the U.K. case, the issues of time limitation to bring the suit and the legal cost are then explored.

As for Myanmar, the provisions related to the unfair prejudice action in the MCL are analysed first. Second, a critical analysis of the legal provisions related to the derivative action and the relief of any directors from any act done with negligence and without bad faith are described and analysed. To conclude the third part, the legal provisions related to the specific fields are checked with the common law principles.

As the summit of the research in the fourth part, the problems of shareholder remedies in the U.K. and Japan are comparatively analysed. The problems of the two countries are to be implicated for Myanmar in settling the issues of shareholder remedies. As the outcome of the analysis in this part, the arrangements are in place to promote shareholder remedies in

Myanmar. The first option to bring the efficiency of shareholder remedies to Myanmar is specifically framed.

IV Research Method

The comparative perspective in this research is to recognise that the problems in one country are the same as in another country. For example, the problems associated with the application of the unfair prejudice action in the U.K. are to some extent similar to the problems in Japan in which the Japanese courts have stressed the unfairness of a company under the legal provisions related to the disadvantage of shareholders. The same problems also exist for Myanmar shareholder remedies within the scope of such legal provisions. The experiences of the two countries are to be drawn to Myanmar where the legal provisions related to the unfair prejudice action in the MCL are not sufficient for settling the issues of shareholder remedies. As unfairness is a broad term and it is difficult for the statutes to define exactly what conduct amounts to unfairness, the company acts by themselves are not sufficient to provide insights into unfairness. The analysis of the cases is set to be the backbone of this research.

Many U.K. and Japanese legal scholars have pointed out the legal cases in which the problems have occurred. The legal cases from the U.K. are retrieved through the LexisNexis web portal. The Japanese cases are confirmed by the Lex Database of the university web archival. The cases from Myanmar are browsed by the web archival of Myanmar Law Library and the Supreme Court of the Union.

In addition, the legal cases have pointed out that the courts in the U.K. have referred to the common law principles and rules in a direct way. Japanese courts, in an indirect way, have referred to the principles set up by METI and MOJ and rules adopted by the courts. These principles and rules are also used as a necessary part of this research. Furthermore, reviews and previous research in the form of articles and commentaries are the paramount sources for the research and such materials are sampled when published through web archival or hard material forms. Thus, this research is based on the qualitative method.

V Research Findings

In the U.K., the issues of shareholder remedies within the scope of the unfair prejudice action, the principles adopted by the House of Lords, the consultation paper for shareholder rights published by the Law Commission in the U.K., the legal cases that create the rules, the provisions in the CA 2006 and the time limitation act are explored. From the exploration, this research determines that the U.K. corporate society has been trying to improve minority shareholder rights within the scope of the unfair prejudice action granted that it extends to that of shareholders in a public company. The concern that the economic interest of an individual shareholder would damage the economic interest of the whole public company makes it difficult to extend the shareholder remedy to that of shareholders in a public company.

Similar to the U.K. legal provisions for the unfair prejudice action, the JCA provides such action under a different title. Those legal provisions were accessible when new shares or other securities were issued and the disadvantaged shareholders claimed or filed for the remedy. The common focus of the U.K. and Japan in granting such a remedy was based on the attributes of unfairness. The U.K. courts' application of the principles and rules also extended to Japan even though the principle-making process is not identical. The overview of this research is that it was reasonable for the courts to rely on the provisions within the JCA in settling the shareholder remedy issues.

As a country with newly developed statutory shareholder remedies, what Myanmar gains from the U.K. and Japan are the procedural methods of the unfair prejudice action. Thus, Myanmar has the concept of how to hold a trial for the unfair prejudice action, and the experience of Japan prevents the abusive use of majority shareholder control in Myanmar. The legal provision in the JCA that the mismanagement of directors who were negligent is not excusable is enshrined in the Myanmar Companies Act.

Chapter 1

Action against Unfair Conduct in the U.K

Introduction

The CA 2006 provides numerous actions for shareholder remedies. There are remedies given to specific shareholders as well as remedies for all shareholders of the company. The CA 2006 opens the unfair prejudice action to provide remedies for specific shareholders in a company. It also provides the derivative action as a remedy for all shareholders in the company. The main attribute of the first action is the unfairness of the majority shareholders or of the company. For the second action, the main attribute is considered to be the infringement of director duties causing economic loss to the company.

In order to explore the first type of action, what 'unfair' and 'conduct' imply has to first be considered. For example, the CA 2006 states 'unfair' and leaves it to the courts to consider the scope of the unfairness. The term 'conduct' is not problematic. The legal cases have not born the substantial problems in defining conduct because it is an act of a company done in accordance with the resolution of a specified majority of shareholders or the BOD. Therefore, the unfairness issue is the core of this research. Originally, the unfair prejudice action was initiated under common law. Later, the action was statutorily provided in the Companies Act of the U.K.

It was not a straightforward route for the U.K. courts in settling this unfairness issue. The principle-making processes in the U.K. in order to commit an action as unfairness were quite impressive. This research mainly explores different strategies adopted within the legal framework of the U.K. Thus, the historical contexts of the unfair prejudice action in §994 of the CA 2006 are traced.

Further, whether shareholders can bring the action depends on whether the loss is specific to them or a loss to the whole company. Thus, the loss is a switch which determines if it should be settled by the unfair prejudice action or a derivative action. However, since a direct

loss to the individuals can be confused with an indirect loss for the company, the floor by which to clarify the two actions needs to be created.

In a derivative action, the concerns were who had the right to sue under the action, the extent of the ratification for acts of directors, who was responsible for funding the derivative action and the grounds for providing a remedy. Regarding the time limitation to file the suit, this research takes the view that the principles are quite well established to avoid this concern. A minor problem was that the legal aid for the litigation and legal cost were not available in the derivative claim.

In addition, the remedies given under the unfair prejudice actions are divided into two categories. First, the remedies are the general remedies granted under the consideration of the courts. Second, they are the specific remedies or the statutory remedies rendered in the legal texts of the CA 2006. Thus, in giving the shareholder remedies, the U.K. courts are not only bound by the bare Act but also by the judicial decisions. It is worthwhile to include in this research a discussion of the court settlements of the unfairness action for shareholders by considering the common law rule and limits on the discretionary power of the courts in integration with the statute.

1.1. U.K. Action against Unfair Prejudicial Conduct

Principles, statutory instruments and court precedents are the tools for the action against unfair prejudicial conduct. Before the statutory provision, the U.K. courts settled the unfairness issue according to the rule of precedent. However, even after the statutory provision was enacted, the rule of precedent could not be ignored in trials in these unfairness cases. This was a reason the House of Lords in the U.K. tried to set up the principles related to which conduct amounted to unfairness. In this way, the U.K. parliament, the House of Lords, and the Supreme Court have taken part in the U.K. law-making process.

1.1.1. Characteristics of the Action

It is generally accepted that for the absolute remedies of shareholders in the U.K., two main actions—the derivative action and the unfair prejudice action—are provided for

shareholders to make claims to the court. Not all of the jurisdictions statutorily and specifically provide these two actions even though the two actions are not homogeneous.[1] Before the statutory provision in the Companies Act, the remedy for unfair prejudicial conduct was used when the good faith relationship among partners broke down based on the U.K law of partnership.[2] At that time, there was a leading case in which the oppression remedy was granted for shareholders in a quasi-partnership company.[3] Later, the unfair prejudice action, originally specified as an oppression remedy, was statutorily provided as an alternative to the winding-up judgement. After the remedy had been provided statutorily in the CA 2006, a subsequent case[4] confirmed that the remedy was to protect the rights as shareholders but not to protect their right to income or involvement in management as an employee or director.[5] Moreover, a creditor as a loan investor could use the action to protect its investment.[6] Therefore, the unfair prejudice action can be used as a tool to protect the entire investment regime. Nevertheless, as the action was transplanted from the law of partnership, it has been hard to use in cases in which trust was unnecessary in the relation between the parties.

KAWASHIMA ET AL., (2017) expounded upon the unfair prejudice action as it was conducted under §459 of the U.K. Companies Act 1985.[7] Continuing to trace the origination of the unfair prejudice action, it was defined in §210 of the Companies Act of 1948 as a remedy for oppressive conduct.[8] The remedies within the provision were the remedies alternative to the winding up of the company if there was a possible way to grant the remedy and not to

1 Newington-Bridges, Charlie, *A Practical Guide to Unfair Prejudice Petitions and their Interaction with Derivative Claims,* 2, (2016, ST JOHN'S CHAMBERS), http://www.stjohnschambers.co.uk/dashboard /wp-content/uploads/Unfair- prejudice-petitions-and-derivative-actions.pdf.

2 HOLLINGTON QC, ROBIN, HOLLINGTON ON SHAREHOLDERS' RIGHTS, ¶¶ 7.11–7.41 (Thomson Reuters, 8th ed. 2017) (1990) .

3 CHIVERS QC, DAVID ET AL., THE LAW OF MAJORITY SHAREHOLDER POWER: USE AND ABUSE ¶¶ 1.04–1.06 (LexisNexis, 2nd ed. 2018) (2008).

4 Elder v Elder & Watson [1952] SC 49 (being overruled by subsequent cases).

5 See HOLLINGTON QC *supra* note 2, at ¶ 7.11 (referring to *Elder v Elder & Watson*, id).

6 Accord id, at ¶ 7.64 (having used the unfair prejudice action by a creditor in Gamlestaden v Baltic Partners Ltd [2007] All E.R. 164).

7 KAWASHIMA, IZUMI ET AL, *Protection of Member Against Unfair Prejudice, in* THE COMPANIES ACTS OF THE UK, 699 (Seibundo, 2017).

8 ELIZABETH J., BOROS, MINORITY SHAREHOLDERS' REMEDIES 113–118 (Clarendon Press, Oxford, 1995).

terminate the organisation.[9] As time went by and the U.K. attempted to widen the scope of that section, the Companies Act 1980 provided 'unfair prejudice' in place of 'oppressive conduct'.[10] Eventually, the legislature in the U.K. provided the unfair prejudice action in §994 in Part 30 of the CA 2006.

There are four elements in §994 of the CA 2006: conduct of the affairs of the company, interests as a shareholder, prejudice and unfairness.[11] A conduct of the affairs of the company is a present, past or continuing act or omission of the company.[12] Interests as a shareholder cover a wide scope including the interest of any person involved with business of the company. If there is lack of interests, such person cannot get *locus standi* to make the claim. The shareholder having the legal status to file the case is the shareholder who sustained the specific loss. That loss is a loss to certain shareholder(s) or investors and not a loss to all shareholders or the company as clarified by HOLLINGTON QC and JOFFE QC ET AL. (2018).[13]

Prejudice is also defined in a broad sense to cover all financial loss and damage from management control.[14] Unfairness is important; it can be defined depending on the facts of the cases while relying on the principles established in O'Neill v Phillips [1999] 1 W.L.R. 1092.[15] Hence, the judicial decisions which create the rules and finally affirm the principles are collectively the backdrop of the unfair prejudice action.

1.1.2. Occurrences of Personal Unfairness

When a company has to do something such as issue new shares or elect members of the BOD or other actions which fall outside of the authority of the BOD, such conduct has to be done according to a resolution of the specified shareholder meeting. The result of the shareholding meeting points out that there are two groups of shareholders in a company. The

9 Id.
10 Seminar, *Minority Shareholders & Unfair Prejudice* 1 (The Thames Valley Commercial Lawyers Association) (2011), http://www.radcliffechambers.com/wp-content/uploads/2015/12/Dov_Ohrenstein_-_Minority _ Shareholders.pdf.
11 HOLLINGTON QC *supra* note 2, at ¶¶7.41–7.79.
12 Id, at ¶¶7.48–7.62.
13 Id, at ¶¶7.63–7.67; JOFFE QC, VICTOR ET AL., MINORITY SHAREHOLDERS: LAW, PRACTICE, AND PROCEDURE, ¶¶6.61–6.69 (Oxford University Press, 6th ed. 2018) (2008).
14 Id, at ¶¶7.68–7.78.
15 Id, at ¶¶7.79–7.115.

shareholders who stand on the margin, that is, who do not want to vote, will be excluded from this research. The company affairs are usually conducted according to the desire of the majority shareholders. Such desire may be unfair in the sense that it negatively affected the interest of certain shareholder(s).

Based on the aforementioned background, specific shareholders as the petitioners are required to prove that they suffered financial loss or an abstract harm due to the unfair prejudice in order to claim a remedy.[16] One of the examples of unfair prejudicial conduct is that the majority shareholders divert business from the company to another company and procure that company, thereby creating a rights issue.[17] The rights plan then increasingly reduced minority shareholder's proportional shareholding. Another example is that the company has paid the director an excessive salary and caused unfair prejudice to a minority shareholder.[18] Breach of trust and exclusion of management of the company affairs by diluting share concentration were also facts for granting the unfair prejudice action.[19] JOFFE QC (2008) described ten examples of cases which were decided by the court as amounting to unfair prejudicial conduct:[20]

1. Exclusion from management/removal as director;
2. Omission to consult the petitioner or to provide information;
3. Misappropriation of corporate business or assets;
4. Mismanagement of company's business;
5. Mismanagement of the company's internal affairs;
6. Payment of excessive director's remuneration;
7. Failure to pay reasonable dividends;
8. Allotment of shares and rights issues in bad faith;
9. Failure to comply with CA 2006; and

16 Cumana Ltd*, Re* [1986] BCLC 430.
17 Id.
18 Harris v Jones, [2011] All ER (D) 94*.*
19 Id.
20 JOFFE QC ET AL. restated these examples based on the facts the court considered *in Harris*, id. VICTOR JOFFE ET AL., MINORITY SHAREHOLDERS: LAW, PRACTICE, AND PROCEDURE, ¶¶5.140–5.193 (Oxford University Press, 3rd ed. 2008).

10. Failure to follow the terms of shareholders' bargain and lack of appointed independent external valuers.

Among the aforementioned rights, there are certain exceptions which are not to be filed under the unfair prejudice action—exclusion from management of the company, failure of the petitioner to provide information and mismanagement of company's business.[21] ELIZABETH J. mentioned that the case of exclusion from management of the company was required to be settled under breach of contract. ELIZABETH J. also asserted that the action for breach of contract was a proper way in this context.[22] JOFFE QC ET AL. (2008) argued that cases claiming a remedy for unfair removal of directors and such exclusion from management were frequent among the complaints brought under §994 of CA 2006.[23] He also explained there was the extreme difficulty in seeking a remedy for exclusion from management under §994.[24] By taking into consideration the issues upon which ELIZABETH J. and JOFFE QC ET AL. (2008) elaborated, the unfair prejudice action was without doubt useful to settle the rights plans.

The infrastructure of the remedy was such that when directors mismanaged a company business and thereby increased risks to the interests of shareholders, there still were other reasons which prevented the unfair prejudice action. Two reasons —a disagreement of the petitioner with management decisions taken by the board in good faith and a shareholder acquiring shares in the company who accepted the risk due to his/her own improper management—did not amount to unfair prejudice despite that the decisions taken by those in control of the company's affairs were commercially disadvantageous.[25]

In a nutshell, the unfair prejudice action was limited in cases of enforcement of contractual rights, of statutory rights, and of the articles.[26] If a petitioner could obtain relief under the unfair prejudice remedy with respect to breach of contract, the case would amount to winding up on the just and equitable ground as decided in the case of Re A. & B.C. Chewing

21 ELIZABETH J., *supra* note 8, at 254.
22 Id.
23 JOFFE QC ET AL. (2008), *supra* note 20, at ¶ 5.144.
24 See id, at ¶¶ 5.90, 5.91.
25 JOFFE QC ET AL., (2008), *supra note*, at 20 ¶¶ 5.165, 5.166.
26 ELIZABETH J., *supra note* 8, at 221–225.

Gum Ltd [1975] 1 All ER 1017.[27] The petitions that could be resolved under the unfair prejudice action were cases such as the members complaining between each other or a member complaining of the affairs of the company or proposed conduct by or on behalf of the company.[28] However, ELIZABETH J. pointed out that where a contractual dispute was tied in with other intra-corporate disputes, the petitioner had to be allowed the enforcement of contract by means of the unfair prejudice remedy.[29]

KAWASHIMA ET AL. (2017) mentioned that most of the court orders made under §994 of CA 2006 were share purchase orders.[30] The court so ordered because it wanted flexibility in resolving the problem.[31] However, the articles of some companies may not allow share purchases by the company. In such a case, the court needs to order the alteration of the articles first. FRANCIS also pointed out that the alteration of articles was one of the remedies for unfair prejudicial conduct.[32] The subsequent procedure in case the court ordered the articles of the company to be altered in order to allow the company or shareholders to purchase shares is also provided in §999.[33] The relevant case related with the court order to purchase the shares will be analysed in section 1.3.1 of this research paper.

The unique aspect of the action is that the secretary of state can make a claim to the court under §995 for unfair prejudicial conduct by a company. The focus is on whether the secretary of state has the interest to sue or has legal standing to sue for a company case. However, the U.K. legislature will never make law without legal theory that pushes to reveal the reason. Thus, this research inputs the logical thinking of the nature of the case and points out that a finding of guilty of the unfair prejudice conduct is a conviction of offence against public nature.

27 Id, at 221.
28 Id.
29 Id.
30 KAWASHIMA ET AL. (2017), *supra note* 7, at 699.
31 Id.
32 FRANCIS, ROSE, NUTSHELLS COMPANY LAW, 60–61 (Sweet & Maxwell, 8th ed. 2012).
33 Id.

1.1.3. Broadening the Scope of Protection

There were many cases in which the minority shareholders in public companies were defeated in the courts of law in the U.K.[34] The first defeated case was *Re Blue Arrow plc*.[35] The appeal was defeated for two reasons. The first was based on the fact that the claim was personal to the petitioner and could therefore be altered by special resolution. Second, the court regarded the wider equitable consideration beyond the articles of incorporation. Based on these reasons, since the concerns of the outside investors (creditors, customers, etc.) were incorporated into the articles, the legal expectation of a minority shareholder could not be assumed. The court was in favour of the equitable principle based on the majority and business environment at large.

A pressing case in which the minority shareholder was defeated was *Re Astec (BSR) plc*.[36] In the first instance, the plaintiff minority shareholder, E Ltd, pleaded the concept of equitable constraint based on its legitimate expectation. E Ltd claimed that its legitimate expectation must be taken into consideration along with the restraint of the equitable interest of the majority shareholder, A plc. Hoffman and Neill dismissed the appeal by reasoning that there was no legitimate expectation in a publicly listed company.[37] The petitioner in this case could not successfully build a strong argument by using the equitable principle with respect to majority shareholders.

Not only were the judges in favour of the majority equitable doctrine in *Re Blue Arrow plc* and *Re Astec (BSR) plc*, but they also denied the legitimate expectation of the minority shareholders in subsequent cases.[38] In fact, the equity concept with respect to the majority is not provided in the CA 2006 within the scope of the unfair prejudice action. The concept has been built up through cases. The possibility of the application of the majority principle

34 See generally JOFFE QC ET AL. (2018), *supra* note 13, Fn311 (describing six other relevant cases in which the constraints of the equitable principle were not applied in the U.K. up to 2013).
35 [1987] BCLC 585.
36 [1998] 2 BCLC 556; see also JOFFE QC ET AL. (2018) *supra* note 13, at ¶6.131.
37 See Re Saul D. Harrison & Sons plc [1995] 1 BCLC 14 (Parker deciding that the directors who stressed the business environment at large and did not follow the articles did not mean 'unfair' and that the legitimate expectation could not be in place in a publicly listed company).
38 See JOFFE QC ET AL. (2018), *supra* note 13, at 353, n.311.

constraint and the rescue of the individual legitimate expectation has to be explored to enter into the democratic corporate governance system.

Whilst the majority principle was considered to be structured on the shareholder plutocratic idea, individuality was the basis of the shareholder democratic doctrine.[39] There has been a proposition that shareholder democracy[40] is a misbegotten metaphor.[41] Nevertheless, this research holds the view that the safeguard of shareholder democratic system pressing on the unfair prejudice action is a proper way and not that of misbegotten behaviour.

1.2. Concept of the Action

The U.K. court drew the unfair prejudice action from the law of partnership and used the concept to settle the company cases prior to the statutory provision in the Companies Act. Similarly, the derivative action was originated in the U.K. through a leading case.[42] The action is the main remedy for a shareholder whenever a director breaches the duties or other obligations owed to the company in the U.K. and commercially disadvantages the interest of the company as a whole.[43] In order to get through the court procedure and consideration, not only the legal provisions but also the procedures of the common law have to be explored.

In order to start a derivative claim, the claimants require an application for permission from the court in accordance with the CA 2006, §261(1). The CA 2006 provides for a two-step procedure in a derivative claim.[44] The first step is to consider whether a derivative claim should or should not be granted depending on the prima facie case supported by the applicants. The second is that the court has to consider whether the claim meets the conditions provided in §263(3). In order to permit the claim, the court should consider the action based on three

39 Buchholtz, Ann K. & Brown, Jill A., *Shareholder Democracy as a Misbegotten Metaphor, in* SHAREHOLDER EMPOWERMENT: A NEW ERA IN CORPORATE GOVERNANCE, 94 (Maria Goranova & Lori Verstegen Ryan, eds., Palgrave Macmillan, 2015).

40 Shareholder Democracy is considered to be the ability of shareholders to influence the corporation through their votes. ANITA INDIRA ANANDA, SHAREHOLDER-DRIVEN CORPORATE GOVERNANCE, 36 (Oxford University Press, 2020).

41 Id, at 81–96.

42 CHEN, WENJING, A COMPARATIVE STUDY OF FUNDING SHAREHOLDER LITIGATION 15 (Springer, 2017).

43 KERSHAW, DAVID, COMPANY LAW IN CONTEXT: TEXT AND MATERIAL 556 (Oxford University Press, 2009).

44 Id.

conditions—the member acting in good faith in seeking to continue the claim, promoting the success of the company and that the member could or could not pursue the claim in his/her own right rather than on behalf of the company. Moreover, there are also certain conditions which bar the court from giving permission under the CA 2006, §263(2). Therefore, §263 is said to provide all of the provisions for the court to consider as to whether or not to approve continuation of the derivative claim or dismiss the claim and thus the core statutory procedure for a derivative action.[45]

Any of the three conditions provided in §263(2) — that a person acting in accordance with §172 (duty to promote the success of the company) would not seek to continue the claim, that the act or omission has been authorised by the company or that the act or omission was authorised by the company before it occurred or has been ratified by the company since it occurred—prevents shareholders from claiming a derivative action despite the claimant or company still intending to continue the claim.[46] At the first stage of the derivative claim, if the court is satisfied that a prima facie case is disclosed by the application and supporting evidence, the court may give directions for evidence to be provided by the company and may adjourn the proceeding to obtain the evidence.[47]

If the court does not dismiss a claim at the first stage, then it continues into the second stage, the hearing process. On hearing a case, the court may still decide whether to give or refuse permission, dismiss the claim or adjourn the proceedings on the application and give directions as it thinks appropriate.[48] After the member has applied to continue a derivative claim, if other members find any defect of the claimant which causes the court dismiss the claim, then other members can apply to continue the claim relying on §264(2) of the CA 2006. In addition to the court procedure according to the legal provisions, the principles used by the

45 Armour, John et al., *The Essential Elements of Corporate Law: What is Corporate Law?* THE HARV. JOHN M. OLIN DISCUSSION PAPER SERIES (2009), http://www.law. harvard. edu/ programs/olin_center/.

46 Hannigan, Brenda, eds. et al., Commentary, *The Companies Act 2006 - A Commentary*, 82 (Lexis Nexis Butterworths, 2007).

47 CA 2006, § 261(3), https://www.legislation.gov.uk/ukpga/2006/46/contents.

48 Id, §261(4).

courts prior to the statutory provision and which were transplanted into the CA 2006 also need to be explored.

1.2.1. Legal Standing as Plaintiff

The claim for unfair prejudicial conduct can be filed by members of the company and the secretary of state. Member covers a wide scope to include anyone such as a creditor. The majority shareholders were generally excluded to be members to make the claim.[49] They were excluded based on the concept that if the majority shareholders in a private company wanted to take some action, they could generally do so by a resolution at the shareholders' meeting. However, if the majority shareholders' votes had been overridden by an act of the BOD, the majority shareholders can apply for the unfair prejudice action.[50] In a public company, conduct such as the issuance of new shares or other securities has to be done by the resolution of the BOD; thus, if the unfair prejudice action were accessible by the majority shareholders, there would be the possibility of success suing under this action.

Looking at who has legal standing to sue under a derivative action, the common law derivative action cannot be skipped. The action was established from the rules in Foss v Harbottle [1843] 2 Hare 461.[51] Because of the proper plaintiff rule set up by this case, only a handful of derivative claims were successful. However, Edwards v Halliwel [1950] 2 All ER 1064 laid down the rules to open the derivative action. If a majority of the shareholders controlled the company, and the minority shareholders were not able to claim a loss under a derivative action, the rules adopted in *Edwards* supported the bringing of the suit in the name of the company. Thus, whether the shareholders could seek redress under the derivative claim depended on the principles adopted through the legal decisions.

HOLLINGTON QC also clarified the authorisation of the derivative action[52] which was unnecessary in an unfair prejudice action. The proper body who can authorise the filing of a

49 Shareholders holding 75% of voting rights claimed a remedy under §994; but both the first instance and the appeal courts turned the petition down in *Re Legal Costs Negotiators Ltd.*, 171 [1999] 2 BCLC. JOFFE QC ET AL. (2018), *supra* note 13, at ¶6.17.
50 Parkisan v Eurofinance Group Ltd., 720 [2001] 1 BCLC; id, at ¶6.18.
51 Accord KERSHAW, *supra* note 43, at 546.
52 HOLLINGTON QC, *supra* note 2, at ¶2.14.

derivative suit is the BOD.[53] However, as pointed out by REISBERG, it would be uncommon for the BOD to pass a resolution to make a derivative claim because directors who want to sue their colleagues would be rare.[54] Therefore, the general meeting of shareholders can also give the board the instruction to file the suit.[55] The requirement that only the resolution of the board can authorise the filing of the suit does not appear in the CA 2006. This fact supposedly led DUBOIS to deduce that 'the U.K. still lacks simplicity and the need to show the *prima facie* case for permission to be granted does not make it simpler'.[56]

KERSHAW also pointed out that the provisions of statutory derivative claims under this Act overruled the common law derivative action.[57] He was right in the sense that the common law derivative action developed into the statutory derivative action. Nevertheless, the new statutory derivative proceeding still maintains the proper plaintiff rule adopted in *Foss.* This is because CA 2006 §260(1)(b) provides that a member can seek relief under the derivative claim only on behalf of the company. Moreover, §260(2)(b) provides that a derivative claim can be conducted in pursuance of the court in a proceeding for protection of members against unfair prejudicial conduct. Thus, if the loss claimed is a specific loss of certain shareholders, then the court can make an order to shift a proceeding to the unfair prejudice action.

The important factors to bring a derivative claim are that the claimant is required to be the representative member(s) and that the claim must be brought against the concerning director(s).[58] 'Another person' provided in §260(3) means a director or legal or real persons who have assisted the director in breach of the duty. This word doesn't cover 'the third parties

53 Id.

54 REISBERG, ARAD, DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE: THEORY AND OPERATION, 100-01 (Oxford University Press, 2007).

55 HOLLINGTON QC, *supra* note 2; see also MOORE, MARC T., *United Kingdom: The Scope and Dynamics of Corporate Governance Regulation, in* COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS 944–945 (Andreas M. Fleckner & Klaus J. Hopt, eds., Cambridge University Press, 2013).

56 DUBOIS, SYLVAIN, CORPORATE LITIGATION AS A DEVICE TO PROTECT MINORITY SHAREHOLDERS: FRANCE, ENGLAND AND WALES: A COMPARATIVE ANALYSIS, 31–32 (VDM Verlag Muller Aktiengesellschaft & Co. KG, 2010).

57 KERSHAW, *supra* note 43, at 551.

58 CA 2006, § 260.

unconnected to a director'.[59] In a company with a sole shareholder, such a shareholder may bring the claim against the company as well as a director.[60] Of convenience to any shareholders in U.K. companies, there is no requirement set for the duration of holding the shares, the percentage of shareholding or a voting rights ratio in order to claim remedies under either the derivative action or the unfair prejudice action.

1.2.2. Ratification and *Ultra Vires* Doctrine

In case of the unfair prejudice action, ratification of unfairness by the majority shareholders will be meaningless. It will be so because the harm does not cause loss to all shareholders.[61] The loss is that of the specific shareholders who are affected by the harm.[62] Moreover, as the unfairness attribute is a threat to the harmonious community, it is impossible to ratify it. Hence, no literature relating to the ratification problem in unfair prejudice cases has appeared. On the other hand, ratification problems have taken place and have been discussed with regard to the derivative action. Therefore, the *ultra vires* rule set out the extent to which conduct can be exonerated and which conduct goes beyond ratification.

It is necessary to start with the *Foss* Rule in examining ratification and the way in which evidence plays before the court in a derivative action. In Foss v. Harbottle,[63] a general meeting could have been called but was not called to show that the majority shareholders and the company wanted to sue or to ratify the act of Mr Harbottle and the other directors. This meant that the majority shareholders' ratification prevented the minority shareholders, Mr Foss and others, from receiving the legal standing to sue Mr Harbottle and the other directors. This principle was adopted by the then House of Lords.[64]

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59 KERSHAW *supra note* 43, at 556.
60 Id.
61 CA 2006, § 994.
62 Id.
63 [1843] 2 Hare 461.
64 History of the House of Lords, https://www.parliament.uk/business/lords/lords-history/history-of-the-lords/ (The House of Lords being the second chamber of the U.K. Parliament, and, before the Constitutional Reform Act, 2005, being responsible for the judiciary and setting up the principles with the force of law. From 2006, the Supreme Court of the U.K. took over its responsibility for the judiciary.)

Ratification of a breach of duties of directors can be obtained in a shareholders' meeting held during the adjournment period.[65] The valid ratification is required to be free from breach of the directors' duty under §172 of the CA 2006.[66] The CA 2006, in §239, provides that a resolution to ratify a director's negligence, default, breach of duty or breach of trust must be disregarded.[67] This section purports that a meeting to receive the legal standing is not so important that it can be quashed by an element of negligence and others.

However, as the CA 2006 is not exhaustive for the derivative action, there is the Practice Directive 196 – Derivative Claim. The Directive instructs that the court must send the notice containing the stages of the proceeding to the company. Thus, it can be deduced that the objection of the board of directors or shareholders' resolution ratifying the breach of the duties and other infringements is just a *prima facie* not to grant the leave. This means that other conclusive proof is still needed to bar the derivative claim.

1.2.3. Litigation Cost

Litigation cost for the unfair prejudice action will not be a problem because the cost shall be borne by the parties who made the claim if they are defeated. Since a shareholder or other member claimed the remedy under the action and it is not conducted for the company, there might be no way that the company has to pay the legal cost. On the other hand, if the secretary of state initiated the claim to the court, it might be confusing as to whether the company or the Ministry for Business, Energy and Industrial Strategy or a trade union has to be responsible to pay the cost. Nevertheless, no literature and legal cases have appeared for such cases. The legal cost problem in litigation has only appeared in derivative actions.

65 STEINFELD, ALAN, BLACKSTONE'S GUIDE TO THE COMPANIES ACT 2006, ¶14.23 (Blackstone Press, 1st ed. 2007).

66 Id.

67 This is not exhaustive for the court to consider. There are other facts, such as consideration of not acting in good faith, authorisation and ratification by the company, the company not being inclined to pursue the claim and the possibility of pursuing a claim in one's own right rather than on behalf of the company, which the court has to take into account. JOFFE QC ET AL. (2018), s*upra* note 13, at ¶¶ 2.28–2.92.

The cost-related issues for the derivative action are provided in the Civil Procedure (Amendment) Rules 2007, rr 19.9A–19.9F.[68] Even though some of the derivative cases might be brought based on the criminal concept, the litigation cost is provided in the Civil Procedure Rule (CPR). Since this concept is not material in a derivative action, the CPR amendment makes it inclusive of all matters in a derivative action. For example, a breach of duties against section 172 relating to the duty of loyalty is in fact a criminal offence.[69] However, all proceedings relating to a derivative action have been incorporated into the CPR.

According to r 19.9E of the CPR, the court has to make the cost-related order. R 19.9 E states: '[T]he court may order the company, body corporate or trade union … for costs incurred in the permission of application or in the derivative claim or both'. The rule does not instruct that the court may make an order against the claimant shareholder(s) to pay the costs incurred. Thus, the rule can solve the problem of who ultimately has to pay the litigation costs incurred in the derivative suit.[70] Conversely, there have been the exceptional legal cases in which the claimant shareholders have had to pay the costs.[71] Walton and Lewison decided this was because the majority shareholders were not in favour of filing the derivative action. What could be learned from the two cases was that even though the claimant shareholders could not overcome 'the best interests of the company' test, the court could grant the claim; and that in these cases, the interests and good faith elements would affect the cost order. However, if the plaintiff shareholders sue without bad faith and were defeated, it was not reasonable for the claimant shareholders to pay the costs of the derivative suit.[72] In addition, a claimant under the

68 DIGNAM, ALAN & LOWRY, JOHN, COMPANY LAW, ¶10.43 (Oxford University Press, 9th ed., 2016).

69 The respective scholars gave feedback on the part of the U.K. among 12 countries being asked hypothetical questions relating to the companies laws from a comparative perspective. CABRELLI, DAVID ed., *Shareholders' Rights and Litigation* in COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH 381 (Mathias Siems & David Cabrelli eds., 2nd ed. Hart Pub Ltd, 2018).

70 See also DAVIES, PAUL L. & WORTHINGTON, SARAH, GOWER PRINCIPLES OF MODERN COMPANY LAW, ¶17.27 (Thomson Reuters, 10th ed. 2016) (1954).

71 Smith v Croft (No. 2) [1988] 1 Ch 114 and Iesini v Westrip Holdings Ltd [2009] 1 BCLC 1, in which the attribute of good faith was central to be granted the indemnified costs were referred. CHIVERS QC ET AL. *supra* note 3, at ¶¶10.69, 10.70.

72 In the four cases—Moir v Wallersteiner and others (No. 2) [1975] 1 All ER 849, Halle v Trax BW Ltd [2000] BCLC 1020, Smith v Croft (No 2) [1988] Ch 114, and Stainer v Lee [2010] EWHC 1539 (Ch)—the litigation cost problem was encountered due to the defeated derivative suits. Accord DAVIES & WORTHINGTON, *supra* note 70, at ¶¶10.43–10.46.

derivative suit in the U.K. is not able to receive legal aid according to the *Wallersteiner* rule.[73] The reason is that the derivative proceedings are on behalf of a legal person, the company, and not a natural person, and thus the claimant is not entitled to legal aid in the U.K.[74] In the derivative suit, although indemnification of the cost was allowed, the contingency fee system was not applied by the U.K. courts.[75] Hence, the cost related issue was considered to be ended by the *Wallersteiner* rule.

1.2.4. Time Limitation

Neither the literature nor the cases have touched upon time limitation for the unfair prejudice action. The rationale is that the focus of the action is to protect the element of unfairness. It is an attribute which proceeds from the guilty mind of a group and makes harm to others. Thus, time cannot bar the remedy against the attribute of unfairness.

Since a derivative action has mainly been to be interactive with the duties of directors or officers, the nature of the infringement of such duties has to be analysed first. According to the general principle, the duties can be classified into duty of care and duty of loyalty.[76] Duty of good faith may stand between duty of care and duty of loyalty or it can stand alone.[77] To whom the directors owe duties[78] will be another context, even though the benefits of a company finally resort to the community at large.[79] This research will only focus on the duties owed to the company.

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73 JOFFE QC ET AL., (2018), *supra* note 13, at ¶2.149.

74 Id. (However, beyond the *Wallersteiner* rule, there might be a company which was not going bankrupt and was unable to pay the legal cost).

75 Id, at ¶¶2.112–2.149.

76 The duty to act diligently in the best interest of the corporation is the duty of care; the duties not to act in conflict of interest, transactions with related parties, and the business opportunities doctrine are the duties of loyalty. VENTORUZZO, MARCO, ET AL., COMPARATIVE CORPORATE LAW, 295 (West Academic Publishing, 2015).

77 Some Companies Acts define the duty of good faith. Id.

78 See Kershaw, David & Schuster, Edmund-Philipp, *The Purposive Transformation of Company Law* (LSE Legal Studies, Working Paper No. 4, 2019), www.lse.ac.uk/collections/law/wps/wps.htm (§170 of the CA 2006 was criticised on the basis that the directors or officers were not only to take into account the company's benefit but also to consider the benefit of the community at large).

79 The community was set to be the stakeholders, such as the employees, customers and suppliers, under the soft law rule. KEAY, ANDREW, BOARD ACCOUNTABILITY IN CORPORATE GOVERNANCE, 119–149 (Routledge, 2015).

Originally, all infringements of the duties of directors could not generally be summarised under a derivative action. Companies also filed for any fraud or fraudulent breach of trust, the recovery of trust property, contract or tort, and an account of profits arising from the breach of duties.[80] The last two infringements mentioned were limited to six years, while the first two offences had no time limitation.

In addition, the time limitation for an action against a director to recover profit or obtain equitable compensation for breach of duty was six years.[81] However, the distinction between breaching the duty of care and breaching the duty of loyalty had to be traced because the time limitation to bring the case would be different for breach of the former from breach of the latter. Since the duty of care was the foundation of negligence liability or strict liability,[82] the time limitation for the breach of duty of care is six years starting from the date when the duty was breached, according to section 2 of the Time Limitation Act, 1980.[83] Next, whether it is necessary for the court to convict the concerned director(s) through the test of strict liability is the issue that the U.K. has to consider.

Apart from breaching the duty of care, the fiduciary duty of loyalty according to the principles set before the enactment of the CA 2006 was arranged as the duty to refrain from a conflict of self-interest (the no conflict rule).[84] The no conflict rule could be diluted through the approval of the shareholders or according to the articles of association in certain circumstances. Nevertheless, the finality clause in which the rule resided was the court.[85] Therefore, under

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80 In calculating the time limitation either by the Time Limitation Act of the U.K. or the precedent rules for the profits arising from breach of duty, it cannot be rescued under §21(1)(b) of the Limitation Act; but under equitable compensation, it is to be within six years. See HOLLINGTON QC, *supra* note 2, at ¶¶ 4.133–4; DAVIES & WORTHINGTON, *supra* note 70, at ¶16.138.

81 DAVIES & WORTHINGTON, *supra* note 70, at ¶16.138 (by referring to §21 of the Time Limitation Act, 1980).

82 Negligent liability has been applied in Japan. See also KAWAMOTO, ICHIRO ET AL. CORPORATIONS AND PARTNERSHIPS IN JAPAN, ¶¶735–740 (Wolters Kluwer, 2nd ed. 2016).

83 It was likely that the concept that the breach of director duties was a criminal offence and that there was no time limitation had been changed by the Limitation Act in 1980. See also DAVIES & WORTHINGTON, *supra* note 70, at ¶16.138.

84 The principle was drawn according to the concept that a director was an agent or trustee or other persons acting as a fiduciary; but later the concept was developed so that a director is a fiduciary of a company only and is distinguished from an agent or trustee. HOLLINGTON QC, *supra* note 2, at ¶¶ 4.65–4.83.

85 There were the concerns with the ratification by the general meeting and authorisation under the articles of incorporation. See id at ¶4.72; see also North West Transportation v Beaty [1887] 12

§175 of the CA 2006, the duty to avoid conflict of interest is based on an objective test only and the right to sue applies within six years from the date the cause of action accrues, that is, the date of the infringement of duties.[86]

Conversely, the relationship between a director and the company that he or she works for is the same as the relationship between the trustee and the principal, the agents and the principal, and the other persons performing a fiduciary role.[87] Therefore, breaching the duty of loyalty has to be dealt with the doctrinal concept of a criminal offence. Infringement of the duty of loyalty has also to be drawn as fraud and abuse of power depending on the facts of the cases.[88] Therefore, for a breach of this kind of duty to fall into the unlimited period, the court requires the use of both objective and subjective tests.[89] In Allen v Gold Reefs of West Africa,[90] the duty of good faith would most likely be the general duty of directors to promote the success of the company in section 172(1) and is likely to be a subjective duty.[91] However, it is to be noted that, despite the duty in section 172(1) being a subjective duty, the objective test must be used in addition to the subjective test because the element of loss is important in a derivative action. Nevertheless, because of the inclusion of a subjective test, there needs to be no time limitation to file the suit under §172(1) of the CA 2006.

App. Cas. 589 (BOD rectified the act; however, the CA 2006 provides to reject the authorisation by the shareholders or the board of directors).

86 Accord SZELEPET, EMMA MANUEL, TOLLEY'S COMPANY LAW HANDBOOK, ¶18.24 (26th ed. LexisNexis, 2018) (2003–2004) (referring to Richmond Pharmacology v Chester Overseas Ltd [2014] EWHC 2692 (Ch), [2014] All ER (D)).

87 Id at ¶4.65.

88 It was debatable whether in the U.K. a director who was convicted with the misuse of constructive trust can be rescued by the time limitation. DAVIES & WORTHINGTON, *supra* note 70, at ¶¶16.138–16.139.

89 The objective test is used for the issues of commercial disadvantage or damages caused to the company; the subjective test is used for the intention of a director causing the company to gain the loss. See also id.

90 [1900] 1 Ch 656.

91 Following the precedent rule, the duty of good faith is a subjective duty, but, in the derivative contexts, the objective test needs to be used in addition to the subjective test to commit the breach according to the reflective loss rule. CHIVERS QC ET AL. *supra* note 3, at ¶1.37; Cf. DAVIES & WORTHINGTON, *supra* note 70, at ¶18.24.

In detail, for the duty to act within powers under §171, the duty to exercise independent judgement to the best interest of the company under section 173,[92] and the duty to exercise reasonable care, skill and diligence under section 174, the objective test needs to be applied by the court. Thus, the time limitation for these sections needs to be within six years. Furthermore, the duty not to accept benefits from third parties under sections 176 and 256 and the duty to declare interests in proposed transactions or agreements under section 177 were constructed on the equitable principles;[93] the objective test also needs to be applied by the court. Thus, these actions must be undertaken within six years from the date of the commitment.

1.2.5. Reflective Loss

If the loss is the financial loss of all of the shareholders in a company, the individual shareholder cannot claim a right other than as a representative of the company. This principle is recognised by the U.K. courts.[94] This research agrees with the prohibition to sue under the personal context without taking the other shareholders into consideration. If a shareholder is allowed to sue personally in such circumstance, the derivative action as an action for all shareholders in those jurisdictions will not be used. Therefore, the concept of shareholders claiming a reflective loss within the angle of human rights, including environmental law, [95] will be beyond this research.

On the flip side of the unfair prejudice action, it is necessary to consider a hypothetical context of a derivative action. There might be a situation in which the director(s) had infringed the duties and breached the provisions of the Companies Act but caused no damage to the company or all shareholders in terms of a commercial advantage. The no reflective loss

92 Ignoring the general principle of the delegation of power from the principal to the agents and by taking into account that the relationship between the directors and the shareholders was a particular delegation of power. See also JOFFE QC AT EL. (2018), *supra* note 13, at ¶1.45.

93 That CA 2006, § 175 is founded on the principle of morality is to be ignored. See id, at ¶¶1.54, 1.55.

94 The U.K. and other commonwealth countries have accepted the principle. See Alan K. Koh, *Reconstructing the Reflective Loss Principle*, 373–401, JOURNAL OF CORPORATE LAW STUDIES (2016.6), https://www.researchgate.net/publication/304365057_Reconstructing_the_reflective_loss_principle.

95 Korzun, Vera, Shareholder Claims for Reflective Loss: *How International Investment Law Changes Corporate Law and Governance*, UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW, vol. 40, No. 1, 2018, 189–254, https://ssrn.com/abstract=3294147.

principle[96] enshrined in the *Foss* rule has to be referred to because the statutory provisions cannot cover this circumstance.[97] It means that the shareholders cannot file a reflective derivative suit by virtue of the loss sustained by the company. Such shareholder(s) need(s) to file before the court on behalf of the company only. Even though the derivative claim in the U.K. provided in the CA 2006 superficially seemed to replace the common law derivative action, this makes sense because the statutory provisions for the claim could not cover all of the principles.[98] The damage or commercial injury sustained by the company as a whole is an ultimate measure for the court to grant leave for the derivative action. This premise is to be derived from the source of no reflective principle.

Moreover, it is not enough to use the common law principles only. In addition, one more fact to consider is that the infringement of the statutory directors' duties is, in fact, actionable; there will be no other test for the court to grant the derivative claim. However, the courts in the U.K. have still referred to analogous cases decided by the highest court.[99] The reason for this process might be that the infringements are so numerous that the CA 2006 could not foresee such various infringements in the future. Any commercial disadvantage also has to be supported in filing the lawsuit as *ex post facto* in addition to the good faith of the claimant.

The good faith related issues appeared in the changing of the articles of incorporation in Allen v Gold Reefs of West Africa Ltd. [1900] 1 CH 656.[100] The issue in this case was the good faith of the majority shareholder in amending the articles and not the good faith of the minority shareholders to make the claim. However, the good faith to make a claim under the derivative

96 The principle was established firmly by the House of Lords through various cases from Johnson v Gore Wood [2002] 2 AC 1 and Gardner v Perker [2004] 2 BCLC 554 to Garcia v Marex Financial Ltd [2018] EWCA Civ 1468). Accord HOLLINGTON QC, supra note 2, at ¶¶ 3.103–3.111.

97 Referring to the cases Johnson v. Gore Wood & Co [2002] 2 AC 1, *Gardner v. Parker* [2004] 2 BCLC 542, and Prudential Assurance Co Ltd v. Newman Industries Ltd (No. 2) [1958] Ch 204—the respective justices defined the reflective loss. Accord JOFFE QC ET AL. (2018), *supra* note 13, at ¶¶ 3.85–3.88.

98 The common law principle was still applied in Wilson v. Dodd [2012] EWHC 3727 (Ch) 98–107. This purports to mean that the common law principles have been applied even after the statutory derivative claim in the 2006 revision. See id; DAVIES & WORTHINGTON, *supra* note 70, at ¶¶17.14, 17.19.

99 For example, Mohamed and another v Egyptian Association in Great Britain Ltd [2018] EWCA Civ 879, [2018] All ER (D) 120 (Apr); Marex Financial Ltd v Sevilleja [2018] EWCA Civ 1468, [2019] QB 173, [2018] 3 WLR 1412, [2019] 1 All ER (Comm) 522, [2018] 2 BCLC 601.

100 CHIVERS QC ET AL., *supra* note 3, at ¶¶1.10–1.37.

action appeared in §263(3) of the CA 2006, and the interpretation was not a major concern. The issue of good faith in claiming the unfair prejudice action could not literally be reviewed in this research because the defendant company had not asserted that the unfair prejudice action was claimed following the bad faith of the plaintiff shareholders or others.

1.2.6. Minority Equitable Principle

The equitable treatment of shareholders between the majority group and minority group in a public company is still unsatisfied in the unfair prejudice action as discussed in section 1.1.3 of this research paper. However, equitable treatment is used in derivative actions without distinguishing between public and private companies. This research takes the view that since derivative action has been sued for the whole company including the shareholders who were opposed to suing, it is fair to make the equitable principle irrelevant in the derivative action. The only fact to be considered in the derivative action is the element of fraud.

The concept of the majority shareholders' control and fraud on the minority is that which the CA 2006 is unable to cover.[101] Since the majority shareholders have control, the legal standing to sue the director(s) on behalf of the company will never be gained. Not only was the legal standing *prima facie* to bringing the suit, the wrongdoer's control was another piece of evidence in the aftermath of the *prima facie* case that satisfied the court.[102] The definition of fraud could not be set through the rules. Whether to define the fraud as the appropriation of corporate assets or opportunities or self-benefiting negligence or whether to exclude directorial misconduct was a never-ending issue.[103]

101 Accord MOORE, *supra* note 55 , at 945 (describing that this context was covered in Cook v. Deeks [1916] 1 AC, 554, Pavlides v. Jensen [1956] Ch 565, and Daniels v. Daniels [1978] Ch 406); see HOLLINGTON QC, *supra* note 2, at ¶¶5.41–5.44 (Principle 13—Equitable of Doctrine of 'Fraud on Minority' in which the majority shareholders were abusing their powers by ratifying the breach of duty and by varying the articles of association); see JOFFE QC ET AL. (2018), *supra* note 13, at ¶2.12 (referring to Prudential v. Newman Industries Ltd (No. 2) [1982] Ch 204, 210); see also CHIVERS QC ET AL., *supra* note 3, at ¶¶10.09, 10.10.

102 MOORE, *supra* note 55.

103 Id.

As an example of fraud, in Prudential Assurance Co Ltd v Newman Industries Ltd and others (No. 2), Vinelott from the Chancery Division considered which kind of conduct was or was not fraud:[104]

> The "fraud" on the minority for the purpose of the exception lies in the directors' use of their voting power and not in the character of the act or transaction giving rise to the claim. Moreover, the exception applies not only where the directors in control are alleged to have improperly appropriated money, property or advantages belonging to the company in breach of their fiduciary duty but also where the allegation is that though the directors acted in the belief that they were doing nothing wrong, they in fact obtained some benefit as a result of their breach of duty, although the exception may not apply if all that is alleged against the directors is negligence and it is not shown that the transaction in question is one in which they were interested or that they obtained a benefit from it.
>
> The quotation was retrieved from LexisNexis.com by searching for U.K. Cases in Content Type and narrowing down by Sources to England and Wales)

If the fraud on the minority shareholder is in existence, then the claimant shareholder will be successful in the derivative suit. However, in a common law sense, if this definition were statutorily defined, it would lead to restrictions on the court that would decide the latter case. This research adopts this view since the fraud on the minority can be grounded in various aspects, thus it is hard for the statutory act to cover all of the circumstances.

1.3. Remedies under the Action

Originally, shareholders could vote for their interest or the abstract interest of the corporation.[105] That means that both of the regulations for shareholders in voting and the remedies for others when there was an abuse by the votes were absent because the business of a company had to be done by the votes of the majority. It was in the second half of the 19th century and the beginning of the 20th century that the control of the votes developed. [106] It became that the corporate society set the categories of the votes: simple, special or super special

104 [1980] 2 All ER 841, [1981] 1 Ch. 229 (John Vinelott, Sir, J. of Chancery Division gave judgment for this case); accord CHIVERS QC ET AL., *supra* note 3, at ¶¶10.05, 10.09, 10.10 (*Prudential* case followed the former case, Burland v Earle [1902] AC 83).

105 GERNER-BEUERLE & SCHILLIG, COMPARATIVE COMPANY LAW, 603 (Oxford University Press, 1st ed. 2019).

106 Id.

majority.[107] The voting system was developed into a unanimous system for some cases. This system was like a system that gives the shareholders veto power. However, all business affairs of a company are hard to be run if consent of all of the shareholders is needed. That is why the unanimous consent of all shareholders was needed only in some cases, and the consent of all was not to be required in other cases.[108]

Due to the toughness or even impossibility to establish unanimous consent, a collateral tool has to be supplied in order to open shareholder rights. At the same time, remedies for others have to be offered in case shareholders use their right of freedom to vote. They can vote for everything they want to do. No one can control them. However, if their votes harm other shareholders, those shareholders must have a right to make a claim for remedies. This requires a consideration of whether shareholders can be liable for their freedom to vote. It would not be harmonious to impose this liability in a British common law sense.[109] The reason that the U.K. could not set the responsibility to focus on purposes other than their own benefit was that the Kingdom favoured freedom to vote. Therefore, it would not be a problem where the BOD on behalf of the company did not make a commitment following the votes of shareholders. The responsibility can be changed to be that of the company. This is the foundational concept of the remedies for oppressive or unfair prejudicial conduct.

The case in which the petitioner sought a statutory remedy against the unfair conduct was the *O'Neill* case which adopted the principles as described in section 1.1.1 of this research paper. Mr O'Neill claimed that his shares should be bought back or that there should be a just and equitable winding up. The remedy which the petitioner, Mr O'Neill, sought was restored in the appeal court. However, the motion was forwarded to the then House of Lords. The unfair prejudice alleged by Mr O'Neill did not satisfy the first instance court and House of Lords as well. Lord Hoffmann considered unfair prejudicial conduct, legitimate expectations, no fault divorce and the capacity in which the prejudice was suffered.

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107 Simple majority was counted for at least 51%, special was more than 75% and super special majority was more than 75% including the votes of the controlling shareholder(s).

108 Id.

109 This concept was based on what Walton JR reasoned in Northern Counties Securities Ltd v Jackson & Steeple Ltd [1974] 2 ALL ER 625 (Ch.D). GERNER-BEUERLE & SCHILLIG, id, at 604–5.

The unfair prejudicial conduct has to be interpreted as conduct against the just and equitable concept as a ground for winding up. The rule of just and equitable has to be drawn from what the House of Lords considered in *Westbourne Galleries Ltd*, Re[110]. The principle of how to define the unfair prejudice and consider the remedy was pointed out in Lord Hoffmann's statements in the *O'Neill* case:[111]

> I do not suggest that exercising rights in breach of some promise or undertaking is the only form of conduct which will be regarded as unfair for the purposes of section 459. For example, there may be some event which puts an end to the basis upon which the parties entered into association with each other, making it unfair that one shareholder should insist upon the continuance of the association. The analogy of contractual frustration suggests itself. The unfairness may arise not from what the parties have positively agreed but from a majority using its legal powers to maintain the association in circumstances to which the minority can reasonably say it did not agree: non haec in foedera veni. It is well recognised that in such a case there would be power to wind up the company on the just and equitable ground (see *Virdi v. Abbey Leisure Ltd.* [1990] B. C. L. C. 342) and it seems to me that, in the absence of a winding up, it could equally be said to come within section 459. But this form of unfairness is also based upon established equitable principles and it does not arise in this case.
>
> O'Neill and another v Phillips and others, [1999] All ER (D) 513. Retrieved https://advance.lexis.com

The House of Lords considered whether there was unfairness in this case and whether it gave a ground to grant a remedy based on the just and equitable winding up. They considered that the unfairness was that the majority shareholder due to his or her power insisted that the minority shareholders agree which the minority could not agree. There was no such contractual frustration in this case. Hence, the House of Lords agreed with the decision of the court of first instance.

The legitimate expectations referred to in the *O'Neill* case has to be taken back from re *Saul D. Harrison & Sons Plc.* [1995] 1 BCLC 19.[112] In that case, Lord Hoffmann borrowed the term from public law and it was the expectation of an individual in which the relationship with each other existed. It was born through the correlative right within a group. Legitimate expectation in this case was 'manage or withdraw'. According to Lord Hoffmann, the correlative

110 [1970] 3 All ER 374.
111 Re, O'Neill v Phillips, [1999] 2 All ER 961, [1999] 1 WLR 1092, [1999] 2 BCLC 1.
112 Id.

right existed when equitable principles made it unfair for a party to exercise rights under the articles. He nullified the equitable restraints. He did so because the restraints should not allow the prohibition of the application of the traditional equitable principle. Lord Hoffmann described whether Mr O'Neill should be given the rights to vote and manage the company by restraint of the equitable principle. According to the articles, he had the right to vote. On the other hand, he might not have the same according to the equitable principle. His syllogism was built with the inference that Mr. O'Neill could not vote was proper according to the traditional equitable principle.

The significance of the case in which Mr O'Neill made the claim was the 'No Fault Divorce'.[113] Even if there was no unfairness of Mr Phillips, there was a breakdown of the relations between two shareholders. Since Mr O'Neill wanted and had been agreed his shares would be bought back, he likely claimed the exit right. The appeal court reversed the petition in the first instance court and granted the share purchase order. Overall, the judgement of the appeal court was that, as this research views, the unfairness in this case was not mainly at issue. It stressed other collateral facts and granted the order to buy out O'Neill's shares. Lord Hoffmann stated that the Report of the Law Commission did not show that the exit right was taken into account in the unfair prejudice action.

Looking at the last point, the capacity in which prejudice was suffered, Lord Hoffmann reasoned that O'Neill was not really a shareholder to be suffered and the exclusion of management which the first appeal court approved was directed. He did not say that breach of the contractual relation could not be considered unfairness between the company and shareholder. However, the fact that O'Neill received 25 shares as gifts from the company could not satisfy Lord Hoffmann to presume O'Neill to be a shareholder. This case pointed out that the principles of the unfair prejudice action were not adopted through clear and simplified routes.

113 'No Fault Divorce' was referred by Mr. Hollington who appeared for Mr. O'Neill; but it was refuted based on the fact that the Law Commission did not consider to plainly grant the right to exit the company without satisfaction of the unfairness under the provision of the unfair prejudice action.

The up-to-date contexts of the oppression remedy are enshrined in the CA 2006. In §994 of the Act, it opens the unfair prejudice action and §996 grants broad remedies for the action. Generally, the CA 2006 has invested power in the court to grant remedies other than those provided within these sections.[114] The statutory provisions in the U.K. have vested the courts with the power to give the remedies. From defining the terms in the sections to granting the remedies, decided cases of the highest court have to be recalled.[115] Therefore, the courts' considerations describing in which situations the courts granted which kind of remedy are considerably important.

1.3.1. Statutory Remedies

Statutory remedies mean the specific remedies provided in §996 of the CA 2006. The courts may make an order to regulate the conduct of the company,[116] halt or permit the conduct,[117] order not to change the articles of the association without leave of the court,[118] authorise civil proceedings instead[119] and authorise share purchases by the company or other members.[120] What the court could order as the general remedies for those actions were share buybacks, modification of the articles to allow the shares to be bought and winding up of the company.[121] Thus, the court's reasons for granting the statutory or specific remedies have to be studied.

114 CA 2006, §996(1); MCL, §193(a).

115 There was no case which the judges did not cite and refer to the previous case. The traditional common law cannot be maintained if the precedent rule is ignored.

116 CA 2006, §996(2)(a) & MCL, §193(a)(iii).

117 CA 2006, §996(2)(b) & MCL, §193(a)(ix)(x).

118 The CA 2006 provides that the court's order may require that the company does not make any alterations in its articles without the leave of the court, and the MCL provides that the court can also make the order that the company's existing constitution be modified or repealed; they are considered to be the same premises. The CA 2006, §996(2)(d) & MCL, §193(a)(ii).

119 CA 2006, §996(2)(c) & MCL, §193(a)(vi).

120 CA 2006, §996(2)(e) & MCL, §193(a)(v).

121 CHIU, IRIS H-Y., *Private vs Public Enforcement of Shareholder Duties, in* ENFORCING SHAREHOLDERS' DUTIES, 111, 112, (Hanne S. Birkmose & Konstantinos eds., Edward Elgar Publishing, 2019); KAWASHIMA ET AL. (2017), *supra* note 7, at 699; HOLLINGTON QC, *supra* note 2, at ¶8.12.

Regulate Conduct of Company

This remedy is rendered in §996(2)(a) of the CA 2006. In McGuinness v Bremmer Plc,[122] the court used this section to order the directors of a public company to convene an extraordinary general meeting on a specified date and to appoint accountants as independent scrutineers.[123] The court found that the delay to convene the general meeting to select and remove the director that had been requested by the petitioner who held more than one-tenth of the paid-up voting capital amounted to unfair conduct of the directors. As the financial loss of the petitioner was not a conflict and the claim was to make the order to convene the meeting, the court granted the same under the remedy of regulation of future conduct of a company.

As discussed by JOFFE QC ET AL., cases in which the courts gave the order to regulate the company's affairs were numerous.[124] The other types of conduct which the U.K. courts ordered are sorted out according to the following:

- Set out the comprehensive code for the future conduct of the company's business;[125]
- Order the petitioner or other person to be involved in management;[126]
- To distribute the dividends at the agreed rate;[127]
- To appoint the directors according to the provided schedule order;[128] and
- Order the director was no longer to be appointed.[129]

In order to estimate in which situation the courts instructed the conduct of the parties would depend on the merit of the cases. If the remedy which the petitioner sought was beyond this merit, the courts shall not order. The long existence of the company was also favoured in the case of granting one of the parties the remedy to meet his or her claim.

Amendment of the Articles

The application of the specific remedies under §996(2)(d) of the CA 2006 did not appear in the law reports. It relates to the court's order to amend the articles of the corporation in the

122 [1988] BCLC 673, 1988 SCLR 226.
123 HOLLINGTON QC, *supra* note 2, at ¶8.69.
124 JOFFE QC ET AL. (2018), *supra* note 13, at ¶¶7.21–7.26.
125 Chemtrade Limited v Fuchs Oil Middle East Limited and another; Sheikh Abdullah Ali Alhamrani v Sheikh Mohamed Ali Alhamrani and others, [2013] ECSCJ No. 62, https://www.eccourts.org/chemtrade-ltd-v-fuchs-oil-middle-east-ltd-et-al/.
126 Orr v Orr [2013] CSOH II6. JOFFE QC ET AL. (2018), *supra* note 13, at Fn54, 427.
127 Sikorski v Sikorski [2012] EWHC 1613. Id, at ¶7.122.
128 Re Neath Rugby Ltd [2009] 2 BCLC 427.
129 Football Assets v Blackpool Football Club (Properties) Ltd [2017] EWCH 2762 (Ch).

aftermath of unfair prejudice having been proven. This research asserts that there are two reasons that the U.K. courts did not give an order to change the articles. One reason might be that the petitioner did not claim for amendment of the articles because he or she could make a claim under breach of contract. Another reason might be that if the petitioner could obtain relief under the unfair prejudice remedy with respect to breach of contract, the case would amount to winding up on the just and equitable ground as described in section 1.1.2 of this research paper.[130] Given that the petitioner did not claim to amend the articles of incorporation in cases brought under §994, legal cases related to the amendment of the articles did not appear.

In addition, there is another premise by which the amendment of articles is not considered as a remedy given by the rule of precedent. The source of the unfair prejudice action is the law of partnership. A partnership firm was not established by articles; it was formed based on the informal agreement of all partners.[131] Therefore, even if the articles of the corporation were accepted as a contract among persons organised within a company, the logic of the order to change the articles of the company could not be sought.

In a case[132] which appeared in the British Virgin Islands, the remedy to change the articles was claimed under Section 184I of the BVI Business Companies Act, 2004. The court of first instance, the Commercial Court, did not give the order that the defendant had to purchase the petitioner's shares or wind up the company after satisfaction of unfair prejudice. The court ordered the articles to be changed based on the fact that the petitioner was unfairly excluded from management of company affairs and did not get a chance to attend the meeting because of the provisions in the articles of the company. Therefore, the appeal was filed to set aside the order of the court to change the articles. In this case, however, the court did not stress the exit right which was not what the petitioner claimed. The court in its own judgement made both

130 A. & B.C. Chewing Gum Ltd [1975] 1 All ER 1017. ELIZABETH J., *supra* note 8, at 221.
131 See Department for Business, Innovation & Skill, A Guide to Legal Form for Business, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31676/111399-guide-legal-forms-for-business.pdf.
132 *Chemtrade Limited*, *supra* note 125.

parties able to attend the board meeting. Nevertheless, if the foundation of the unfair prejudice action was stressed, the appeal in this case was proper to be filed.

Share Purchase

A purchase order was the remedy primarily given by the court; however, there was a conflicted point for the court to consider.[133] The problem of the unfair prejudice action under §§994–6 was that the courts could not grant the interim or final order unless and until the courts were satisfied that the conduct was unfair and prejudicial.[134] It made sense that injunctive relief was better to be granted before the unfairness had yet been satisfied.[135] Nevertheless, there were cases in which the purchase order could conclusively be granted where the petitioner and the defendant agreed on purchasing the shares with the price set by the independent valuer.[136] In other cases, the parties compromised for share purchase with the share price set by the court.[137]

In order to confirm in which situation the courts made the purchase order, Sunrise Radio Ltd, Re; Kohli v Li[138] is analysed. This case was selected because the causes of the action in the cases were related to the issuance of new shares, the shareholding dilution problem, issuing at the book price and giving the minority shareholder misleading information about the shareholder meeting. The petitioner filed the suit that he was oppressed under §994 of the CA 2006 and claimed for a purchase order with the undiscounted price. Ms Kohli, the petitioner, claimed to the court against Dr. Lit and other directors jointly with Sunrise Radio Ltd (*Sunrise*). The original shareholders of *Sunrise* were Ms Kohli and Dr Lit. After the issuance of

133 The reason the court did not have power to make the interim order was because CPR rr.25.6–7 provides that the interim order cannot be granted before the satisfaction of the commitment. HOLLINGTON QC, *supra* note 2 , at ¶¶8.01–8.07

134 As the purchase order was the interim order, it would be complicated for the court to render the final order because the courts did not have jurisdiction to set the share price and who had to purchase the shares concerned. Id.

135 Id.

136 Caldero Trading Ltd v Beppler & Jacobson Ltd [2013] EWHC 2191 (Ch); Re *Clearsprings (Management) Ltd* [2003] EWHC 2516 (Ch). Id.

137 Re *Bird Precision Bellows Ltd* [1986] Ch. 658 CA (Civ Div); Tomlin v Standard Telephones & Cables Ltd [1969] 1 W.L.R 1378 CA (Civ Div); Millar v Battlebridge Group [2008] EWHC 265 (Ch). Id.

138 [2009] EWHC 2893 (Ch).

new shares, ABC Ltd, owned by Dr Lit, became the shareholder with the largest shareholding and Ms Kohli's shareholding was diluted from 15% to 8.33%.

The court, in determining which remedy to grant, first considered the winding up process. The court considered this because of the breach of trust and the infringement of director duties which happened in *Sunrise*. Nevertheless, taking into consideration that there was another remedy other than the winding up process and the petitioner did not claim the winding up order, the remedy of winding up the company was not granted. Since the claim had been that Ms Kohli's shares were to be bought back and the court had been satisfied that she was unfairly prejudiced by the conduct of Dr Lit, the court granted the purchase relief.

The focus of the case in this research was that the petitioner, Ms Kohli, could satisfy the court that she was excluded in order to receive the pre-emption right to which she was entitled under the CA 2006. However, the fact that she did not claim the invalidation of the new share issuance came to be an impressive point. It may be that she did not want to halt the authorised capital increase and her trust as a shareholder in that company could no longer be restored. Therefore, the consequence of issuing new shares appeared that the minority shareholder claimed the exit right because of the attribute of unfairness. That was why the target to increase the cash flow of the company could not be fully gained without the compromise of the other shareholders.

It is to be noted that those who were ordered to buy the concerned shares were normally the majority shareholders. Nevertheless, there were the exceptional circumstances in which the majority shareholders received the right to be bought out.[139] In Boughtwood v Oak Investment Partners XII, Limited Partnership,[140] the parties made cross-claims against each other and Boughtwood admitted his unfair conduct. The parties were shareholders of QED Company. The unique aspect of this case was that they complained against each other and the petitioner did not claim through the company; he directly sought the relief against the other shareholders. They agreed that any one of them was to be bought out. Even though Boughtwood was a major

139 DIGNAM & LOWRY, *supra* note 68, at ¶11.69.
140 [2010] EWCA Civ 23, [2010] 2 BCLC 459, [2010] All ER (D) 188 (Jan).

shareholder, as his unfairness was admitted, he was ordered that his shares be bought back by the minority shareholders. This court procedure has to be *obitor* because the court agreed the majority and minority shareholders to make the claims against each other under §994 of the CA 2006. The reverse claim might appear that the opposite party caught the weakness of the law and made a cross-claim without good faith. Optimistically, the U.K. court did not want to presume the allegations without trial and without beyond a reasonable doubt.

Shift to other Proceeding

As described in section 1.2.1 of this research paper, the court in its consideration can shift the derivative proceeding to be conducted under the unfair prejudice proceeding. With the same situation, the court can change the proceeding of an unfair prejudice action into a derivative action according to §996(2)(c) of the CA 2006. This procedure was proposed by the Jenkins Committee for the minority shareholder to be able to make the derivative claim without having the status to claim.[141] The advantages and disadvantages of this procedure were pointed out by HOLLINGTON QC and JOFFFE QC ET AL. (2018). The latter persons described the advantages and the former person revealed its disadvantages. The advantages are that the order to shift to the derivative proceeding can escape from the proper plaintiff rule adopted by *Foss*.[142] Another advantage was that if the order to transfer was made the petitioner did not have to prove the good faith element.[143]

The courts changed the proceeding not only by the statute but also by the remedy established by the precedent rule. However, HOLLINGTON QC pointed out that this order was specifically for the case in which the directors infringed their duties.[144] As shifting the proceeding to the derivative proceeding was not what the petitioner had claimed, the court considered that there were other options, such as claiming damages under tort law. Other problems, such as the legal cost and distribution of damages, would have occurred. Therefore, this fact prompted HOLLINGTON QC to comment that claiming for injunctive relief might be

141 JOFFE QC ET AL. (2018), *supra* note 13, at ¶7.28.
142 Id.
143 Iesini v Westrip Holdings Ltd, [2009] EWHC 2526 (Ch), [2011] 1 BCLC 498, [2010] All ER (D) 108 (Jul). Id, at ¶7.29.
144 HOLLINGTON QC, *supra* note 2, at ¶8.64.

better.[145] Injunctive relief may be granted against various types of conduct. As an injunction is one of the interim orders, the court is cautious in granting it before it has been satisfied that the alleged conduct was the unfair prejudice manner.

Restrict Articles Amendment

With regard to the specific order for the company not to make any, or any specified, alterations in its articles without the leave of the court provided in §996(2)(c) of the CA 2006, no literature relating to the section has yet been found. Neither has a case report regarding the section yet been found. In all of the cases related with the unfair prejudice action, the petitioners did not claim for restriction to alter the articles. The situation is reasonable because the affairs of the companies are to be done by the ordinary resolution[146] in some cases and the special resolution[147] in other cases. For alteration of the articles of the corporation, it can be done by special resolution.[148] Even if majority shareholders abused the power and changed the articles, the petition might not be to restrict changing the articles. The petitioners might claim other remedies such as an order for winding up or a share purchase.

Injunctive Relief

In Re *a company*,[149] based on the share allocated rights issue, the court granted the relief sought by the petitioner. The petitioner was a member and used to be a director of the defendant company. He was removed from the BOD by the shareholders' vote. Thus, he claimed that he was unfairly prejudiced and was entitled to relief or an order for a just and equitable winding up. While he had made the claim, the respondent company convened an extraordinary general meeting to increase its capital. The meeting also conferred upon the directors the right to allot the newly issued shares. However, the injunction relief was granted. Although the share price was set at a proper value and the petitioner had got the share allocation rights, the court granted the injunctive relief rather than the just and equitable winding up order:

145 Id, at ¶8.66.
146 For example, CA 2006, §168 (The ordinary resolution is required to remove the directors).
147 For example, id, §626(2) (The special resolution is required for reduction of the capital).
148 Id, at §21.
149 [1985] BCLC 80; DIGNMA & LOWRY, *supra* note 68, at ¶11.65.

> Such an allotment could be unfairly prejudicial where, for example, (i) it was known that the objecting member could not afford to take up the offer and this had been a reason for making the offer, or (ii) the objecting member was engaged in litigation against the majority shareholders and the offer was designed to deplete his resources available to finance the litigation. Accordingly, as there was an arguable case that the proposal to make a pro rata rights issue could be unfairly prejudicial to the interests of L, and as it was desirable in the case of a petition under s 75 of the Companies Act 1980 that the status quo should be preserved except where change was absolutely essential, the injunction sought would be granted.
>
> Re a company, [1985] BCLC 80 (The case was reported in BCLC and available through [1985] Lexis Citation 1366.

In that case, the company did not join the appeal. The two directors set the motion. Even though the petitioner could receive the *pro rata* basis share allotments, he was unable to take it because he had invested his effort in the petition to the court of first instance at that time. Dilution would happen to all shareholders except that there would not be the compromise between the new subscribers. The court might inquire such fact and consider that even if he had taken the subscription rights, his shareholding would still be diluted. This might be the focus of the court to presume such manner was an oppressed manner.

1.3.2. Remedies by Court Consideration

In one of the cases, the companies as the petitioner shareholders did not claim the purchase order. They sought to claim a relief which the court thought fit. This case was Destiny Investments (1993) Ltd and another v TH Holdings Ltd (formerly Tonstate (Hotels) Ltd) and others; TH Holdings Ltd (formerly Tonstate (Hotels) Ltd) and another v Destiny Investments (1993) Ltd and another.[150] The claim for unfairness was brought with the reverse claim and the two proceedings constituted as a suit. The two claims were: 1. the equity shareholder loans are repaid with interest; and 2. that their shares are bought at a value and on terms to be determined or other relief. The second claim was compromised.

The cause of the action was that of a concern with issuance of new shares to dilute shareholdings and control the management to merge three hotels in England and Wales. After the court was satisfied with the unfair prejudicial conduct, it considered which remedy was

150 [2017] EWHC 657 (Ch), [2017] All ER (D) 10.

proper to grant. The case was considered to be unique because the parties claimed the relief against each other. The reverse claim was for the share purchase with interest and the first proceeding of the suit was just a claim to receive any relief which the court considered suitable. This fact could be understandable that the court could investigate the exit rights of both parties. The right was given to the party who was unfairly prejudiced. Because of the reversed claim, this case confirmed that in an unfair prejudice action, the good faith of the petitioner to make a claim was immaterial.

As the unfair prejudice against the petitioner in the first proceeding satisfied the court, it gave the petitioner in the first proceeding the exit right. That was why the first petitioner got the relief that her shares should be bought by the defendant company at the fair price. The petitioner in this case did not claim the extinguishment of shares or damages; they were likely to claim the exit rights against each other. However, the significance of this case was that the parties sought the relief against each other as the two proceedings in a single suit. It was likely that the petitioner in the second proceeding looked at the exit right rather than that to be unfairly prejudiced.

1.3.2.1. Equitable Relief for Shareholder in Private Company

Equitable relief for compensation was a remedy under the consideration of the courts.[151] This remedy has become popular during the 21st century.[152] The relief was also granted depending on the claim of petitioner.[153] In one of the cases, Profinance Trust SA v Gladstone,[154] the minority shareholder petitioner could receive compensation for the diminution in the value of his shares. The relief sought by the petitioner met with the relief granted by the appeal court. In that case, the court of first instance made the order that the defendant majority shareholder had to buy the petitioner minority shareholders' 40% shares. However, the relief sought was to receive equitable compensation based on the valuation set for the issued shares. The order was

151 The CA 2006, §996 does not provide the relief for equitable compensation. The court granted according to the precedent rule and its consideration.

152 The order to grant equitable compensation was given following the precedent rules. Thus, the court required not to award that compensation to every claimant but to a particular one only. JOFFE QC ET AL. (2018) *supra* note 13, at ¶¶ 7.32–7.36, 430–31, n.74–85.

153 HOLLINGTON QC, *supra* note 2, at ¶8.63.

154 [2001] All ER (D) 08. Id.

appealed. The appeal court found the new evidence in proving the toughness to receive the approval from the petitioner to fix the share price by five times. Therefore, it mainly considered the attempt of the majority shareholder to set the price of the newly issued shares. The attempts constituted the prejudice and this prejudice was an unfair manner. The appeal court granted the equity compensation equal to the loss to the petitioner minority shareholder based on this investigation.

1.3.2.2. Just and Equitable Winding Up

Winding up the company under the unfair prejudice was a later developed stage of granting a remedy.[155] As the winding up order was likely to kill the goose that might lay the golden eggs, it had to be restricted.[156] Therefore, when there were other remedies, the winding up order was not granted. It had a link with §122(1)(g) of the Insolvency Act 1986. In Ebrahimi v Westbourne Galleries Ltd [1973] A.C. 360, the development process was found.[157] Ebrahimi claimed her shares to be bought by the company or, as an alternative, a just and equitable winding up. At the court of first instance, the oppressive conduct that she alleged did not satisfy the court to grant a remedy under §222(f) of the CA 1948. Therefore, Ebrahimi appealed to the House of Lords. The consideration of House of Lords to grant the remedy for winding up was not based on the oppressive conduct. The House of Lords took a reason of non-distribution of the dividends, exclusion from participation and breakdown of the relationship among members. Therefore, this case showed that the courts used wider discretion in order to consider the remedies given under oppressive conduct in the CA 1948. This might be a reason why the CA 1985 upgraded as the unfair prejudice and the Civil Procedure Rules 1998 provide that the court is not to grant an interlocutory order unless and until the unfairness is satisfied.

Conclusion

Within the three contexts—characteristics, concept and remedies—of the unfair prejudice action, there are points in which the U.K. meets the goal and points that it has not yet

155 DAVIES & WORTHINGTON, *supra* note 70, at ¶20.21.
156 Restriction is not to be meant as prohibition. Id.
157 The winding up order was granted in *Ebrahimi*. This case drove the scope of oppression remedy to wider coverage than the unfair and prejudicial conduct remedy.

met. What can be said is that the U.K. has met the goal, firstly, in clarification of the derivative and unfair prejudice action either by the CA 2006 or the rules. Further, that the U.K. courts could meet the target in setting up the rules relating to proper plaintiff, *ultra vires*, litigation cost and time limitation to claim the remedies. The ultimate betterment of the CA 2006 is that its provisions are not so confusing and that it meets with the object of the revision in 2006 to 'think the small first'.

Within the corporate society, there appeared the imperfection with the source to give the legal standing to make a derivative claim. For example, whether a resolution of the BOD or a shareholder meeting can give consent to make a derivative claim was not simply enough even though the conclusive proof was the court's consideration. For the unfair prejudice action, the struggles of the U.K. courts were hard to define the unfairness. Thus, the unfairness could not be decided without referring to the principles.

The main problem that can be identified is that the U.K. courts require to revisit the remedies for shareholders in a public company. The remedies for shareholders in a private company have met with the claim, however. This fact draws this research to compare the nature of a company. The U.K. does indeed take the path of distinguishing between public and private companies and makes this irrelevant to the nature of a corporation. Therefore, there is an uncertainty as to whether the U.K. courts have left the economic interest of the public in the hands of the administrative department of the government. With regard to that concept, this research stands with that the courts of law require to be vested with the jurisdiction to solve the economic interest of the public. If this fact can be the consensus of the judiciary and executives of the U.K., it will be the end of the activism of shareholders for unfair prejudice action.

Chapter 2

Shareholder Action in Japan

Introduction

The Japanese way of action against unfairness was provided in the former commercial code and then in the JCA. The JCA offers shareholder remedies by way of the actions against unfairness or the shareholder representative action. With regard to the first action, it is provided in Art.109, Art.240 and Art.247 of the JCA. The courts focused on the legal right provided in the JCA first. Then they considered the economic right of shareholders or corporate value theory adopted under the principles.

The problems regarding Japanese shareholder remedies appeared after companies issued new shares and allocated the rights to acquire them. Some shareholders complained of the new share issuance. Others did not do so and claimed the allocation rights. Thus, several shareholders brought the cases before the courts and claimed the new share issuance should be suspended, invalidated or non-existent. With regard to the share allocation rights, what shareholders claimed before the courts were to be granted either the shares or damages.

The courts in Japan substantially applied the Commercial Code before the enactment of the JCA. Later, they used the Act and the principles adopted by the Ministry of Economy, Trade and Industry (METI) and the Ministry of Justice (MOJ) to settle these shareholder remedies.[158] The principles are indeed reasonable to be used for the sake of a company's interests. However, a more problematic principle which the court referred to was the business judgement principle. Therefore, this research is to take a stand against the courts regarding whether to stress the legal right of shareholders granted under the JCA or whether to focus on the economic right of shareholders adopted within the purview of the principles.

158 Although the courts did not cite the principles in the guidance directly, the reasons given to justify the act of the respective parties were based on any of the three principles—protecting and enhancing corporate value and shareholders' common interests, prior disclosure and shareholders' will and ensuring the necessity and reasonableness—adopted in the guidance. METI & MOJ , GUIDELINES REGARDING TAKEOVER DEFENSE FOR THE PURPOSES OF PROTECTION AND ENHANCEMENT OF CORPORATE VALUE AND SHAREHOLDERS' COMMON INTERESTS, 3-4, https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/shishin_hontai.pdf.

Based on the aforementioned ideology, courts in Japan have received different views from lawyers in settling the legal disputes involved with the issuance and allocation of new shares or other securities. In order to be confirmed, the main contexts which the courts stressed to be unfair provided under the JCA are analysed in this research. Further, legal cases relating to suspension of the new share issuance and the conceptual relation between invalidation and non-existence of the share issuance are analysed. Similarly, the distinction between the action against unfairness and the derivative action is also explored. In addition, through the analysis of the cases, it shows that the concerns were the admittance of direct or indirect loss, the resolution of shareholder meeting and of the BOD and the time limitation. Finally, the preventative effect of granting damages to shareholders regarding share allocation rights with a favourable price is also to be analysed.

2.1. Action against Unfair New Share or others Issuance in Japan

In Japan, the problems of unfairness of a company followed the new share issuance and its acquisition rights. The petitions involved in such cases were dealt with under Arts. 109, 210 and 247 of the JCA. Japanese scholars also had different views on the application of Art. 109 in which the principle of shareholder equality is provided. Court considerations and scholarly views on Art. 210 and Art. 247, which were the main legal contexts for disadvantage and unfair manner, are also of interest in this research. The concept of imputation of a tort law nature related to the accountability to pay damages to the party that sustained the loss is also impressive.

2.1.1. Shareholder Equality Treatment

The JCA in Art. 109 provides: A Stock Company shall treat its shareholders equally in accordance with the features and number of the shares they hold.[159] As Japan is one of the

159 The original provision is in Japanese and the translated document is available through the website run by the Ministry of Justice. The translation is kept with a disclaimer. It can be accessed from www.japaneselawtranslation.go.jp/law/detail/?Ft=2&re=02&dn=1&yo=companies+act&x=0&y=0&ia=03&ja=04&ph=&ky=&page=1

members of the OECD, the principles adopted by the OECD are of importance.[160] Among those principles, the principle relating to shareholder equality is set in principle No.3. This principle focuses on the equitable treatment of all shareholders, including minority and foreign shareholders, to have the opportunity to obtain effective redress for violation of their rights. However, as the principles of the OECD were synchronised with the Corporate Governance Code of Japan and Stewardship Code as the soft laws,[161] the OECD principles cannot be regarded as an overlap application by transplant into the Companies Act. Moreover, the JCA is not to be said dependent on the German style or Anglo-American style; it has its own uniqueness.[162] Therefore, this research paper relies on the textual interpretation.

The Japanese courts have applied this principle depending on the circumstances of the case in a similar way to the application of fair, just and equitable in British judicial settlements.[163] The court in *Bulldog Sauce* interpreted shareholder equality as treating shareholders proportionally in accordance with their share ownership. The allocation of shares was also to be done depending on the qualification of shareholders to own the shares. The interpretation would put forward that the rights of shareholders would depend on their economic investment. This fact prompts shareholders to think that Art. 109 emphasises only the economic right. Therefore, there is a need to explore the JCA to realise its protection for both the legal and economic rights.

160 It is reasonable because OECD principles were originally adopted in 2004 and the Companies Act of Japan was passed in 2005. OECD, OECD Principles of Corporate Governance, http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf.

161 KANDA, MASATO, Corporate Governance for Growth: Japan's Initiative along with OECD, OECD Asian Roundtable on Corporate Governance 2015 October 29, Bangkok, Thailand, https://www.fsa.go.jp/common/conference/danwa/20151029.pdf.

162 See also KANDA, HIDEKI, *What Shapes Corporate Law in Japan?, in* TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA, 61 (HIDEKI KANDA eds. et al., Routledge, 2008) (Even if it is generally accepted that the concepts in the JCA are of the American, the research has hardly assented to it; however, this does not mean that the courts also have used distinguished reasons).

163 UEMURA, TATSUO, *Sōsoku* in KAISHA-HŌ KONMENTARU: KABUSHIKI [1], vol. 3, 141 (Shōjihōmu, 2013).

The legal (non-financial) and economic (financial) rights in this research article are conceptually the same as subjective and objective rights.[164] The infringement of the right granted under the subjective element is considered to be dependent on the good faith of the parties involved, while the infringement of economic rights is tested objectively by the loss in economic interest of the parties. Thus, depending on the merit of the case, the court does not require the exclusion of the subjective element which is the non-financial rights behind this Art. 109.

2.1.2. Action for Disadvantage of Shareholders

One of the provisions in the JAC with partial similarity to the unfair prejudice action in the CA 2006 is found in Art. 210 of the JCA. This Article provides that the shareholders may demand that share issuance or disposition of treasury shares cease if they are likely to suffer any disadvantage and such issuance or disposition is effected by an extremely unfair method. If the share issuance or disposition of the treasury shares violates the applicable laws and regulations or the articles of incorporation, they can do the same. Frequent questions have been in regard to which conduct amounted to the disadvantage to shareholders and thus could be considered as unfairness. The disadvantage meant any impact on the opposed shareholders' share value and shareholding ratio.[165]

The other provision which includes the elements of disadvantage and unfairness is Art. 247. The article provides that if share option issuance violates the applicable laws and regulations or the articles of incorporation and shareholders are likely to suffer any disadvantage, they can demand that it be discontinued. Moreover, if the issuance is effected by using an extremely unfair method, they can also apply for suspension of the issuance. This article analyses the contexts of allocation of the options with free of charge, favourable price,

164 Whether to use both the subjective and objective tests or to use only a single test and commit any party will be the discretion of the court dependent on the merit of the case; however, in the *Bulldog Sauce* Case, it was reasonable to use the subjective test because the conflict between the two parties involved the legal rights of both parties. CHIVERS QC ET AL., *supra* note 3, at ¶¶1.17, 1.18.

165 SUZAKI, HIROSHI, *Boshū Kabushiki No Hakkō* in KAISHA-HŌ KONMENTARU: KABUSHIKI [3], vol.5, 103, (Shōjihōmu, 2013).

infringement of the regulations, management control and the issuance of the options according to the rights plan adopted by the shareholder resolution.[166]

Both Japanese scholars and judges have held different views of whether the principle of shareholder equality in Art. 109 could be applied with Art. 247 or other articles related to the issuance of shares or stock options.[167] If Art. 109 and Art. 247 were read together, it would mean that the issuance of shares or other securities had to be under an equity doctrine and its acquisition rights must not be distributed to cause a disadvantage to shareholders and must not be in a grossly unfair manner. Therefore, it could be proved by two cases that the courts in Japan had considered the equity principle, disadvantage and unfair manner depending on the facts of the case.[168] This research addresses the practice of common law and Japanese judicial doctrines in Chapter 4.

2.1.3. Joint Civil Action for Damages

There have been cases in which shareholders claimed for damages resulting from new share issuance and allocation rights under Art. 210 or Art. 247.[169] Nevertheless, the courts could not satisfy these claims. In such cases, there were concerns as to what would be a fair price for the newly issued shares or other securities. From a legal point of view, the price could be set according to book value, market value or real value. There would not be a major problem to use market value. However, there have been many legal cases that involved issuing the new shares or other securities with the book building price.[170] The duties of the directors had to be irrelevant with regard to accounting finance.[171] This book price was not persuasive to be set

166 See generally id, at 101–12.

167 Not only in the decisions of the courts was the equality principle used as a measure in order to commit the unfairness but also all of the Japanese scholars did not agree to apply this principle together with other provisions. Compare AOTAKE, SHOICHI, *Shinkabu Yoyaku-Ken Mushō Wariate To Sashidome: Burudokku Sōsu Jiken*, 164 HANREI JIHŌ No.1987 with ZUSAKI, *supra* note 165, at 121–25; Compare Steel Partners Japan Strategic Fund (Offshore), L. P. V. Bulldog Sauce (Sup. Ct. Aug 7, 2007) with Showa Shell Ltd v. Idemitsu Kōsan Ltd (Tokyo D. Ct. July 18, 2017).

168 *Steel Partners Japan Strategic Fund*, id; *Showa Shell Ltd*, id.

169 This is confirmed by checking with Lex Database.

170 See KITAMURA, MASASHI, *Shin-Kabu Yoyaku-Ken Tsuki Shasai No Yūri-Hakkō To Torishimariyaku No Sekinin*, HŌGAKU KYŌSHITSU, No. 463 (2019.5).

171 YANAGA, MASAO, *Shin-Kabu Yoyaku-Ken Tsuki Shasai No Hakkō Ni Yoru Kabuka Geraku To Songai Baishō Seikyū*, 3 JURIST, No. 1528 (2019.2), 135.

because if the share price were set accordingly, the purchasers would think the business had staggered and then share prices would consequently fall. On the other hand, real value, which relied on arithmetical calculation, might be lower than the current price when the business of a company was successful.[172] This is a reason why some shareholders filed the suits jointly with tort liability.

The cases with regard to filing a corporate law suit by referring to the corporate law and the tort liability under the civil law were started even when the old commercial code of Japan was enforced. Such joint applications were made under Arts. 266(3), 280(2)(11) of the old commercial code together with Art. 709 of the Civil Code.[173] After some parts in the old commercial were separated and enacted as the Companies Act in 2005, Arts. 709 and 719 were jointly applied with Arts. 238(3), 247, 429 and 430 of the JCA.[174] Such cases were frequently brought before the courts because the provisions in the JCA expressly specified in the articles whether or not to exclude the application of the articles in the Civil Code. Arts. 238, 247, 429 and 430 of the JCA do not express whether to exclude the provisions of the Civil Code. Thus, unless and until the articles in the JCA expressly prohibit use of the Civil Code in corporate litigation, the articles in the Civil Code can be jointly referred to in cases sued under the JCA.

2.2. Concept of the Action

It is necessary to start with what Kawashima (2019) described in order to state the difference between derivative action and action for unfairness in Japan.175 She pointed out that the court at that time settled the claim for the indirect loss from the company as the direct loss of shareholders. Apart from Kawashima's (2019) view, there was also a digest that such direct or indirect loss did not seem to be

172 One of the cases in which shareholders were not satisfied with setting the real price was *Apaman Shop Holdings Co. Ltd.* (Sup. Ct. 2010 July 15), HANREI JIHŌ, No. 2091, 90.

173 AR Taro v WATANABE Kazuo and three others (Tokyo D. Ct. Sept. 1, 1992); AR Hanako v AP Kōgyō Kabushiki-kaisha (Chiba D. Ct. August 8, 1996); see SUGITA, TAKAHIRO, *Shinkabu Hakkō Jiko Kabushiki Shobun Yūkōsei Handan Ni-okeru Torihiki Anzen No Hakari-kata To Hakarikata, in* GENDAI SHŌJI-HŌ NO SHOMONDAI, (KYŌICHI TORIYAMA ET AL.), 616 (2016, Seibondo).

174 The case was file in Tokyo District Court and appealed to Tokyo High Court and the claim for damages was defeated. (Tokyo High Ct. 2019, July 17), KINYŪ SHŌJI HANREI, No.1578 (2019.11.15) 18.

175 See KAWASHIMA, IZUMI, *Yuri Hakkō Ni Tsudzuku Shōsū-Ha Kabunushi No Shimedashi To Torishimariyaku No Sekinin*, KINYŪ SHŌJI HANREI, No.1575 (2019.1.10) 2.

paramount.176 All concepts were reasonable because the JAC does not provide this specific differentiation.

Even though giving the shareholder remedies was more important than classifying the nature of the losses, two prongs of the consequential problems would be associated. The first problem would be that of who was required, that is, the claimant shareholders or the company, to pay the legal cost. The other problem would be related to the distribution of the loss claimed, that is, whether the company wholly or only the claimant shareholders would receive the compensation or the relief for the loss. To be specific, if a case was brought for the indirect loss, the compensation or the damages would be given to the company. On the other hand, if only the specific shareholders sustained the loss, the compensation or the relief would be granted only to those shareholders. Based on this general concept, this research takes the view that the indirect or direct loss was required to be taken into account by the courts in settling the cases related to representative action or the action against unfairness adopted in Art. 210 and Art. 247 of the JCA.

With the backdrop of this concept, it is also necessary to consider whether other laws contained procedures for such consequential circumstances. The Civil Code, the Civil Procedural Law and the Enforcement Ordinance of the Companies Act are considered to be the laws and ordinance related with the corporate legal cases.[177] Nothing in those laws and documents gives an illustration related to the direct or indirect loss. There might be two possible solutions for this problem. First, if the JCA can input such ideology into its provisions, such problems would not happen. Second, it rests upon the courts that all the courts are responsible to consider the cause of the action. Since the problem regarding this difference in the direct or indirect loss was reflected in the legal cases, such cases have to be discussed.

176 Anonymous, *Kabushiki No Yūri Hakkō Wo Hete Shōsū Kabunushi Ga Kaisha Kara Shimede Sareta Baai No Kaisha Oyobi Torishimariyaku No Sekinin*, HANREI TAIMUZU, No.1472 (2020.7), 234.

177 By scanning through the legal cases, the courts applied the JCA and the Civil Code as the substantive law and used the other documents as the procedural laws.

2.2.1. Concept from Legal Cases

With regard to the direct loss and indirect loss from the new shares or other issuance, the major problem which the courts stressed was the issuance with a favourable price.[178] There were many related cases in which a company issued new shares or other securities with a lower price than the current price.[179] Shareholders in some cases claimed the suspension, cancellation or non-existence of the issuance. Only shareholders in a few cases claimed for damages.[180] Out of these few cases, there were even cases in which shareholders claimed under the derivative action;[181] shareholders in other cases claimed directly to the BOD when there was a reason to believe that the BOD issued shares for their own benefit.[182]

One of these cases was reviewed focusing on the indirect loss or direct loss by KAWASHIMA (2019). [183] This case could be generally known in this research as *Grani Inc.* and was decided by the Tokyo District Court on March 22, 2018. In fact, the case involved the squeeze-out issue as well. The court was in favour of the indirect loss and did not consider the squeeze-out problem in this case. The theoretical problem was only that the court gave the judgement for the indirect loss even through the trial of the case was not under the shareholder representative action under Art. 847 of the JCA.

Another case which involved the liability or non-liability of the BOD was a case which was commonly known as *Art Nature*.[184] In that case, the new shares were allocated without the shareholder resolution. The BOD disposed the treasury shares and allocated those shares to the third parties. These shares were also allocated to the directors. In consideration of the unfair

178 A case related with the game application company decided in the Yokohama District Court and appealed to the Tokyo High Court and finally decided in (2012, July 25). HANREI JIHŌ No.2268, 127; see *AR Taro*, *supra* note 173; see *AR Hanako*, id.

179 The research takes the view that if the issued price were set higher than the book price, the problem would lessen because the purchasers had to check all about the shares.

180 The confirmation is checked by the lex database and it was found that the number of cases related with such suspension, cancellation or non-existence was larger than that of cases for claiming damages.

181 For example, in the *Art Nature* Case, damages were claimed under the derivative action. (Sup. Ct. 2015 Feb. 19), HANREI JIHŌ, No. 2255, 108.

182 For example, in the *Grani* Case, shareholders claimed the direct loss through the BOD; but, the relief granted was the indirect loss from the company. HANREI TAIMUZU, *supra* note 176.

183 (Tokyo Dt. Ct., 2018, March 22). Id.

184 (Sup. Ct., 2015 Feb, 19), HANREI JIHŌ, No. 2255, 108.

manner of the BOD to allocate shares to themselves and the issuance price was a favourable price, the court decided this as an indirect loss. It should be noted that although the plaintiff shareholders claimed damages for the favourable price, the court was not satisfied with the claim. What the court approved was the unfair issuance of the shares. Thus, the court considered that part and gave the judgement for invalidation of shares only.

If these two cases are compared, the first case allowed the indirect loss sustained by shareholders and refused to grant the direct impact of the squeeze-out of minority shareholders. However, that case was not conducted according to the representative action. In the second case, what the court approved was not the indirect loss claimed under the representative action; rather, the judgement approved the unfairness of share issuance and invalidated the same. The judgements of the two cases were consistent in the concept of price calculation. This was reflective with the usual procedure of the court not to interfere in managerial affairs done by the BOD. MONGUCHI acknowledged the absence of the BOD's negligence because the BOD made the disclosures for issuing the shares.[185] That was what he pointed to in deciding that the plaintiff shareholders were not entitled to damages. In such circumstance, the BOD could also push the burden to the valuer. This was a reason why there were many reviews that stressed the favourable price but only a few discussed the damages for directors' liability in this case.[186] The directors were not liable in this case because they set the price according to the valuer.[187] The valuer rescued the BOD because the court presumed that the price calculation was not the job of the directors; it was the job of accounting auditors.

The aforementioned situation forwarded this research to view that where there was a combination of indirect and direct loss of shareholders, it would be hard for the court to sort out which part of the claim was related to the indirect loss and which part was related to the direct loss. Thus, because of this complicated nature of the cases, since the JCA does not provide that

185 MONGUCHI, MASAHITO, *Kabunushi Daihyō Soshō: Shinkabu No Hakkō*, KINYŪ HŌMU JIJŌ, No.2082 (20181.25), 44.

186 In the topics of the reviews, 'the issuance by an unfavourable price' was used and stressed to discuss this context. For example, KINYŪ SHŌJI HANREI, No.1464 (2015.4.15), 24; KINYŪ SHŌJI HANREI, No.1465 (2015.5.1), 16; HANREI TAIMUZU, No.1411 (2015.6), 67.

187 This valuation could be assumed to have been done associated with the disclosure rule. See MONGUCHI, *supra* note 185.

the courts could shift the proceedings from one to another, the courts would not be confident to take the trial beyond the application of the plaintiff shareholders. That is, unless and until Arts. 210 and 247 of the JCA had not been applied jointly with Art. 847 of the same Act, the courts will not reasonably grant the two remedies in a single suit.

2.2.2. Statutory Ratification

Ratification of the directors' conduct by shareholders in Japan did not purport to be a problematic issue. The liability of directors can be exempted by the consent of all shareholders according to Arts. 424, 120(5) and 462(3) of the JCA.[188] These sections hit the point that the fact that shareholder(s) filed the case to the court showed that the agreement of all or the specific number of shareholders was lacking. If all shareholders had consented to ratify the act of the directors, the cases would have been brought by parties other than shareholders. Thus, the ratification issue was just floated on the legal texts.

With regard to the absolute exemption, according to Art. 424 of the JCA, the neglect of duties of directors or other officers can be ratified by all of the shareholders' approval. In addition, rectification can be given under Art. 120(5) of the JCA. Ratification of an act of a stock company under this Article covers a wide range. A company can give property benefit to shareholders not having owned the shares for the specified duration or the specific shareholdings or shares in a subsidiary in which all of the shareholders have approved to do so. It is to be noted that this Article does not cover the right to call a meeting or to file a derivative suit. Further, Art. 462(3) can be narrated generally as the amount of distributed money passed in a shareholder meeting, or if proposed by the BOD or directors, the amount can be increased if all of the shareholders gave consent to increase the distributed amount.

There are also the partial exemptions of the liability granted by the specific shareholder majority or the BOD resolution. These exemptions are provided in Art. 425–428 of the JCA.[189] The partial exemption available by Art. 425(1)(i)(b) is an exemption providing that the liability of directors who are not outside directors may not exceed their four year remuneration. For the

188 KAWAMOTO ET AL., *supra* note 82, at ¶741.
189 See id, at ¶¶742–48.

representative directors, the amount of liability is set at a maximum of six year remuneration according to Art. 425(1)(i)(a). For outside directors, the maximum amount of their liability may be limited to up to two years of their remuneration. Even though partial exemptions cannot be interpreted as ratifications, it is reasonable to link the two terms in cases of the infringement of directors' duties followed by the resolution of a shareholder meeting and irregular event.

2.2.3. Time Limitation

Time limitation used to be a problematic issue in the issuance of new shares or other securities within the provisions of the JCA. The timeframe for claiming to suspend, invalidate or null and void set by the JCA should not be confused with the time limitation to invalidate the result of the meeting in courts of law. Based on these backgrounds, not only the different considerations of the judges in legal cases but also scholarly reviews of the same appeared.[190] The problem was that the provision in the old commercial code was presumed to be the limitation for the court to invalidate the resolution that had been made in the shareholder meeting or by the BOD.

With regard to time to invalidate the shareholder meeting or others, it was described in Art. 280 of the commercial code and carried in Art. 828 of the JCA. The time to invalidate or cancel the resolution of a shareholder meeting is within six months from the time the outcome of the resolution takes effect.[191] This timeframe is considered to be the prescription within the company and not considered to be prescription time for the court to give judgement for invalidation.

Few scholars have considered this fact and discussed the reason the courts invalidate the result of the meetings. In fact, their discussions were reasonable in their rationality. KAWAMOTO ET AL. stressed the different nature of claiming for the non-existence and invalidation whilst UEGAWA stressed the interest claimed.[192] After the enactment of the JCA in

190 Compare UKEGAWA, KANDAI, *Shinkabu Yoyaku-Ken No Kōshi Jōken Ni Hanshita Kenri Kōshi Ni Yo Ru Kabushiki Hakkō No Kōryoku*, KINYŪ SHŌJI HANREI, No.1398 (2012.9.1), 8 with KAWAMOTO ET AL., *supra* note 82, at ¶¶496–500.

191 Art.280 (15) of the old commercial code.

192 KAWAMOTO ET AL., *supra* note 82, at ¶¶496–500; UKEGAWA, *supra* note 190.

2005, the legal issues related to time prescription were not of concern. However, for the derivative action, if the time prescription is to be set in accordance with the regular civil law suit and must be within three or six years from the commencement of the act of the directors, it would be a problem in checking with the directors' duties. Those duties may be imposed on breach of duty of trust, duty to avoid conflict of interest or duty of care.[193] Thus, if the concept of breach of trust is developed and drawn into the civil nature, there is not a problem. Sometimes, the apprehension will be that the process of making the development is likely to renounce the settled legal theory.

2.2.4. Litigation Cost

Legal costs for a shareholder suit against unfairness is not a problem because the court sets this according to the civil procedure rule. For the derivative suit, the cost is to be borne by the company.[194] In one of the so-called derivative suits brought under §847 of the JCA by an auditor,[195] a concern was whether the suit was brought for that auditor's own benefit. Thus, the plaintiff auditor was defeated. Based on this background, the court of first instance, the Yokohama District Court, did not exactly set the legal cost to the company but set it to the plaintiff auditor. The auditor appealed to the Tokyo High Court and got the judgement that the cost had to be borne by the company.

With regard to legal aid, according to the Comprehensive Legal Support Act (Act No. 74 of 2 June 2004), the Japan Legal Support Center (JLSC) is organised in order to render the legal service depending on the situation of the applicants. The Act makes legal service available to all citizens.[196] Therefore, the company as a juridical person will not be entitled to receive the legal support to make a derivative claim. However, as citizens, it is possible for shareholders to

193 VENTORUZZO ET AL., *supra* note 76; Samanta Tan & Hisashi Harada, *Commonwealth No Kengen – Kabunushi Daihyō Soshō Hōsei No Rippō Kate-kara Mita Konmonuerusu Shohōiki Ni Okeru Kaishahō No Taki-teki Hatten*, SHŌJI HŌMU, No.2211 (2019.10.5), 34.

194 Shareholders encountered the problem with the filing fee of the derivative suit, the situation was changed later. Although KAWAMOTO ET AL. mentioned that the plaintiff shareholders had to pay the filing fee, they did not specify who was finally responsible to pay it. KAWAMOTO ET AL., *supra* note 82, at ¶756.

195 Tokyo High Ct. (2012, July 25), *supra* note 178.

196 MOJ, Implementation of Comprehensive Legal Support by the Japan Legal Support Center, http://www.moj.go.jp/ENGLISH/issues/issues08.html.

ask for legal support. The support includes appointing a court-appointed defence counsel and a court-appointed attorney at law. However, this service was not a popular service.[197] Regarding the filing fee, the Comprehensive Legal Aid Act does not provide the costs for the filing fee and stamp duty.

Either for the shareholder action against unfairness of the company or the derivative suit against the BOD, this research bears a question whether it would be possible when the company has been in insolvency or a shareholder goes bankrupt and applies under the pauper suit. In this situation, the Bankruptcy Act must be checked. Here, it is a good point of the Japanese Bankruptcy Act that it authorises the court to make the assessment of the officers' liability in a company going bankrupt.[198] Any officer cannot escape from his or her liability in a bankruptcy case. This fact prompts this research to acknowledge that since the liability of the officers has to be assessed by the court, it is not possible to sue the derivative action during the bankruptcy process. For the action against unfairness, there is a possible way that the bankrupted shareholder can receive the exception for the filing fee amid the challenges.

2.3. Remedies under the Action

The new shares issuance can be understandable. However, besides the common shares or equities, there are other securities a company can issue. These securities can also be issued various forms of shares, depending on the BOD in public companies[199] and the resolutions of in

197 Japan Federation of Bar Associations, Duties of the Japan Legal Support Center and the JFBA, https://www.nichibenren.or.jp/en/about/judicial_system/legal_aid_and_jlsc.html.

198 Art. 178, Bankruptcy Act (No. 75 of June 2, 2004): [Where] an order of commencement of bankruptcy proceedings is made against a debtor who is a juridical person, the court, when it finds it necessary, upon the petition of a bankruptcy trustee or by its own authority, by an order, may make an assessment decision on a claim for damages based on its officer's liability (hereinafter referred to as an 'officer's liability assessment order' in this Section).(2) When filing the petition set forth in the preceding paragraph, the petitioner shall make a prima facie showing of the fact constituting the grounds for liability. (3) Where the court commences proceedings for an officer's liability assessment order by its own authority, it shall make an order to that effect. (4) When a petition set forth in paragraph (1) is filed or an order set forth in the preceding paragraph is made, for the purpose of interruption of prescription, it shall be deemed that demand by litigation is made.

199 JCA, Art.201 (1); KAWAMOTO ET AL., *supra* note 82, at ¶445.

the form of share warrants, share options or convertible bonds. Companies are able to issue shareholder meetings in the non-public companies.[200]

In a concise version, the problematic issues created by the issuance of new shares or other securities were various:

1. source to authorise issuing new shares or other securities;
2. to whom was it reasonable to allocate the new shares or other securities;
3. the issued price of the shares; and
4. whether directors and companies were liable for accounting methods.

With any of the aforementioned backgrounds, some shareholders supposed these manners were unfair and came to court to claim their rights had been infringed.

In fact, the purposes of the new share issuance followed by the acquisition rights were to raise the funds of a company and to be an incentive in business contribution by the amendment of the Commercial Code in 2001.[201] However, the evidence from the legal cases reveals that the concerned companies issued the new shares for other purposes.[202] These ideas had also spread in the EU from the 1970s and in American corporate society from the 1980s.[203] The U.S. termed new share issuance as for other purposes such as issuing poison pills or rights plans.[204] Japan corporate society imported the strategy of poison pills.[205] Problems resulting from the ideas

200 JCA, Arts.199 (2); Id, at ¶442.

201 ŌTA, YŌ, *Nippon Hōsō Shinkabu Yoyaku-Ken Hakkō Sashidome Karishobun Meirei Mōshitate: Jiken Kettei To Sono Igi* in KIGYŌ BAISHŪ WO MEGURU SHOSŌ TO NIPPON HŌSŌ JIKEN KANTEI IKEN, BESSATSU SHŌJI HŌMU No.289 (Shōji Hōmu, 2005), 232.

202 The new shares were issued for the takeover defence and merger, respectively. Significantly, those purposes were discovered in *Steel Partners Japan Strategic Fund*, *supra* note 167 and Showa Shell Ltd v. Idemitsu Kōsan Ltd (Tokyo D. Ct. July 18, 2017).

203 KIGYŌKACHI KENKYŪKAI, KIGYŌ KACHI HŌKOKU-SHO KŌSEINA KIGYŌ SHAKAI NO RŪRU KEISEI NI MUKETA TEIAN, 44-46, www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/3-houkokusho-honntai-set.pdf.

204 OSUGI, KEN-ICHI, *Transplanting Poison Pills in Foreign Soil: Japan Experience, in* TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA, (HIDEI KANDA ET AL. eds, Routledge, 2008), 36–40.

205 The newly issued shares had been called poison pills in the sense that poison was somewhat good to be used to get rid of persons who wanted to acquire shares in a hostile manner. See *Partners Japan Strategic Fund* and *Showa Shell Ltd*, *supra* note 167.

other than to increase investment cash flow were numerous.[206] Therefore, the alternative object of increasing cash flow drives this research to explore not only the legal texts but also the expectations of shareholders claimed through the courts. The expectations of shareholders were to suspend, invalidate, nullify and void (be non-existent) or be granted damages.

2.3.1. Suspension of New Share Issuance

The new share issuance-related issues from legal cases were covered with whether the issuance was unfair in terms of the dilution of shareholding or management control, whether the purpose of the issuance was in accordance with the principle to create corporate value and whether the issuance was to deter a hostile takeover. The first issue involved the JCA and the second one involved the principles set up by METI and MOJ. The third issue was a reflection of the second issue and no express statutory provision for the takeover defence for corporate value was found, except that which the respective parties pledged as a reason. Open Loop Inc. v. Quanz Co. Ltd.[207] and Showa Shell Ltd. v. Idemitsu Kōsan Ltd[208] are selected as the cases for analysis of the new share issuance.

In fact, the purposes of the new share issuance were, as described in section 2.3 of this research, to raise the funds of a company and to be an incentive for job opportunities. Notwithstanding that corporate profiles were noticed with their increasing cash flow, some internal problems occurred behind the corporate profiles. Therefore, shareholders who were one of the stakeholders in the company came to the courts and claimed for their remedies because they felt that their control rights or financial rights had been infringed. In order to discover the

206 All the cases referred to showed that the intentions of the companies to issue new shares were to make business alliances with other companies that seemed to promote the businesses. *Steel Partners Japan Strategic Fund*, id; *Showa Shell Ltd*, id.

207 A positive comment upon the decision was not expressed. (Tokyo D. Ct. 2008, June. 23) KINYŪ SHŌJI HANREI, No.1296 (2008.8.1), 10; See MIURA, OSAMU, *Shinkabu Hakkō, Shinkabu Yoyakku Ken Hakkō Ga Ichijirushiku Fukōseina Hōhō Ni Yoru Mono To Sareta Jirei*, KINYŪ SHŌJI HANREI, No.1538 (2018.4.1), 7, n2.

208 In some cases, judges and lawyers in Japan omitted the use of the names of the parties and relating groups or persons, but after checking the data discussed by MORIMOTO and YOSHIDA, they reviewed the same case. (Tokyo D. Ct. July 18, 2017); MORIMOTO, SHIGERU, *Shinkabu No Fukōsei Hakkoū Mondai No Aratana Tenkai*, SHŌJI HŌMU, No.2174 (2018.8.5), 6–17; YOSHIDA, MASAYUKI, *Kōbo Zōshi No Hōhō De Okonau Shinkabu Hakkō Ga Fukōseina Hōhō Ni Yoru Hakkō Ni Wa Ataranai To Shite, Sono Hakkō O Sashitomeru Mune No Karishobun Kettei No Saru-Tate Ga Kyakka Sareta Jirei*, KINYŪ SHŌJI HANREI, No.1555 (2018.12.15), 2–6.

reasoning of Japanese courts in settling the issuance of new shares or other securities, this section analyses the cases involved with the same. The two cases are selected because the parties involved were recorded without a confidential purpose.

2.3.1.1. Dilution of Shareholding as Unfairness

A case was filed by the Open Loop Inc. (O), a shareholder of Quanz Co. Ltd. (Q), for an injunction of the new share issuance by Q in the Tokyo District Court.[209] The district court considered whether the new share issuance was done in a way that was grossly unfair to O, whether there was an apprehension that the issuance would bring a disadvantage to O and whether the issuance was done according to the principle of ensuring the necessity and reasonableness of defensive measures. The court succinctly decided that the new share issuance in this case was grossly unfair according to Art. 210 of the Companies Act.

The considerations of the court were based on Art. 210 of the JCA and concentrated on the dilution of shareholding of a minority and management control. As the facts of the case fitted into the provisions of the Companies Act, the court did not use the other principles set by the respective organisations. On the other hand, if the court had not stressed the statutory provision and rather emphatically considered the corporate value or profits to extend the business in Macao, the decision would be otherwise. Therefore, some Japanese lawyers were not satisfied with this judgement.

MIURA was of the view that this and three other decisions were similar and were unusual in granting the injunction on the grounds of an unfair issuance.[210] He pointed out that the court had not applied the conventional main purpose rule. The main purpose rule is derived from the principle of protecting and enhancing corporate value and shareholders' common interests, which is Principle No. 1.[211] However, since this case was not seen to be involved in the takeover defence, the court was right to not emphasise the principles and rules especially set for the hostile takeover defence.

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209 (Tokyo D. Ct. June 23, 2008), *supra* note 207.
210 MIURA, *supra* note 207.
211METI & MOJ, *supra* note 158, at 3–4.

One of the comments also showed that the court stressed the dilution of shareholding and management control.[212] The judgement was passed without taking the main purpose rule into consideration. However, this research takes the view that since there had been an express provision in the statute, the court would not have any procedure to refer to the principle. The seniority of the binding force of the legal documents has to be set on the statute first and the principles and rules second.[213] The other comment was made based upon the idea that a public company must not consider the existing shareholders' interests only.[214] This meant that the fund should be issued for incoming shareholders who would buy the new shares. Nevertheless, one point which shares the same view with the decision was that if minority shareholders were prohibited to vote at that time, then it would affect the next vote. Due to such rigidity, it could not be said that there was no disadvantage on the part of shareholders when the new shares would be issued.

There was also another comment from the same source that the resolution to issue new shares was not obtained by the unanimous resolution of the BOD. Therefore, with regard to the adoption of the BOD's resolution, it would be tough to resolve if any director had a veto without any cause. It is better to set out in the articles of incorporation that the resolution requires being done in accordance with a super majority.

In a nutshell, the applications of the law by the court have to be recalled. The provisions in the law can be divided into two types: mandatory and enabling.[215] The mandatory provisions have a compulsory enforcement, whilst the application of the enabling or default rules is

212 KINYŪ SHŌJI HANREI No.1296, *supra* note 207.

213 As Japan has not practiced a common law system, the court will encounter an awkward situation if it has applied the principles prior to the statutory law. Cf. KAWAMOTO ET AL., *supra* note 82, at 275–6; Cf. Puchniak, Dan W. & Nakahigashi, Masafumi, *A New Era For The Business Judgment Rule In Japan? Domestic And Comparative Lessons From The Apamanshop Case (2012)*, www.researchgate.net/publication/256061160_Case_No_21_Corporate_Law_-_Business_Judgment_Rule_-_Derivative_Action_-_Supreme_Court_15_July_2010_-_%27Apamanshop%27_with_Comment.

214 KINYŪ SHŌJI HANREI, No.1296, *supra* note 207.

215 See also Coffee, John, *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, COLUMBIA LAW REVIEW, vol. 89, No. 7, 1989, 1618–1691.www.jstor.org/stable/1122814; Ian Ayres, *A Law Student's Toolkit: Default vs. Mandatory Rules*, YOUTUBE (Nov 10, 2015), www.youtube.com/watch?v=UYFSZb6hGNM. (Even though this online lecture was focused on the contract, the concepts on the application of the general law were also included in the lecture.)

dependent on the consideration of the court.[216] Moreover, if the idea of the contractual and non-contractual application of corporate law is checked with the provisions related to minority shareholders' rights in the Companies Act, they have to be categorised under the non-contractual regime.[217] Therefore, it is legally reasonable for the Tokyo District Court to use Art. 210 of the JCA in this case as a mandatory application.

2.3.1.2. Management Control Not as Unfairness

The reasons of the courts in Tokyo in granting decisions or giving judgements for new share issuance have been on different grounds.[218] This can be proved through the cases.[219] For example, new share issuances and allocation rights were approved in the cases of *Bulldog Sauce*[220] and *Autobacks Seven,*[221]whilst injunctions were granted in *Dalton*[222] and *Nireko.*[223] As these cases happened over ten years ago, it might be that there were no later such cases. However, Showa Shell Ltd v. Idemitsu Kōsan Ltd (Tokyo D. Ct. 18 July 2017)[224] and the other case[225] showed that the same problems were repeated. Due to confidential data, the names of the respective parties were preserved in the latter case, so only the former is analysed.

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216 Both British common law and American common law share the same term for mandatory provisions; however, they differ in their usage of the term for the enabling or default provisions. Id.

217 The duties of shareholders are defined either as contractual or non-contractual; non-contractual duties, such as to treat equally, are defined in the statute and to have the compulsory enforcement. See MALBERTI, CORRADO, *Contractual Enforcement of Shareholder Duties, in* ENFORCING SHAREHOLDERS' DUTIES, *supra* note 121, at 85–105.

218 MATSUI, TOMOYO, *Corporate Governance and Closely Held Companies in Japan: The Untold Story, in* CORPORATE GOVERNANCE IN THE 21ST CENTURY: JAPAN GRADUAL TRANSFORMATION, 125–28 (Luke Nottage et al. eds, Edward Elgar, 2008).

219 This can be proved by analysing the cases: SFP Value Realization Master Fund Ltd. v. Nireko K.K, (Tokyo High Ct. June 15, 2005) SHŌJI HŌMU, No.1735 (2005.6.25), 44; Sun Telephone v. Dalton, (Tokyo D. Ct. June, 30) KINYŪ SHŌJI HANREI No.1247 (2006.8.15), 7; *Steel Partners Japan Strategic Fund*, *supra* note 167; Livedoor Ltd. v. Nippon Broadcasting System Inc., (Tokyo D. Ct. March 11, 2005) HANREI TAIMUZU, No.1173 (2005.5.1), 125; and Autobacks Seven Co. Ltd. v. Silchester International Investors LL.P, (Tokyo D. Ct. Nov. 12, 2007) KINYŪ SHŌJI HANREI, No.1281 (2008.1.1), 53.

220 *Steel Partners Japan Strategic Fund*, *supra* note 167.

221 *Autobacks Seven Co. Ltd., supra* note 219.

222 *Sun Telephone*, id.

223 *SFP Value Realization Master Fund Ltd.*, id.

224 The legal case proves that the problem on the share issuance and the rights plan has still happened because the case was decided in 2018, *Idemitsu, supra* note 208.

225 The case was filed in the Tokyo District Court and the judgment was made on 2019, May 20. The aggrieved party appealed to the Tokyo High Court and the final judgment was given on July 17, 2019. The proceedings were recorded by the Tokyo District Court and Tokyo High Court. Anonymous, *Shinkabu Yoyaku-Ken-Tsuki Shasai No Hakkō Ni Tsuite, Kore Wo Ketsugi-*

The main problem in the *Idemitsu Kōsan* case was the issuance of new shares for the merger of Showa Shell Ltd (Showa) and Idemitsu Kōsan Ltd (Idemitsu). The judgement was made by the Tokyo District Court on 18 July 2017 and then appealed to the Tokyo High Court. The court of first instance gave the decision that the new share issuance was neither grossly unfair nor a disadvantaged issuance and not in opposition to Art. 210 (2) of the Companies Act. According to the facts submitted to the court of first instance, some shareholders of Idemitsu filed a case against the new shares issuance of Idemitsu.

The court reasoned the issuance based on three points. Firstly, the court considered the main purpose rule to increase corporate value, and the issuance was not unfair. Secondly, Idemitsu made a public offering rather than issuance to third parties. Thirdly, who could buy the new shares depended on the security underwriters and the incoming shareholders were independent from Idemitsu.

MORIMOTO discussed the doubt in raising the funds to build a joint venture with Showa.[226] When he considered the amount required to pay the loans and the upper limit of the public offering, the amount to be issued by public offering was less than the amount of the loans to be paid. Further, he asserted that due to the public offering being independent of the BOD, it would reduce the control of the management team because the plaintiff shareholders could purchase those shares, too. He indicated that there was no evidential material about the merger submitted in the meeting. Therefore, he viewed that it was an unfair share issuance and the issuance disadvantaged the plaintiff shareholders. He was also of the view that not only should the merger with Showa be considered, but the legal status of the plaintiff shareholders had to be protected.

YOSHIDA (2018) also mentioned that when a stock company issued new shares in a significantly unfair manner and shareholders were disadvantaged, the shareholders could request the suspension of the issuance according to Art. 210 (2) of the Companies Act. Then he

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shi Matawa Okonatta Torishimariyaku Ni Zenkan Chūi Gimu Ihan Ga Aru To Made Wa Mitome Rarenai To Shite, Sorera No Mono No Songai Baishō Sekinin O Mitomenakatta Jirei, KINYŪ SHŌJI HANREI, No.1578 (2019.11.15), 18.

226 MORIMOTO, *supra* note 208 (the facts of the case were not elaborated specifically but the author stressed the legal issues on new share issuance and placed the case as an example).

described what would amount to the unfair issuance. This was a significantly unfair manner specifically when a director maintained his or her control and gave favour under the control relationship for an unjust purpose. The offering method in this case was not the problem. In a concise version, he pointed out that the rationalities upon the unfairness were not seen clearly in the decision. Furthermore, issuing new shares was not for the control of management and instead merely raising funds which was not clearly seen in the decision because there were other options to propose more loans. On the other hand, he was also of the view that in the application of the main purpose rule depriving minority rights and their vetoes had to be inclusively considered. Nevertheless, he also pointed out the weakness of the plaintiff shareholders and summarised that the necessity of the procurement of funds denied by the plaintiff shareholders could not defeat the rationality of raising the funds under the purpose rule.

In addition to the comments which this research explores, in order for the plaintiff shareholders to be successful in the appeal case, they were required to pledge the application of law and principles and rules. They must clearly prove the statute had to be strictly applied rather than relying on the principles under the guidance. Further, the plaintiff had to pledge that to raise funds to merge with Showa and get a link to the Middle East countries by Kuwait International Oil Company would not surely bring the economic interest to the company. To maintain the stable interest of the company was paramount. Furthermore, the plaintiff was required to pledge that there was reasonable doubt that the issuance could create the common interest of a company in terms of broad corporate value.

2.3.1.3. Distribution of Share Allocation Rights

Some cases showed that shareholders who seemed to be aggrieved applied for the injunction or invalidation of new share issuances; some did not encounter any problems with the issuance but filed for the gratis allotment of the share allocation rights to block the takeover. Share allocation rights mean shareholders have a right to receive the shares of the

stock company by exercising the stock acquisition rights according to Art. 2(21) of the JCA.[227] The rights could be issued to the existing shareholders, third parties or by public offering.[228] In addition, the rights could also be issued to the designated persons as the options.[229] Notwithstanding the shares that have been issued using any of those methods, two different concerns relate to the rights of minority shareholders. The first concern is that minority shareholders have the right to receive the shares issued, and the second issue is the right to request their shares be purchased by the company.[230]

2.3.1.4. Discrimination by Share Qualifications, not Unfairness

With regard to the issue of share allocation rights as a rights plan for a takeover defence, an impressive legal case to international corporate society was filed by the Steel Partners Fund against Bulldog Sauce Ltd (Bulldog Sauce), commonly known as the *Bulldog Sauce* Case.[231] Moreover, the case reviews of various lawyers in Japan also appeared in Hanrei Jihō (The Hanrei Periodical), Hanrei Taimuzu (The Hanrei Times), Shōji Hōmu (The Business Law Review), Kinyū Shōji Hanrei (The Business and Financial Law Precedents), Bessatsu Shōji Hōmu (The Special Business Law Review) and other publications. The dominant concept through these reviews in this case was that the takeover defence was paramount. In fact, there were lawyers who held the idea to consider the dilution of shareholding. The Bulldog Sauce takeover defence measure was filed in the Tokyo District Court and then appealed to the Tokyo High Court.[232] The first appeal court affirmed the decision of the court of first instance. Therefore, a third motion was made to the Supreme Court of Japan.

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227 ŌTA, YŌ eds. et al., SHINKABU YOYAKU KEN HANDOBOKKU, 4 (4th ed. Shōji Hōmu, 2018).

228 Until 1970, the existing shareholders could acquire the new shares for the sake of their pre-emptive rights comparing the third parties or public offer. ODA, HIROSHI, JAPANESE LAW, 274-8 (3rd ed. Oxford University Press, 2009).

229 KAWAMOTO ET AL., *supra* note 82, at ¶¶472.

230 UEDA, JUNKO ET AL., RIGHT OF MINORITY SHAREHOLDERS, 251 (Keisōshobō, 2019).

231 This case was the second most commonly written about and interacted with in the Thomson Reuters and even dominated the Nikkei, with 70% of the articles related to Funds cases in 2007. BUCHANAN, JOHN ET AL., HEDGE FUND ACTIVISM IN JAPAN: THE LIMITS OF SHAREHOLDER PRIMACY, 170 (Cambridge University Press, 2012).

232 Anonymous, *Kigyō Baishū Bōei-Saku Toshite No Shinkabu Yoyaku-Ken No Mushō Wariate Ga Ichijirushiku Fukōseina Hōhō Ni Yoru Mono To Wa Mitome Rarenai To Sareta Jirei: Burudokku Sōsu Shinkabu Yoyaku-Ken Mushō Wariate Sashidome Kyakka Ni Taisuru Kōkoku-Shin Kettei*, KINYŪ SHŌJI HANREI, No.1271 (2007.8.1), 17.

The issue in law was mainly whether the stock acquisition rights and allocations violated Art. 247 of the JCA and was contrary to the principle of shareholder equality and Article 109 of the JCA based on the interpretation of the equality of shareholders. Nevertheless, the unanimous opinion was built mainly on the fact that even if the shareholders were discriminated against, it was not against Article 109. This was because the allocation of shares had to be done according to the qualification to own the shares.

There were various reviews of this decision. Among these reviews, there was also a review which appeared to be neutral regarding the decision of the court. This review was made by Aotake in Hanrei Jihō, which can be called a contribution to Japanese jurisprudence.[233] Aotake first noted that there was no precedent rule that the gratis allotment had been unfair. Then, he looked at the JCA to consider whether Art. 247 was to be drawn and applied with Art. 109. He acknowledged their joint application. With regard to the abusive acquirer, he was of the view that even if the acquirer took the shares, if that acquirement did not cause irreparable harm or damage to the minority shareholders and impair the interest of majority shareholders, it could not be said that it was unfair and violated the equality principle. Additionally, he claimed that the gratis allotment of stock acquisition rights had to be decided by the resolution of the BOD. Thus, what he meant was that the resolution in the general meeting to make the allotment against the takeover defence was not done according to substantive procedure and fairness. The pressing point he made was that if the real acquirer in this case had taken the stocks and the company suffered irreparable harm, he would wait and see how the court would have decided.

In addition, there was another critical review by Tanaka[234] He pointed out that the court decided that the acquirer was an abusive acquirer depending on whether their takeover bid was wholly fair. He confirmed that after the target company had raised the price of the shares, the acquirer halted its bid. This showed that the acquirer did not have the intention to

233 AOTAKE, SHOICHI, *Shinkabu Yoyaku-Ken Mushō Wariate To Sashidome: Burudokku Sōsu Jiken*, HANREI JIHŌ, No.1987, 164.

234 TANAKA, WATARU, *Burudokku Sōsu Jiken No Hōteki Kentō: Baishū Bōei-Saku Ni Kansuru Saiban Keika To Igi*, BESSATSU SHŌJI HŌMU, No.311 (Shoji Hōmu, 2007), 9–14.

take control of the management nor did it aim to develop the company policy. He also argued whether such allotment was reasonable to be used as a takeover defence. The reason that most shareholders agreed with the takeover defence and were not against the takeover bid was that they would not be disadvantaged. However, he mentioned that the court stressed the takeover bid as the coercive theory because the fund did not have any post-acquisition plan. He was also of the view that the decision of the Supreme Court was not completely proper. He stated that the takeover defence might not have a positive consequence even though such a defence was reasonably done. Then he compared this event with ideas from the U.S., elaborating that if the takeover bid were not withdrawn and continued, the defence could not surely end up greenmailing. Ultimately, since Japan has not had a statute relating to the rights plan, he also wondered whether the rights plan was legal or illegal in Japan.

As reviewed by Aotake and Tanaka, their common dissatisfaction with the decision of the Supreme Court was upon the takeover defence measure. Gorzala and Nyombi also suggested that, even in the U.K. and the U.S., installing takeover defence measures still needed further research in order to realise whether those measures created corporate value.[235] Based on this background, there is a parallel between the role of minority shareholders in times of merger and takeover defence measures.[236]

The most significance was pointed out by H. Kanda that the scheme structured in the share acquisition rights was to dilute the voting rights of the fund and did not have any impact on its economic loss. He took this case as an example and pointed out that the JCA was central with regard to hostile takeovers and defence.[237] He also was of the opinion that the courts played an important role in applying the rules under the JCA. He did not think, however, that

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235 GORZARA expounded the situation up to 2010; however, NYOMBI elaborated the situation up to 2017. Therefore, the research confirms that the situation continues. NYOMBI, CHRISPAS, UK TAKEOVER LAW AND THE BOARD NEUTRALITY RULE, (xvii) (Wildy, Simmonds & Hill Publishing, 2017); GORZALA, JEANNETTE, THE ART OF HOSTILE TAKEOVER DEFENCE: THE ROADMAP OF FIGHTING CORPORATE RAIDER, 54-55 (IGEL Verlag, 2010).

236 JCA, Art. 786, has allowed a company to buy out the shares of dissenting minority shareholders; however, this might be a flaw. Nevertheless, if the court considers that article as a default law and not a mandatory one, it is not an issue. But the courts in Japan will find it hard to accept the default and mandatory law; they tend to use all provisions as mandatory law. UEDA ET AL., *supra* note 230, at 251.

237 KANDA, *supra* note 162, at 65.

the Tokyo Stock Exchange was the first important role for the takeover and its defence because the Financial Instruments and Exchange Act of 1948 (FIEA) did not expressly give power to the Financial Service Authority (FSA) to regulate such an act.

Moreover, Ramseyer offered criticism based on the theory of corporate value from an Anglo-American view.[238] He addressed that the Tokyo High Court and the Supreme Court of Japan in the *Bulldog Sauce* case did not get through the market theory for corporate control. He expressed that the market theory for corporate control was to increase shareholders' value. His view was that the courts must not retaliate the tender offering by the fund in the *Bulldog Sauce*. He signalled that the fund had to be allowed to take part in the market for corporate control in order to create corporate value. However, this research was not of the view that the two courts did not understand the market for corporate control;[239] they considered to block such a market instead. The perspective on this market is also reflected in Principle No.1 in the 'Guidelines Regarding Takeover Defense for the Purposes of Protection and Enhancement of Corporate Value and Shareholders' Common Interests' set by METI and MOJ. The principle favours the takeover defence for the common interest of shareholders:

> [it] is legitimate and reasonable for a joint-stock corporation to adopt defensive measures designed to protect and enhance shareholder interests by preventing certain shareholders from acquiring a controlling stake in the corporation.
>
> Principle 1, retrieved from METI website in English version, www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/3-houkokusho-honntai-set.pdf

Therefore, the courts were in favour of the internal control management system which was driven by the majority shareholders. The limit of imposing the defensive measure adopted in Principle No. 3 was buried beneath Principle No. 1.[240] This research also adds that the court

238 The Anglo-American theory of market for corporate control was skipped for clarification while giving the comment for *Bulldog Sauce*; however, the theory was explained in the discussion of the MUFJ incident for the selection of the management market between Mitsubishi-Tokyo and Sumitomo Trust, Minshū 1763 (Sup. Ct. August 30, 2004), 58; RAMSEYER, J. MARK ET AL., AN AMERICAN PERSPECTIVE ON JAPANESE LAW, 208–17, 220-32 (Yūhikaku, 2019).

239 The theory of market for corporate control was a problem in the law and not one that the courts overlooked. Cf. id, at 231–32.

240 Principle No. 1 is the principle of protecting and enhancing corporate value and shareholders' common interests by adopting, implementing and terminating takeover defense measures, and the measures should be undertaken with the goal of protecting and enhancing corporate values

was required to consider the *ex-ante* and *ex-post* remedy for either causing harm to the economic interest or decreasing the rights of minority shareholders (for example, voting rights) after installing the defence. A remedy for shareholders whose shareholding was diluted was missing from the court's consideration. Even if a plaintiff could not prove the economic impact, the negative impact on their legal rights should be taken into consideration.

2.3.1.5. Exclusion of Shareholder Participation in Making Decisions as Unfairness

A shareholder either as an individual or as an institutional investor investing in a company directly or through the stock market channel may have various purposes. They have purchased shares or other securities depending on their individual interests or their future prospects in a broad sense. Some prefer economic profit;[241] others prefer to create a policy,[242] to gain corporate value as a whole[243] or to bring about community interests.[244] Due to their different perceptions, when legal problems arise among stakeholders in a company, judicial institutions are designed to render the settlement mechanism. The courts in Japan, in settling such disputes, have received significant criticism from both lawyers from Japan and abroad. The case hereinafter mentioned also received many reviews. In order to judge why there is so much interest in this decision, the facts of the case and the reasons of the court are elaborated.

The case was filed by Livedoor Inc. (Livedoor) against Nippon Broadcasting System Inc. (NBS) for the injunction of share allocation rights.[245] Livedoor consulted on computer networks, managed computer networks and developed and sold computer programmes. Livedoor Partners

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and to be extended to the shareholders' common interest. Principle No. 3 is the principle of ensuring the necessity and reasonableness to adopt the takeover defense measures in response to a possible takeover threat. METI & MOJ, *supra* note 158.

241 This concept is generally meant for an ordinary investor whose purpose is based only on the individual's need.

242 For example, in TIC v. J Power case, this research takes the view that TIC intended to contribute to policy design more than to deal with its own interest. BUCHANAN ET AL., *supra* note 231, at 225–39.

243 This purpose was discovered through the precedents in Japan, the concerning shareholders pledged what the corporate value was.

244 In this case, the shareholders applied for the cancellation of a nuclear project looking forward not for their own interest but for the whole interest and made environmental concerns inclusive in the resolution in general. See KIHARA, AYAKA, *Torishimariyaku-Kai Gijiroku No Etsuran Tōsha Seikyū Ni Okeru Kabunushi No Kenri Kōshi No Hitsuyō-Sei*, SHŌJI HŌMU, No.2155 (28.1.15), 122.

245 *Livedoor Inc.*, *supra* note 219 .

Ltd. was a subsidiary of Livedoor and its main business was investment advisory, securities investment trust, etc.

NBS's main business was AM radio broadcasting and planning, producing and operating digital audio broadcasting, in addition to planning, producing and operating other related products. The common shares issued were listed on the Second Section of the Tokyo Stock Exchange. NBS was a member of the Fuji Sankei Group and was affiliated with Fuji Television Co., Ltd. (Fuji TV) under the equity method. It held 22.5% of the total outstanding shares. Sangyo Keizai Shimbun, NBS and Fuji TV were a parent of Pony Canyon Ltd.

The root of the case started from the public tender offer made by Fuji TV to acquire all the shares from NBS. NBS approved the offer. However, Livedoor through Livedoor Partners purchased 97,270,270 shares, equivalent to approximately 29.6% of the outstanding shares of NBS using ToSTNeT-1 and became a shareholder holding approximately 35.0% of the common stock of NBS. Livedoor then informed NBS that it would like to acquire all of their common stocks and would create a business alliance with the Fuji Sankei Group. Fuji TV had no intention of doing so. The Fuji Sankei Group also had verbally informed NBS that they would have to cancel their previous transactions with NBS and its subsidiaries. Fuji TV also submitted the intention to suspend the transaction to NBS. Additionally, the BOD of Sangyo Keizai Shimbun resolved that it would liquidate its tie with NBS if Livedoor had made NBS its subsidiary. Therefore, NBS's BOD resolved to issue the stock acquisition rights. The resolution was received by unanimous agreement among 15 directors out of the 19 attending directors, excluding 4 outside directors. The issuance price of the stock acquisition rights was 336.2731 yen per share. (Subject to the stock acquisition rights of 47.2 million shares, the market value of a share was 6750 yen. This was 1.44 times the total number of issued shares and the dilution rate was 143.9%). When all of the stock acquisition rights were exercised and converted into common stock, the new capital amount would be 68 times NBS's current capital and approximately 3.5 times its total assets. NBS's shares would decrease from about 42% to 17%, while Fuji TV's shareholding would increase to approximately 59%. Livedoor pledged that the issuance of the stock allocation rights was an unfairness and without a special resolution of the

general meeting. The Tokyo District Court upheld the case. The judgement was appealed to the Tokyo High Court. The high court also confirmed the judgement of the court of first instance. Various lawyers criticised that the decision was inconsistent with precedent.

The business law review department, Shōji Hōmu, made a collection of the opinions of both Japanese and foreign lawyers in order to receive their stands regarding this case. Two American lawyers, Coffee and Allingham II, went in different directions.[246] Coffee stressed the primary purpose rule discussed and lectured upon by Kanda Hideki, Egashira Kenjiro and Kawamoto Ichiro and reflected in this case. He commented that if this case happened in Delaware in the U.S., the Delaware Court would have applied the primary purpose rule and considered the tactics of NBS. He contributed by analysing the case with Unocal and Revlon standards[247] decided in the U.S.. He was also of the view that there would be an apprehension that Fuji TV would be a greenmailer or its tactics would be of a coercive nature to inspire Livedoor to lower the price of its share and sell them back to NBS. With regard to the issuance of warrants, he pointed out that NBS could buy them back at any time it wanted to by judging the controlling mind of the purchaser. This fact led him to agree with the decision of the court.

However, Alligham II sent his comment relating to the primary purpose rule against the poison pills which the court used and decided as described by Finkelstein. Due to the inability of getting the document of Finkelstein Opinion, this research does not discuss it. Alligham II asserted that the court did not use the concept of poison pills, which rendered coercive tender offers and huge amount of shares purchase with a high price uncommon as derived from the Delaware Corporation Act §203. He argued that it was impossible for the courts in Japan to apply U.S. law used 20 years ago. He pointed out that, 'NBS has apparently decided to confer control on Fuji TV…..[which] would dramatically dilute Livedoor's recently acquired effective

246 COFFEE, JOHN, *in* KIGYŌ BAISHŪ WO MEGURU SHOSŌ TO NIPPON HŌSŌ JIKEN KANTEI IKEN, 70–80 (Shōji Hōmu, 2005); THOMAS J. ALLINGHAM II. Id, at 153–156.

247 Unocal adopted the rule on the hostile bid as a coercive or preclusive measure and Revlon focused on the reasonable takeover defence measure to be according to the BOD's resolution. Both cases related to the business judgment rule. Unocal Corp. v. Mesa Petroleum Co., A.2d 946, 956 (Del. 1985), 493; Revlon Inc. v. MacAndrews & Forbes Holding Inc., A.2d 173 (Del.1986), 506; accord Razaggo, Robert A., Unifying the Law of Hostile Takeovers: Bridging the Unocal/Revlon Gap, ARIZ. L. REV. 989 (1993), 35.

control interest, and would convey absolute control on Fuji'. He compared this case with three legal cases decided by the Delaware courts, and noted that the consideration of Japan's courts shared a common theme with those of the three decisions.[248] He proved, in this way, that Japanese courts considered decreasing the shareholding ratio.

On the other hand, there were criticisms from Japanese lawyers who appeared to be uncomfortable with this decision. Among those criticisms, there was feedback to the Tokyo High Court that was not likely to agree with the decision. Morimoto appeared to focus on the ToSTNetsT-1 first. Because of ToSTNetsT-1's trading issue, Fuji TV made a tender offer. He wanted the court to be flexible in the interpretation of 'unfairness'. He clarified that the Commercial Code Art. 280(10)[249] was not meant to refer to the common interest of shareholders, no for disadvantaged shareholders only. Regarding the new share issuance by the resolution of the BOD, he raised that it was not really a problem; it was fair to issue new shares by the BOD's decision where there was a conflict among shareholders. However, one of the unjust purposes for the share issuance and raising the funds was often to maintain management control. If it came under the management control it was an unfair purpose. He also referred to the honesty of shareholders and the purpose of control to be taken into consideration for an injunction. He then added that the 2001 revision of the Commercial Code also allowed the issuance of stock acquisition rights for corporate defence purposes.[250] On the other hand, he pointed out the problem of the prohibition of ToSTNetsT-1 purchasing additional shares from the public offering. Nevertheless, he was likely to forward that the court's decision was without considering the purpose of Livedoor to acquire the shares in an increasing number. The consensus of his forwarded message meant that when there was a market for corporate control, the court still had a challenge to settle such a problem.

248 Condec Corp. v. Lunkenheimer Co., A.2d 769, (Del. Ch. 1967), 230; Canada S. Oils v. Manabi Exploration Co., A.2d 810 (Del. Ch. 1953), 96; Yasik v. Yachtel, A.d 303, 313 (Del. Ch. 1941), 17.

249 Commercial Code, Art. 280(10) was replaced with Art. 828(2) of the Companies Act, 2005.

250 Even though the textual amendment of 2001 of the Commercial Code did not expressly include the issuance of new shares against the takeover, the intention of the legislature upon the amendment is unknown. See also KAWAMOTO ET AL., *supra* note 82, at ¶¶156–59.

The consequence of such disputes was that the popularity of cross shareholding appeared to prevent the hostile takeover.[251] Up to 2018, there were companies involved in cross shareholding,[252] and the percentage of introductions of the takeover defence measure did not decrease sharply.[253] Thus, this research is of the view that competing to control management has been a never-ending issue. It is natural that fair competition means increasing the share price and will bring shareholder interest. However, there will be a limit of such competition so as not to have an adverse effect on employees. If corporate management is a maze, there is also the worry that the concerning companies get terminated because the corporations get harassed. Therefore, the statute requires the opening of such a market without insulting both stakeholders and employees. However, in order to create such a situation, the legal right of the minority shareholders also requires consideration.

2.3.2. Invalidation of New Share Issuance

There have been claims for the invalidation of the new share issuance together with the rights to allocate the shares beyond the prescribed period for the invalidation under the JCA.[254] Moreover, there have also been cases in which shareholders did not file the suits within six months from the resolution of the general meeting according to Art. 280(15) of the old Commercial Code.[255] Remarkably, even in Otojirō FUJII v. Fujii Co. Ltd,[256] which was brought before the court beyond the time for invalidation, the Supreme Court gave the judgement to invalidate the new shares or allocation rights issuance. However, one comment stated that the

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251 The substantial effect of cross shareholding became a chain investment and if any part of the chain does not go well, the other parts in that chain will gain little benefit and vice versa. Id, at 63.

252 SHIRAKABE, TATSUHISA, *Corporate Japan Sheds More Cross-shareholdings*, ASIANEKKEI.COM, Sept. 5, 2019, https://asia.nikkei.com/Business/Business-trends/Corporate-Japan-sheds-more-cross-shareholdings

253 MOGI, MIKI & TANINO, KŌJI, *Tekitai-Teki Baishū Bōei-Saku No Dōnyū Jōkyō To Mono Iu Kabunushi No Dōkō*, SHŌJI HŌMU No.2212 (2019.10.25), 33.

254 UKEGAWA, *supra* note 190.

255 Id. (Art. 280 of the old Commercial Code was carried in the JCA as Art. 828).

256 (Tokyo Sup. Ct. July 14, 1994), KINYŪ SHŌJI HANREI, No.956, 3 (The main issue in this case was focused on whether the new share issuance was an unfair manner under a certain circumstance; but the Supreme Court viewed that the court of first instance might misunderstand Art. 280(15) of the old commercial code. That article provides that the resolution of the board of director is required to be invalidated within six months from the date of the resolution. However, the timeframe described in that article did not cover the time limitation to bring this case before the court).

invalidation of shares against unfairness was done for the interest of the whole company or public interest, so the time limitation could not bar it.[257] Since the claim is rationally for the whole interest, the court is reasonable not to set the limitation of time within the scope of the JCA. KAWAMOTO ET AL. also pointed out that the time limitation applied in filing for an invalidation of the share issuance, whilst there was no time limitation in claiming a declaratory judgement for the non-existence of the issuance.[258] On the other hand, since the court could reason that unfairness was a criminal wrong, such case could not be overruled by the time limitation.

There was another claim related to the source authorising issuance of new shares. As the new shares were issued by the resolution of the BOD in non-public companies, some shareholders filed the issuance against Arts. 199 and 201 of the Companies Act.[259] Those cases were settled in favour of the claimant shareholders by invalidating the issuance of new shares. Feedback to the judgement stated that it would have been better to consider the suspension of the issuance than to invalidate it in such a case. However, this research takes the view that it is not possible to suspend the issuance after the shares have been issued and paid. The court's decision to invalidate the shares was therefore reasonable.

An updated case in which shareholders claimed invalidation of the new share issuance, of which the reviews can be read (at the time of writing), involved the defects in the issuance procedure.[260] Those cases related to issuing new shares in non-public companies without the resolution of a shareholder meeting or without sending public notice to hold the meeting. Moreover, another case was also criticised regarding whether it had to be filed for the non-existence of the resolution of shareholder meetings.[261] However, a literal paradox in considering

257 Before the enactment of the Companies Act, although non-existence of the new share issuance had not been provided in the old commercial code, the courts considered the case as invalidation of the issuance. See (Tokyo Sup. Ct., 1997, Jan. 28), HANREI JIHŌ, No.1592, 129 (The JCA expressly provides that the non-existence and invalidation of the new share issuance can be filed under Art. 830(1) and (2) of the Act, respectively).

258 KAWAMOTO ET AL., *supra* note 82, at ¶¶496–500.

259 (Tokyo Sup. Ct. 2012, April 24), HANREI TAIMUZU, No.1378 (2012.11.1), 90.

260 (Tokyo D. Ct., 2019, May 20), KINYŪ SHŌJI HANREI, No.1571 (2019.8.1), 47.

261 IWABUCHI, SHIGEHIRO, *Shōshū Tsūchi No Kenketsu To Hikōkai-Kaisha Ni Okeru Shinkabu Hakkō Mukō*, HŌGAKU SEMINAR, No.783 (2020.4), 111.

whether to make the legal settlement under suspension, invalidation or non-existence is not to be taken as a comprehensive investigation; rather, the approach to grant the remedies is considered to be a salient point.

With regard to the judgement for share invalidation, there was a debatable case which regarded the court's reason to grant judgement for share invalidation.[262] The reason of the court to invalidate the new shares was mainly on the basis of the infringement of the injunctive order of the court.[263] The court was proper to invalidate the new shares by equitable principle because the company did not oblige its injunction order. However, with regard to the court procedure, it would be a problematic procedure to give judgement after the injunctive relief had been granted.[264] In considering the reason why the company issued new shares after the injunction of the issuance was that the injunction was granted without making it publicly known and it was granted two weeks after the general meeting.[265] This fact was proper for the company to issue after the injunction order was made. The inference could be made that there was no sufficient instructions on how to grant the injunctive order.[266] With regard to the time permitted to invalidate within six months from the general meeting according to Art. 280(15)(1), the Supreme Court reasoned the continuous effect of the result of the meeting.[267] Therefore, even though the judge could grant the remedy by the equitable concept, it could not be said that his judgement was done according to the procedural rule. However, since the legal texts in Art. 235 of the Code of Civil Procedure are not said to directly provide the detailed procedure for this case, it is hard for this research to surmise that the court overlooked the procedural law.

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262 Meisei Motor Co. Ltd v Toyozo Kitamura and 19 others, (Sup.Ct. 1993 Dec. 16), HANREI JIHŌ, NO.1490, 134.

263 Accord YOSHIDA, MASAYUKI, KONPAKUTO KAISHAHŌ, 168–69 (Shinsei-Sha, 2012).

264 *Meisei Motor*, *supra* note 262; HANREI TAIMUZA, No.842 (1994.6.15), 131.

265 Art. 280(10) of the old commercial code provides the new share issuance must be complained within two weeks from the resolution of the BOD.

266 The comment for this case appeared in HANREI JIHŌ and shared a common theme with that of HANREI TAIMUZA.

267 Anonymous, *Shinkabu Hakkō Shitomeseikyū No Uttae Kara Henkō Sa Reta Shinkabu Hakkō Mukō No Uttae Ga Shutsusokikan No Junshu Ni Kakeru Tokoro Ga Nai To Sa Reta Jirei Shinkabu Hakkō Sashidome No Karishobun Meirei Ni Ihan Shita Koto To Shinkabu Hakkō Mukō No Uttae No Mukō Gen'in*, KINYŪ SHŌJI HANREI, No.944, 3.

2.3.3. Non-existence of New Share Issuance

The non-existence of the new share issuance was mainly claimed because of the defects in shareholder meetings or the BOD for the resolution of the issuance. After the enforcement of the Act, those issues were mostly brought to the courts, as with the invalidations of the issuance.[268] There were two cases appealed to the Supreme Court of Japan and Nagoya High Court, respectively.

The first case appealed to the Supreme Court of Japan related to share issuance without public notice or the resolution of the BOD.[269] The court of first instance for this case was Kanazawa District Court and the first appeal court was Nagoya High Court, Kanazawa Division. The court of first instance and the first appeal court decided in favour of the plaintiff shareholder and upheld the non-existence of the issuance. The final court, the Supreme Court of Japan, dismissed the appeal and also affirmed the decision of the previous courts. The judgement was criticised regarding the non-existence of new share issuance not being provided by law, and so the defendant had to be eligible to pledge that such non-existence would be set aside.[270] The first point was that the case was filed after six months from the shareholder meeting. This time period was beyond the prescribed time to invalidate the result of the meeting provided under 280(15) of the old Commercial Code (Art. 828(2) of the Companies Act). However, as the non-existence of the share issuance was claimed for the interest of the company as a whole, as mentioned in section 2.2.3 of this research paper, the courts were reasonable to make such a limitation time exclusive in this case.

The second potentially problematic case for the non-existence of share issuance was filed to Nagoya District Court, Handa Division and appealed to Nagoya High Court.[271] The district court upheld the non-existence of the share issuance. The judgement debtor appealed to Nagoya

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268 This can be proved by checking the legal cases. The cases related to the new share issuance had been brought for suspension, injunction, cancellation or invalidation only. They were mostly brought under these contexts because the former Commercial Code did not expressly provide the context of the non-existence of share issuance.

269 HANREI JIHŌ, No.1592, *supra* note 257.

270 SUGANO, YOSHIO, *Shinkabu Hakkō Fu Sonzai Kakunin No Uttae No Kōtei No Yōchi*, HANREI TAIMUZU No.958 (1998.2.15), 60.

271 (Nagoya High Ct. 2002, Aug. 21) HANREI TAIMUZU, No.1139 (2004.3.1), 251.

High Court with four different problems. The first problem was that the case was filed six months after the share registration period and was not in accordance with Art. 280(15) of the old Commercial Code. The second problem was that the plaintiff shareholder did not have standing to sue for the non-existence of the issuance. The third problem was that there was no interest of the plaintiff shareholder upon the existence or non-existence of that issuance. Finally, the fourth problem was that the right to sue was abused to lessen the influence of the appellant company and its single director. Although the purpose to issue new shares was to increase the capital, that purpose was not beyond a reasonable doubt.[272] The appellate court turned the judgement of the first instance court down. The appeal court stressed that since almost all of the shareholders were, at that time, directors and auditors of that family-owned business, the shareholder meeting was not essential. Another fact that the appeal court investigated was that the decisions of the business had been customarily made by a representative director, and that fact proved that even the resolution of the BOD was unnecessary. Therefore, that court mainly stressed the generation of increased capital and the official registration of the new shares. As a result, it rejected the non-existence of the new share issuance confirmed by the court of first instance.

2.3.4. Equitable Relief

After analysing the cases involved in claiming damages resulting from new share issuance within the scope of the Companies Act, the research finds that the damages were claimed for the issued share price and the loss if the share price had fallen after the issuance. There was a conception that the minority shareholders could directly sue either the company or the BOD when only some shareholders (not all) in the company suffered losses from the resolution or act of the BOD.[273]

In the case filed against Grani Inc., it might be assumed that the court considered the shareholders' direct loss and private claims upon the directors' liability for the new share

272 See BAN, AKEN, *Shinkabu Hakkō Fu-Sonzai Kakunin No Uttae Ni Okeru Fu-Sonzai Jiyū*, JURISUTO, No.1294 (2005.7.15), 161.

273 See KAWASHIMA, IZUMI, *Yuri Hakkō Ni Tsudzuku Shōsū-Ha Kabunushi No Shimedashi To Torishimariyaku No Sekinin*, KINYŪ SHŌJI HANREI No.1575 (2019.1.10), 2.

issuance and the squeeze-out rule within the scope of the Companies Act.[274] However, in the Grani Inc. case, it was immaterial to consider whether the loss was a direct loss or indirect loss or whether the third party described in Art. 429 included the shareholders in the third party.[275] The court's focus was that the case had three substantial consequences.[276] The issuance of new shares to decrease the shareholding of a particular shareholder was the main cause. As the result of the new share issuance, the shareholder could be squeezed out. Moreover, the cash out with low pricing was also unfair. As the plaintiff did not set the motion for restitution in terms of share invalidation, the equitable relief was granted.

The plaintiff and defendant were jointly responsible for paying 47,000,000 Yen on a *pro rata* basis for the loss, that is, they had to pay for 5% of the loss sustained within five years. As the original subscription of the plaintiff was 8% of the issued shares, he was entitled to receive 5,875,000 Yen as his portion of the liability for the loss. According to the judgement, the court considered that the loss in this case was for the indirect loss; however, it skipped to consider the legal right of the minority shareholder for his or her shares to be bought back or squeezed out at a reasonable price, which KAWASHIMA wished to clarify in *infra*. Therefore, based on this consideration, what the courts granted in this case was not damages but for a certain amount of the relief which the plaintiff was entitled to in equity. The direct loss was not considered.

Beyond the aforementioned case, there have been cases in which shareholders claimed for the damages resulting from the new share issuance and allocation rights.[277] Nevertheless, the courts could not satisfy these claims. In such cases, there were concerns about what would be a fair price for the issuance of new shares or other securities. The most problematic legal cases involved issuing new shares with the real price by the BOD and, as a consequence, the share price fell. According to precedent cases, the courts rarely granted damages by virtue of

274 Based on the loss being indirect or direct, there was also a time when the courts considered the direct loss as an indirect loss and allowed claimants to settle under the derivative action. *Id.*

275 Anonymous, *Kabushiki No Yūri Hakkō Wo Hete Shōsū Kabunushi Ga Kaisha Kara Shimede Sareta Baai No Kaisha Oyobi Torishimariyaku No Sekinin*, HANREI TAIMUZU, No.1472 (2020.7), 234.

276 The consequences which the court traced were also elaborated by the record of the case. Id.

277 This is confirmed using the Lex Database.

the share price falling as a result of calculation of the share price.[278] The justification of the courts could be that setting share pricing was within the scope of the business judgement rule. If the legal rights of the disadvantaged shareholders had been considered prior to their economic rights, companies would be cautious in issuing new shares or other securities for many reasons.

Conclusion

The shareholder remedies claimed through the courts in Japan have been in various contexts. The courts focused on the unfairness of the issuance of new shares or allocation rights and rendered the decisions. However, the problems remained regarding which acts were liable for the unfairness. According to the case analysis, the courts assumed the unfairness was the dilution of shareholding in some cases and the exclusion of shareholder participation in making decisions in other cases. The courts did not assume the unfairness was discrimination according to the share qualifications and management control by the majority group.

If the unfairness was taken as a reason, the courts gave the judgement for restitution in terms of the suspension or invalidation of the issuance of the shares or allocation rights depending on the circumstances of the cases. The judgements in favour of or against the claimants were given within the contexts of the requests by the respective parties. The courts did not give judgements which seemed to be more reasonable than the plaintiffs or appellants claimed. For example, the judgement that a company or respondent had to buy the newly issued shares was never made.

The good point through the judgements of the courts was that equitable relief rather than damages was granted. However, the relief requires to be granted in all cases of shares or other securities issuance with favourable prices, the allocation rights being distributed irrelevant to minority shareholders and in case of either legal or economic rights of the specific shareholders being infringed by such issuance. As the provisions in the JCA have

278 See YUKIOKA, MUTSUHIKO, *Tenkan Shasai Gata Shinkabu Yoyaku-Ken Tsuki Shasai No Yūri–Hakkō Gaitō,* SHĪHŌ HANREI RIMĀKUSU, No.59 (2019), 78.

not dictated the judges in imposing the sanctions, the courts are safe to grant the relief for such kinds of cases.

Chapter 3

Remedies for Action against Unfairness in Myanmar

Introduction

The action against oppression or unfairness to shareholders and the derivative action have been newly introduced in the MCL. The MCL provides an unfair prejudice action in §192 and a derivative action in §196. Since the actions have been new ones, the interpretation of the legal texts is considered to be essential. By the same token, as the history of the action originated in the common law system, it is paramount to explore the principles and rules as the background of the actions. Therefore, the issues of unfairness and derivative actions in the U.K. and Japan are drawn upon in order to analyse the legal texts of the MCL.

After analysing the legal texts, the remedies given within the purview of the legal texts also has to be analysed. The remedies granted by the derivative action are designed to be compensation for what has been lost. Those granted by way of action against oppression or the unfair prejudice action are the general remedies under the consideration of the courts and specific remedies provided in the MCL. As a general remedy can be granted according to the consideration of the courts, the remedies granted by the common law courts, especially the U.K. courts, are worthy of exploration. Therefore, the theme of this chapter is the interpretation of the legal texts and the examination of judicial decisions.

The problem settlement mechanism has also to be prepared in Myanmar. Japan has encountered numerous problems with shareholder remedies. The courts in Myanmar can observe the problems in Japan and take them into consideration when there is a dispute among shareholders or corporate society. If shareholder remedies are well equipped, monitoring of corporate governance is said to have efficiency. These are not exhausted yet. The concept of the business judgement rule also plays a critical role in deciding whether or not to grant the shareholder remedy. Therefore, this chapter aims to analyse the legal provisions of the action against unfairness or oppression and the derivative action, remedies granted by the actions and

the need of Myanmar courts to explore the principles and rules as the infrastructures of the actions.

3.1. Myanmar Action against Unfair Prejudicial Conduct

The unfair prejudice action is a novel legal action which the MCL adopts. The policy behind the MCL has to be explored in order to understand why such legal texts appeared as one of the parts in the law. The backdrop of providing this action was the intention of the drafters of the law to make the MCL consistent with the common law system.[279] Myanmar has gone along with this idea because of its traditional adherence. This adherence was supported by FREDRICK'S description that the common law system was not forcefully implemented in other jurisdictions in business and commercial transactions.[280] Rather, an adhering country, such as India, aligned it with its situation and adopted it as its law.[281] MAUNG MAUNG shared the same view with FREDRICK and affirmed that Myanmar first tried the common law system with the liberal policy, *laissez faire*, and social science.[282] Those policies permitted Myanmar to accept and abide by the common law rules.[283]

In framing the MCL, the principles of the common law system adopted by the former Myanmar Companies Act (MCA) have been preserved, while its development has also partially been undertaken. Myanmar only had a general goal to upgrade the MCA—to promote the

279 Aung Naing Oo & Winfried Wicklein, *The New Companies Law: Creating Better Conditions for Business*, FRONTIER MYANMAR (Nov. 29, 2016), http://frontiermyanmar.net/en/the-new-companies-law-creating-better-conditions-for-business.

280 FREDRICK, POLLOCK, SIR., THE EXPANSION OF THE COMMON LAW, 15–17 (Rothman Reprint Inc.) (1904) (Pollock, who received the title of Sir as a commoner but for his great effort as a Corresponding Member of the Institute of France, Corpus Professor of Jurisprudence at Oxford, Fellow of Trinity College, Cambridge, and the author of remarkable publications, expounded that the equity rule was impressive but would be perplexing if it was mixed with the German law system).

281 Id at 17 (as India used to be a British colony, the British Government at that time did not force India to adopt its legal system; rather, India abided by the common law rules by virtue of the intellect of the English jurists).

282 MAUNG MAUNG, JR., LAW AND CUSTOM IN BURMA AND THE BURMESE FAMILY, 16, 17 (M. Nijhoff, 1963).

283 Id (one of the former presidents of Myanmar, Dr Maung Maung, recognized that the British did not use force to implement the English common law system in Myanmar).

Myanmar economy and follow the international trend[284]—it needed to articulate the policy in which the aims and objectives were set. Nevertheless, the aims and objectives can be assessed through the structures of the law. Such aims are set to facilitate the formation of a company,[285] install corporate governance and the mechanism of shareholder remedies, and define corporate social responsibility.[286]

With regard to internal shareholder protection, there were only a handful of legal shareholder remedies within the MCA. Even though Myanmar has organised itself as a member of the common law family, it has hardly touched on the ideas developed in the corporate regime in the U.K. Canada[287] and Delaware[288] followed the common law principles and granted shareholder remedies first. They added the remedies to the statutes only after the rules had been established. However, Myanmar was beyond the reach of such varied concepts of shareholder remedies by that time. This fact used to be a reason for the absence of legal shareholder remedies in the statutes of Myanmar. Such remedies have been brought to Myanmar from 2017 and so their exploration cannot be ignored.

3.1.1. Scope of the Action within MCL

According to the texts provided in §192 of the MCL, the elements of unfair prejudice action which constitute in this section can be divided into:

1. conduct of the affair or proposed act or omission of a company;
2. interests of individual member or all members; and

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284 TUN, MELINDA, *A Principle Approach to Company Law Reform* in MYANMAR, LAW, SOCIETY AND TRANSITION IN MYANMAR, 222–234 (Hart Publishing, Melissa Crouch & Tim Lindsey eds., 2014).

285 Id (the MCL shares the same goal as the CA 2006, which is the 'think small first' principle, which means first making the provisions in the Act simple and easy for small businesses to follow).

286 See MCL, §§6, 7, 8, 12, 60, 164–172 (providing the non-necessity of a permit to trade, no par value share, the object clause being unnecessary, duties of directors, environmental protection and worker rights).

287 See WILLEMS, MARCEL, SHAREHOLDERS' RIGHTS AND OBLIGATIONS: A GLOBAL GUIDE, 177–180 (Globe Law & Business,1st ed. 2017) (By checking the texts and legal cases annotated in the footnotes, it was learned that courts in Canada granted an oppression remedy before the Business Corporation Act in 1975).

288 Taking into account Elster et al. V. American Airlines, Inc., 00 A.2d 219 (1953) Del. Ch., New Castle, it is learned that the derivative suit had been decided before the statutory provisions by following the Court of Chancery rule. VENTORUZZO ET AL., *supra* note 76, at 365.

3. capacity of member or other capacity.

1. A company is a juridical person and it needs natural persons to represent it.[289] Therefore, the BOD is assigned to be the representative of a company. The act of a company is therefore the act of the BOD.[290] The act covers a wide range. An act proposed to be done is also an act. Further, an omission to do an act is also the act.

2. §192 can be applied for the interest of an individual member or all members. It means that the amount of shareholding or voting right percentage is not material to make a claim under this section. However, with regard to the interests, as there are many interests such as financial or non-financial rights, this term needs to be clarified. However, as the term is expressed in the plural form, it is sure that not only the economic right but also the legal right are taken into account under this section.

3. With regard to capacity of a member or other capacity, it is a complex context. Based on the principle set up by *O'Neill*,[291] it should consider whether other persons in the capacity of member can claim under this section. For example, there is doubt as to whether an employee not a director can sue under this section. It is considered to be a problem because any persons to whom the shares have been transferred can claim according to this section. In the current situation in which options can usually be issued to employees as an incentive for good employment, it is problematic if an employee to whom the shares are transferred will claim under this section. If the drafters of the MCL want it to be in conformity with the common law principle, the principles developed in *O'Neill* must be observed. If an employee who has received

289 In the CA 2006, as the minimum age for a director is adopted as a qualification of a director, the logic of appointing any organisation or association as a director cannot be sought. KEAY, *supra* note 79, at 8.

290 According to the agency theory, the BOD is the agent of a company but their liability for external corporate governance would be dependent on the circumstances of the cases in the U.K. PNG, CHEONG-ANN, CORPORATE LIABILITY: A STUDY IN PRINCIPLES OF ATTRIBUTION, 41 (Kluwer Law International, 2001).

291 Although there were cases prior to *O'Neill*, those cases did not reach the House of Lords and the principle related to capacity had not yet been established.

bonus shares[292] is counted as a member under this section, this research takes the view that it navigates from the common law to some extent.

3.1.2. Contextual Interpretation of Legal Provision

As §192 of the MCL specifically protects a member's personal right, the term 'member' has to be defined. The interpretation of 'member' is in conformity with a case decided nearly sixty years ago in Myanmar.[293] Although the background of the interpretation of 'member' in the U.K. context might be distinguished from that in Myanmar,[294] the imputation of a shareholder to be a member within the ambit of the unfair prejudice action shares the same definition.[295] Thus, 'member' in §994 of the CA 2006 and in §192 of the MCL includes 'shareholder'. For the interpretations of other terms, the principles and rules developed through the common law system are relevant. The frame of the action is set according to the figure that follows.

Following who, whom, why and where the unfair prejudice action can be made, what the court can order under the unfair prejudice action is consequently provided in §193. To analyse the court orders in this section, this research takes the view that the court can make orders that the U.K. courts have not granted. This kind of order is the order to grant damages. One more issue that will raise questions in Myanmar's corporate environment is whether the

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292 If bonus shares are issued to the current shareholders, the problem will not appear. However, if they are issued to the employee, it is a kind of 'transferring at will'. If the employees become shareholders by way of receiving the bonus shares, such employee will have the capacity to claim under the unfair prejudice action. Moreover, the profit sharing system for employees could not be a positive sense, i.e., it was not totally dedicated to the employee; it was for the industrial firm owners. See POOLE, MICHAEL, THE ORIGIN OF ECONOMIC DEMOCRACY: PROFIT-SHARING AND EMPLOYEE-SHAREHOLDING SCHEMES, 8–14 (Routledge, 1989).

293 In the Burmese Review Ltd and two others v. Daw Than Tin [1959] B.L.R. (S.C.) 206, the then Supreme Court of Myanmar decided that members were not only the original subscribers but also the shareholders who did not appear in the company registration but to whom the share was being transferred or by operation of law by referring to the cases decided by the courts of the Chancery Division and of Calcutta.

294 See id; DIGNAM & LOWRY, *supra* note 68 , at ¶¶2.7, 2.33; CA 2006 §§112, 994(2); MCL §192 (despite the fact that a shareholder not registered as a member could not be termed as a member according to §112 of CA 2006); MARC T. MOORE, *supra* note 55, at 945 (Moore contended that a shareholder was also a member of companies in the U.K. and Myanmar. Likewise, a person who has held any share is also a member, as described under the section on the unfair prejudice action, which the CA 2006 and the MCL have in common).

295 Section 994 (2) of the Act extended the right to petition to a person who was not a member of the company but was a person to whom a share or shares in the company had been transferred or transmitted by operation of law. See *Harris*, *supra* note 18.

remedy can be granted either for a public or for a private company. In the U.K., since its courts have encountered many unfair prejudice cases since 1948, analogous cases can be inferred in certain circumstances.

Fig (i) Process of Unfair Prejudice Action under MCL

<table>
<tr><td>Claimant (who)</td><td>1. Member</td><td>2. a person who has been removed from the register of members because of a selective reduction</td><td>3. a person who has ceased to be a member of the company</td><td>4. a person to whom a share in the company has been transmitted by will or by operation of law</td><td>5. a person whom the Registrar thinks appropriate having regard to investigations it is conducting or has conducted into the company's affairs or matters connected with the company's affairs</td></tr>
<tr><td>Defender (whom)</td><td>1. Company</td><td>2. a person on behalf of the company
Officers (directors, auditors, etc.)</td><td>3. members who have proposed or omitted the act</td><td>4. class of members who have proposed or omitted the act</td><td></td></tr>
<tr><td>Reasons (why)</td><td colspan="3">1. an actual or proposed act or omission by or on behalf of a company</td><td colspan="2">2. a resolution, or a proposed resolution, of members or a class of members of a company</td></tr>
<tr><td></td><td colspan="5">1. or 2. is either contrary to the interests of the members as a whole; or oppressive to, unfairly prejudicial to or unfairly discriminatory against a member or
members</td></tr>
<tr><td>Ex-ante or ex-post (when)</td><td colspan="3">1. ex-ante</td><td colspan="2">2. ex-post</td></tr>
<tr><td>Forum (where)</td><td colspan="5">Court</td></tr>
</table>

3.2. Concept of the Action

The MCL has to be explored in order to discuss the distinctions between the unfair prejudice action and the derivative action. The precedent decision with regard to shareholder

remedies in a corporate form of business showed that it resided within the general meeting and winding up for an extreme case.[296] As the quote of the decision was alive within the corporate society and the role of shareholders who monitor corporate governance was unrevealed, shareholders in Myanmar were inactive along with the concept to do business individually. Sole proprietorship without a corporate form was proper in its own way and to some extent. The many incentives given to corporations which possess legal personality and reduce the agency cost to some extent as expounded in Coarse Theorem[297] was not sufficiently transplanted to Myanmar business society.

COARSE was at that time considered to be in favour of the capitalism that ADAM SMITH was fond of through the 'Wealth of Nations'. The idea of the invisible hand by ADAM SMITH, as this research reaches, spread through the curriculum of the universities in Myanmar, especially through the institute of economics. Nowadays there have been discussions on its effect upon liberal thoughts; as asserted by KARIYA,[298] it would be wondering that Myanmar was fortunate that the theory did not concentrate in Myanmar business society. Nevertheless, as one can learn from the experience, it is not fair to make such a deduction.

Notwithstanding that private business organisations may be said to be independent from the macro-economic policy, they were impacted by the policy, especially when the judicial institutions settled the problem involved with the business. In this situation, the courts in Myanmar have to avoid stressing such economic theory and emphasis the legal theory. Based on this background, the courts are required to consider in granting the remedies by way of derivative action or action against unfairness and to navigate from one action to another..

296 Accord with the decision of Justice Maung Maung who was the then chief justice of the Supreme Court of the then Socialist Republic of the Union of Myanmar. U Ohn Maung and Two v. Chan Thar Zay Co. [1964] B.L.R, 499.

297 R. H. Coase, The Nature of the Firm, https://onlinelibrary.wiley.com/doi/full/10.1111/j.14680335.1937.tb00002.x.

298 KARIYA, HIROSATO, *Adamu Sumisu, Nōmu Chomusukī sohite, Kaisha-hō: `Miezarute' Wo Mitsume Naosu-toki, Sore-wa Ima*, HŌGAKU SEMINAR, No.781 (2020.2), 50.

3.2.1. Proceeding for Derivative Action

The responsibility to sort out the cases related to the shareholder remedies rests on the courts. Even if the actions by members or others applied by the shareholders under §192, the court may consider to change the proceeding to a trial as a derivative action or other action.[299] In this circumstance, the courts are responsible to consider whether to grant the remedies directly to the claimant shareholders under the actions against the oppressive manner or grant the remedies to the company by way of the derivative action.

In the derivative action, the MCL precludes the rights that are usually claimed under the general law to be referred and cited.[300] A derivative claim must be brought only under the MCL.[301] The derivative claim is to be obliged by the MCL from §196 to §201. The good points are that a person claiming to file the derivative action does not need to receive the permission of the company concerned if it is claimed for the benefit of the company,[302] that the court can intervene in such case even if the company ratified the conduct of the officers[303] and the court is to set the costs order.[304] Therefore, the MCL absolutely gives the power of the courts to settle the company affairs.

With regard to the judicial institutions, there are minor concerns not to presume the rights from the general law. The MCL describes to bar the shareholders' rights under the general law in the derivative suit. Here, the general rights from other law can be interpreted with two different meanings. First, it may mean the rights to claim under the criminal law, civil law or tort law. Second, it can be presumed as the common law generally adhered to by the former British colonies or human rights-related law to some extent. In this circumstance, this research takes the view that it will be better if the general right from other law means the general right given by the criminal law, civil law or tort law.

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299 MCL, §192(vi).
300 MCL, §196(c).
301 Id.
302 Cf. STEINFELD *supra* note 65, at ¶14.23 (deriving that the provisions within the MCL have not included that a company written resolution is needed in order for shareholders to make a claim).
303 MCL, §199.
304 MCL, §201.

3.2.2. Time Limitation

With regard to unfair prejudice in the MCL, the common law principle has to be applied. This means that not only the objective test but also the subjective test have to be used in order for the courts to commit the feasors. It has to be done so because unfairness or oppression possesses the characteristic of a threat against society's peace. Thus, such action is open without time limitation. It is also proper to be a free time because the continuing effect is always attached with the element of prejudicial unfairness or oppression.

One more fact which this research paper would like to point out is that the MCL does not provide the nature of breach of the director duties, that is, whether the breach is a criminal wrong, civil infringement or tort liability. Neither is the time limitation for a derivative action provided in the Limitation Act, 1908.[305] However, according to the first schedule of the Limitation Act, 1908, in No. 120, a 'suit for which no period of limitation is provided else-where in the Schedule' must be filed within six years from when the right to sue accrued. Therefore, a derivative action not based on a criminal offence in Myanmar must be undertaken within six years. On the other hand, if it stresses the presumption that a breach of director duty is based on the intention or *mens rea* to be committed by the court, then the infringement is a criminal offence, and there is no time limitation in such case.

If the conduct of any officer such as a statutory auditor will be interacted with the derivative action, this research takes the view that the Limitation Act, 1908 has to be applied. In such case, if a company makes a claim against any officer based on accounting fraud, the concept of the criminal offence has to be applied. For such case, it is generally known that there is no time limit to make a claim. However, if the company sues for other than the accounting fraud, for example, on a negligence-based claim, the time limit set for the accounting factors described in the No. 88 of the First Schedule[306] has to be referred. According to that schedule,

305 There are (13) volumes of the Burma Code as the consolidated law of Myanmar. The Limitation Act, 1908 succeeded as the British law is consolidated in Burma Code vol. 12. The Act has been amended from time to time as needed by the situation. It started to have binding force in Myanmar from 1 January 1909 and was amended in 1977, 2008 and 2014.

306 The Limitation Act, INDIA ACT IX, 1908, https://www.mlis.gov.mm/lsScPop.do?lawordSn=8705.

the time limit for the accounting factor is within three years starting from when the company knows such factor or the officer terminates the service.

3.2.3. Litigation Cost

The litigation cost has to be separated from the legal cost. The litigation cost covers the court fee, witness expenses and lawyering fee. The legal cost includes more than those fees. It includes the lawyering fee in order to file the suit. It is not a big problem for the actions by members taken personally against oppressive conduct or unfair prejudicial conduct. It is normally set by the order of the courts as in other civil suits.

In the MCL, the persons responsible for paying the litigation cost are the claimant to whom the leave has been granted, the company itself or the other parties to the proceeding.[307] In fact, as the derivative action proceeds for the company's economic loss, the reason the claimant himself or herself has to pay the legal costs sustained by the company is hard to explain. Since the voice of shareholders or the resolution of the board of directors can infer that the action is for the company as a whole, the company needs to indemnify all of the costs. However, the majority shareholders' consent having effect on the legal costs does not appear in the MCL. If the plaintiff defeated in the suit, the litigation cost will be indemnified from the whole amount of the compensation. Nevertheless, it is not reasonable for the claimant shareholder to pay the costs of the derivative claim.[308]

With regard to legal aid, as legal aid focuses on criminal cases for the poor, a claimant shareholder will not qualify to receive legal aid and will be barred from receiving legal aid under the Myanmar Legal Aid Law.[309] Even if a claimant shareholder is poor and the director breaches the duty of loyalty, an element of which is a criminal offence, offering legal aid will create an awkward situation. Moreover, whether the system of contingency fees is applied in

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307 MCL, §201.

308 Accord DAVIES & WORTHINGTON, *supra* note 70, at ¶¶10.43–10.46 (citing the four cases—Moir v Wallersteiner and others (No. 2) [1975] 1 All ER 849, Halle v Trax BW Ltd [2000] BCLC 1020, Smith v Croft (No 2) [1988] Ch 114, and Stainer v Lee [2010] EWHC 1539 (Ch)—the litigation cost problem was encountered due to the defeated derivative suits).

309 The Legal Aid Law, the *Pyidaungsu Hluttaw Law* No. 10/2016, §6 (*hsalain*) (the law being available in Myanmar version, and the Myanmar alphabet '∞(*hsalain*)', in chronological order, is equivalent to the English alphabet 'g').

Myanmar needs to be instructed following the court's direction.[310] Hence, the question arises whether more sections need to be incorporated into the MCL or whether the highest court needs to issue an instruction or to insert the consequential contexts of derivative actions and actions by members into a part of the court manual.

3.3. Remedies for Oppressive or Unfair Conduct

As formerly discussed in section 3.2 of this research paper, shareholders' problems were decided in the general meeting; that the MCL renders shareholder remedies is the upgraded idea in the 21st century. Especially with regard to remedies for an individual shareholder, §192 of the MCL provides a wide range of remedies to be granted. At the same time, as the remedies are newly offered, there is an apprehension that the remedies are unknown. Thus, §192 indicates that the courts can grant the specific remedies contained in the section or can grant remedies according to its own consideration.

3.3.1. Statutory Remedies

The MCL in §192 provides that 'the Court may make an order…if the conduct of a company's affairs, an actual or proposed act or omission by or on behalf of a company, or a resolution, or a proposed resolution, of members or a class of members of a company is either: (a) contrary to the interests of the members as a whole; or (b) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity'.

The following section, that is, §193 of the MCL, provides what the court is authorised to do relating to §192 of the MCL. According to §193, the court can make any order that it considers appropriate in relation to the company, including an order:

(i) that the company be wound up;

(ii) that the company's existing constitution be modified or repealed;

(iii) regulating the conduct of the company's affairs in the future;

(iv) for the purchase of any shares by any member or person to whom a share in

310 The court considered legal aid and the contingency fee. See *Wallersteiner*, *supra* note 72.

the company has been transmitted by will or by operation of law;

(v) for the purchase of shares with an appropriate reduction of the company's share capital;

(vi) for the company to institute, prosecute, defend or discontinue specified proceedings;

(vii) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

(viii) appointing a receiver of any or all of the company's property;

(ix) restraining a person from engaging in specified conduct or from doing a specified act;

(x) requiring a person to do a specified act; or

(xi) for damages.

MCL §193 (2017). Retrieved https://www.dica.gov.mm/sites/dica.gov.mm/files/documenttfiles/final_mcl_english_version_6_dec_president_signed_version_cl.pdf from website created under the authority of the Directorate of Investment and Company Administration in Myanmar.

From all of these orders which the court can make, the orders that the court can give under (i), (iv) and (v) are not to be considered as the best remedies because the shareholders will no longer remain as shareholders. Nevertheless, as BOYLE had stated, the unfair prejudice action was much more complicated than the derivative action because, depending on the concept,[311] there was imperfection in having only the unfair prejudice remedy. Therefore, the provisions following the unfair prejudice action in the MCL are those that relate to the derivative action.

3.3.2. Remedies by Court Consideration

In addition to the specific remedies described in section 3.2.1 of this research paper, the court in its consideration can grant remedies other than the statutory remedies rendered in §193 of the MCL. For the court to decide according to its consideration, the judges must draw on the concept of the common law rule. The rule permits the judges to decide according to justice,

311 BOYLE, A.J., MINORITY SHAREHOLDERS' REMEDIES 101 (Cambridge University Press, 2002).

equity and good conscience.[312] As the rule of justice, equity, and good conscience[313] is born of the common law system, how to use the rule in granting the remedies provided in the unfair prejudice action or action against an oppressive conduct requires to refer to the common law concept. Thus, this research recalls the remedies which the House of Lords, courts in all divisions and the appellate courts in England granted according to the equitable principle. If these remedies were checked, the remedies which are not provided in §193 of the MCL are the orders according to the following figures.

According to the Fig (ii), the specific remedies provided in §996 of the MCL are numerous. The specific remedies, amendment of the articles (constitution) of the corporation and winding up of the corporation are provided as the remedies granted by the consideration of the court. They are proper to be provided statutorily because Myanmar does not have precedent cases to refer to and cite. In the reverse situation, with regard to the order to regulate the conduct of the company's affairs in the future, not only the CA 2006 in §996(2)(c) provides for this but also there are some cases in which the U.K. courts can grant certain remedies. These remedies were granted as the orders described in section 1.3.1 of this research paper.

- Set out the comprehensive code for the future conduct of the company's business (Chemtrade Limited v Fuchs Oil Middle East Limited and another; Sheikh Abdullah Ali Alhamrani v Sheikh Mohamed Ali Alhamrani and others, [2013] ECSCJ No. 62);
- Order the petitioner or other person to be involved in management (Orr v Orr [2013] CSOH II6);
- To distribute the dividends at the agreed rate (Sikorski v Sikorski [2012] EWHC 1613);
- To appoint the directors according to the provided schedule order (Re Neath Rugby Ltd [2009] 2 BCLC 427); and
- Order that the director was no longer to be appointed (Football Assets v Blackpool Football Club (Properties) Ltd [2017] EWCH 2762 (Ch)).

312 The Burma Laws Act, 1898 (India Act XIII, 1898, 4 November 1898), § 13 (3) (The Burma Laws Act, 1989 was codified in the Burma Code, vol.1).

313 Justice, equity and good conscience are used by the courts when they have to settle a problem brought before them which the statutes cannot cover. The courts are responsible to settle even if there was no law to settle in accordance with the merit of the case. Thus, it cannot be interpreted within a fixed boundary.

These remedies can also be used by Myanmar courts as the remedies to grant under the consideration of the courts when the analogous cases appear and a person who has the capacity of a member claims the remedies. One remedy which the MCL does not expressly offer is that of the injunctive remedy. This fact inclines to recall the Specific Relief Act, 1877.[314] As the order for the injunction can be claimed by this Act,[315] shareholders or persons who have the capacity of members who want to deter any conduct of a company and want to claim the injunctive order will be wondering whether they have to make a claim according to the Specific Relief Act.

Fig (ii) Remedies Given by Unfair Prejudice Action in CA 2006 and MCL

Specific / General	Remedies	U.K	Myanmar
Specific	regulate the conduct of the company's affairs in the future	Yes	Yes
	Shift to other proceeding	Yes	Yes
	the company not to make any, or any specified, alterations in its articles without the leave of the court	Yes	No
	Amendment of the Articles	As general	Yes
	Share purchase	Yes	Yes
	appointing a receiver of any or all of the company's property	No	Yes
	restraining a person from engaging in specified conduct or from doing a specified act;	No	Yes
	requiring a person to do a specified act	No	Yes
	Damages	As Equitable Compensation	Yes
	Winding up	As general	Yes
General	Injunctive Relief	Yes	No
	Equitable Compensation	Yes	As Damages

314 The Act was consolidated in Burma Code, vol.11 as India Act 1877.
315 See Specific Relief Act, 1977, §§52–55.

The other point that distinguishes the MCL is that it expressly provides that the court can make an order for damages whilst the CA 2006 leaves this similar order to be according to the consideration of the court. Despite the Myanmar courts' authorisation to consider orders to grant the remedies, the reasons for the MCL explicitly offering damages for the court to grant might be complex. As damages have to be referred to as an amount much more than the loss, there will be a worry if any person comes to court to sue for all of the interests occurred as the consequences of the unfair manner.

One more order that the MCL does not expressly provide is the order for the cancellation, invalidation, or null and void of the new shares or other securities issuance. In the case of Japan, most claimants related with the new issuance sought such extinguishment of the newly issued shares, while in Myanmar, courts can invalidate the shares by their consideration. Moreover, they can do so by the statutory provision within the scope of 193(v) by granting the order for the purchase of shares with an appropriate reduction of the company's share capital.

Conclusion

Among the changes in the MCL, especially with regard to unfair prejudice action and derivative action, some good points can be seen through the provisions. One of them is that it is up to the court to consider the permission to the claimant shareholders to file a derivative suit. Therefore, a problem similar to that of *Foss* in which the absence of a shareholder meeting could prevent minority shareholders to file a derivative suit cannot be repeated in Myanmar. Another good point is the inclusion of examples of remedies that the courts can grant under an unfair prejudice action.

As the flip side of the good points, this research finds out six main problems focused on the textual interpretation of the unfair prejudice action and derivative action in the MCL. The first problem is the prohibition of the application of the general law in unfair prejudice action. The second one is the capacity of members to make a claim under the oppression remedy. The third one is the uncertainty of the parties with regard to the order for injunction. The fourth is related to the granting of damages. The fifth and the sixth are the problems with who are the

respondents in a derivative action and the time limitation and legal cost of the derivative action.

In addition, there is one more point that relates to corporate governance. The concern relates to the provision that the court requires to grant a concerning officer the relief for infringement of his or her duties in good faith. For this kind of case, the MCL still maintains the power of the court to make the officer concerned free from the action being taken for his or her non-fulfilment of the duties imposed by the MCL. According to the textual meaning of the MCL, the court has to use the subjective test in order to commit the concerning person. Therefore, although the MCL has been upgraded, it is hard to say that the monitoring of corporate governance is framed in the law. If the provision on the court power to grant the relief for negligence which is similar to the business judgement rule would be kept silent, then a device for checking the corporate governance within the law would be more developed.

Chapter 4

Lessons Learned for Myanmar

Introduction

The legal remedies which shareholders have claimed in the U.K. and Japan are considered to be the legal remedies against the unfairness done to them. This unfairness has taken place after the various conduct of a company done in pursuance of the resolution of shareholders or the BOD. The company Acts of the two countries provide different versions in order to render the remedies to shareholders when they bring their cases to the courts. Some judicial decisions meet with what the shareholders claim; some are not successful for numerous reasons. In some cases, the pledges of the shareholders might not be the promising petitions. In other cases, the courts were not able to grant the remedy because the traditional value of the corporate law theory has to be maintained.

In the U.K., there are barriers which prevent the courts to render the remedy for private legal or economic interest. As the traditional values of the U.K. are ingrained in capitalism, although the system has changed in political regime, it cannot guarantee that the courts renounce that capitalist idea. It was hard for the courts to leave that idea because they thought that the economic interest of the whole company depended on the majority shareholders. For example, the uncommon characteristics of public and private companies exist. Therefore, the emergence of liberal thought is considered to be a pill for remedies of shareholders in a public company.

Similar to the U.K., courts in Japan are considered to be the institutions to settle shareholder disputes and render their remedies. The JCA specifically opens for shareholders to claim their remedies for the unfairness. The claims of shareholders are also different from those of shareholders in the U.K. The shareholders mostly claim for the extinguishment of shares followed by the unfair issuance; the U.K. shareholders mostly claim the share purchase order. Because the judicial institutions are independent from each other in Japan, different courts have different presumptions in order to give judgements. One more thing which Japan is likely

to be honoured for is that of its case reviews. There are numerous research groups for case reviews which have given many ideas for the development of the law. By studying the case reviews, this research takes the view that the trend in Japan is to put its own liberal thought into the corporate issues.

If the experiences of the U.K. are drawn to Myanmar, what is valuable are the legal framework of the U.K., the law reform commission and the endeavours of the judicial institutions in settling the remedies. Likely, Japanese experiences in solving the problems within the legal cases related with shareholder remedies and the formation of legal research teams are worthy for Myanmar. Taking these lessons and how to install the mechanism to protect shareholders within the MCL, the prospective agenda that can be implemented in order to render the remedies to shareholders are retrieved as a chapter in this research.

4.1. U.K. Experiences

Although imposing shareholders' duties had been popular in the EU,[316] the U.K. could not impose shareholder fiduciary duties.[317] Even though Britain has a shareholder centric policy, the so-called liberal policy, and Germany had a co-determination policy in corporate management, they could cooperate in the Union due to the founding treaty of EU that opened state preferences.[318] Even though the state preferences had been the core to establish the union, the EU had been trying to impose shareholder duties[319] according to its *lex societatis*; but some states used their own law to override it.[320] Nevertheless, the cooperation of Britain was last at the end of three decades of participation.

The way of the U.K. is not to impose shareholder duties in order to make them liable for what they have done. Its strategy is to provide the action against unfair prejudicial conduct of

316 BIRKMOSE & SERGAKIS, *Introduction* to ENFORCING SHAREHOLDERS' DUTIES, *supra* note 121, at 1.
317 CAHN, ANDREAS & DONALD, DAVID C., COMPARATIVE COMPANY LAW: TEXT AND CASES ON THE LAWS GOVERNING CORPORATION IN GERMANY, THE U.K. AND THE USA, 713–14 (Cambridge University Press, 2018).
318 FIORETOS, ORFEA, *The Domestic Sources of Multilateral Preferences: Varieties of Capitalism in the European Community* in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE, (Peter A Hall & David Soskice eds.), 215 (Oxford University Press, 2001).
319 BIRKMOSE & SERGAKIS, *Introduction* to ENFORCING SHAREHOLDERS' DUTIES, *supra* note 121, at 1.
320 Besides tort law and insolvency law, another example might be that unification could not be implemented due to the shareholder law. Accord id, at 9.

the shareholders instead.[321] Thus, this research is inclined to ask why the U.K. has not been on the trend of defining the obligations of shareholders. The possible answers are various. One answer may be that the U.K. favours shareholder democracy unless and until it infringes others' rights. Another answer may be that if there is an infringement of some shareholders, other shareholders cannot get the legal standing to sue among each other in a court of law. However, an *obitor dictum* in one case[322] in which the courts settled the disputes between two shareholders in the crossed claims against each other has to be ignored.

To look at the sources of corporate decision, there are two limbs: decisions driven by resolution at shareholder meeting and those of the BOD. Based on these sources, conflicts between the majority shareholders and the BOD [323] and between majority and minority shareholders[324] existed. This research focuses on the problems associated with rights between the two groups of shareholders. Based on this focus, the link between the majority favouritism at the world early stage and capitalism has to be considered. As long as the business of the company has to be done under the control of the majority despite the malfunction, it is the situation that the capitalism overwhelms.

4.1.1. Problems associated with Capitalism

Capitalism which was used as the country economic development driver before World War II was tagged to the post war era.[325] Each country had its own style of capitalism, that is, economic development of some countries was gained by the state leveraged on private industries through the bank, such as in France and Japan.[326] However, the U.K. style of

321 The action against the shareholders' conduct is not defined under the law of obligation or private law; but under the public law as an offence against public peace. Id.

322 TH Holdings Ltd (formerly Tonstate (Hotels) Ltd) and another v Destiny Investments (1993) Ltd and another [2017] EWHC 657 (Ch), [2017] All ER (D) 10 (Apr).

323 This is the direct democracy that the BOD is responsible for according to the results of shareholder meetings and shareholder participation in management decisions. BUCHHOLTZ & BROWN, *Shareholder Democracy as A Misbegotten Metaphor, in* SHAREHOLDER EMPOWERMENT, *supra* note 39, at 89.

324 Acting in accordance with the majority shareholders' wish is a democracy between majority and minority shareholders. See GERNER-BEUERLE & SCHILLIG, *supra* note 105.

325 HALL, PETER A & SOSKICE, DAVID, *An Introduction to Varieties of Capitalism, in* VARIETIES OF CAPITALISM, *supra* note 318, at 2.

326 Id.

developing economy was slowly gained by the state leveraged style.[327] Its capitalist system was neither the neo-corporatism which stressed the worker participation system nor the sociological approach.[328] Hence, as aforementioned, it can be confirmed that the U.K. way of capitalism was started with no more than shareholder democratic thoughts. In order to connect shareholder liberalism and the corporation, the corporation of the Kingdom which started as the chartered corporation[329] will not be stressed in this research.

Considering the shareholder democratic system, there are three limbs which are usually the sources of the authority to make the decision.[330] The first limb is the majority resolution. The second is special resolution, and the super special majority as mentioned in section 3.1 of this research. Suppose a company is in need of funds in order to start a new project by issuing new shares or other securities in a non-public company, the BOD is not generally authorised to do without the approval of the specified shareholders. In such a case. it will not be a problem. However, according to the issues which have sometimes happened in the U.K., the fund raising is not for the business purpose; it is used as a tool to expand individual control by lessening the subscription rate of other shareholders. This problem is the consequential circumstance of using a shareholder democratic system. The decision of a company relies on the intention of the bigger finance holder(s) either singly or jointly. Thus, even in the political democracy, it is not sure whether the democratic system is the end of history.[331] In other words, it is doubtful there is a system better than a direct or representative democratic system.

327 Id.

328 The U.K. has not used the coordinated system as has Germany and has also not embraced the socialist system in which trust is generated within the large communities. Id, at 3–4.

329 A chartered corporation was granted to be formed by the order of the British Emperor and it was known as the Royal Charter.

330 GERNER-BEUERLE & SCHILLIG, *supra* note 105.

331 As there was feedback for FRANCIS FUKUYAMA's opinion that there can be no more system better than democracy, this research goes beyond the democracy agenda. FUKUKYAMA, FRANCIS, *The End of History?,* THE NATIONAL INTEREST, No. 16, 1989, 3–18, *JSTOR*, www.jstor.org/stable/24027184.

Similarly, economic democracy is also doubtful as a residue of capitalism which favours those who hold strong financial power.[332] The logic of the favouritism might be that the capitalists can contribute more extensively than those who hold a weak economic power can do. Nowadays, that idea has to be renounced because there are other contributions for the country's development. In other words, there are other indicators[333] which each country requires to take into account in order to make the concession for its rank. Just as democratic, socialist or capitalist in the political field had to be visited at the end of the 20th century,[334] the remedies cannot completely be rendered unless a system scripted in business relations has not been revisited. According to this research, a monitor to control the economic democracy that has worked well is to render remedies and indemnify what shareholders lost.

4.1.2. Emergence of Liberal Thought

Before the 19th century, the corporations were not of the private regime.[335] The first former concept was that corporations were created under the Charter of His or Her Majesty. After the law of corporation was enacted, the aspect turned to be that the corporations were created by the government. Gradually, the corporations were conceptually defined by the liberalists and they thought that corporations were created by contract.[336] Since the nature of the contract had been based upon the private conduct of the contracting parties, the corporations created under the contractual agreement were to be of the private nature. Hence, the emergence of liberal thought made the corporations be private ones.[337] Therefore, within the regime of the corporations including private and public companies, the companies had better be considered as a private affair.

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332 See BERGER, PETER L., *The Uncertain Triumph of Democratic Capitalism, in* CAPITALISM, SOCIALISM, AND DEMOCRACY REVISITED, (Larry Diamond & Marc. F. Plattner eds.), 1–10 (The Johns Hopkins University Press, 1993)

333 According to the World Development Indicators, there are other indicators in addition to economic development, such as poverty and inequality, people, environment and global links indicators. The World Bank, http://wdi.worldbank.org/.

334 Berger, *supra* note 332.

335 Ciepley, David, *Beyond Public and Private: Toward a Political Theory if the Corporation*, THE AMERICAN POLITICAL SCIENCE REVIEW, vol. 107, No. 1 (February 2013), 139.

336 Id.

337 Id.

Within the timeframe between the concepts of non-private and private, there might have been reasons for why the former changed to the latter.[338] There is no doubt that the corporate regime reflected the political and macroeconomic concepts.[339] The political economy of western countries was transitioned into capitalism and then to a democratic system for the support of *laissez faire*, and the institution of the corporation might turn into a private institution. This concept is drawn from direct democracy; the representative and liberal democracy have not yet been reached. This research draws upon what GERNER ET AL. have found about the correlation of their discussion with liberal democratic ideas in which there is the limit of public interest for private interest.

GARNER ET AL. discussed the importance of defining the private or public nature of a company reflective with security of the property and the functions of the corporation. In the 17th century in England, the law to protect the private property of an individual was absent. Therefore, in order to protect property from interference of the monarch or parliament, these institutions were important. GERNER ET AL. did not mean that the division between public and private institutions of the corporation was meaningless for today.

They pointed out the institutions of a company reflective with social thought, the concept of director duties, effect of financial distress, purpose of the corporation, the ability to adopt default rules and the distinction between private and public companies in the U.K.[340] They discussed why the corporate institutions were public or private first. The problems which need be solved in specific situations followed. Finally, they pointed out the difficulties which the corporation would encounter if the public institution was annexed. If it was to be taken as a public institution, there would be the bargaining power from the government and the shareholders were not reasonably the owners. They found an incomplete answer of private or public institution of the corporation.

338 See also GERNER-BEUERLE & SCHILLIG, *supra* note 105, at 223.

339 Clemens, Elisabeth S., *The Problem of the Corporation: Liberalism and the Large Organization, in* THE OXFORD HANDBOOK OF SOCIOLOGY AND ORGANIZATION STUDIES, (Paul S. Adler ed.), 535 (Oxford University Press, 2010).

340 GERNER-BEUERLE & SCHILLIG, *supra* note 105, at 223–36.

In more detail, they first discussed the view on the institution of a company as a public affair. They showed this with examples of being a public institution. They hold the corporation to be a public institution by considering its externalities. An externality can be seen as an effect of the agents' action, for example, setting the price of a company's product will have an effect on the wellbeing of customers. One more externality they explained was that if a company by the decision of the management team polluted the environment, it was human beings who were affected by the pollution.

They further pointed out the other externality in the form of financial distress. It was the creditors, employees and financial institutions who received the financial effect in times of distress. Large corporations by virtue of this situation could propose that the government organisation make laws and regulations which have effects on the small corporations. The large corporations would get the bargaining power from the small ones. They could do many things, especially in setting the price of the products and to control the market for the benefit of the customers.

However, they noticed the incompleteness of focusing only on these types of externalities. They viewed the other potential impact on the society at the time of closure of the corporation and change into a different market. Since there was the social cost to run the firm while that firm could not bring the economic benefit, the negative effect of taking the externalities into account would exist. Thus, the plant had to be closed and the relocation of the employees had to be done in the new market. It was not sure that the allocations of the job might meet with all the former job positions. The maximisation of revenue of the government or cost minimisation could not be assured.

Furthermore, they focused on the purpose of the corporation. This focus would point out that the institutions of the corporation for it to be public or private would be different. The CA 2006 provides the purpose of the company through the duties of directors is that they must act for the benefit of shareholders and the company. Therefore, the CA 2006 forwards the private nature of the corporation while other countries might not view this the same.

They also discussed the private nature of corporations based on duties of directors. Finally, they proposed to change the duties of directors to cover the public interest. However, those duties were owed to all shareholders and the company at large in the CA 2006. The Company Acts usually did not impose the duties of directors to cover the public interest. Thus, it was hard to accept that the corporation is the public institution permanently. However, some of the objective standards[341] of the infringement of director duties from the different context have to be irrelevant when the company is a public institution. Nevertheless, even though the CA 2006 does not impose director duties to be for the public at large, it opens the choices which are apt to the user. It provides the public and private companies with a uniform set of laws which means that the public company will be the public institution and the private company will be the private institution.

4.1.3. Concepts on Private and Public Company

According to case analysis in section 1.3 of this research, all of the petitioners who successfully claimed the remedies were shareholders in private companies. Shareholders in public companies could not make a breakthrough in pledging that the conduct of the company infringed their rights. This was the distinction of the legal status of being a shareholder or member in a private or public company. This uncommonness of their status forwards this research to explore the essence of public and private companies in the U.K. This context is not to be confused with the existence of a corporation being unclear as to whether it is public or private and the sure thing is that it is the creation of a government.[342]

Specifically, public and private companies are altogether governed by the CA 2006.[343] It was upgraded from time to time before being the CA 2006.[344] As the purpose of the revision in

341 SZELEPET, *supra* note 86, at ¶18.24.
342 See Ciepley, *supra* note 335.
343 WillemS, *supra* note 287, at 693; DAVIES & WORTHINGTON, *supra* note 70, at ¶1.19 (The origin of the U.K. Companies Act was also the consolidated Act of all of the companies run for profit as a business purpose. The U.K. has not had a separate Act for public companies and private companies as has Germany).
344 The amendments of the companies Act were done under the initiation of the law commission and corporate governance groups.

2006 was set to be 'Think Small First',[345] the revision made the private company inclusive.[346] Thus, the CA 2006 simplifies that a private company is 'any company that is not a public company'.[347] For the public company, it provides that a public company is a company limited by shares or limited by guarantees and having a share capital.[348] If the meaning of private and public companies were read, it can be interpreted that an unlimited company can be a private company but not a public company. Nevertheless, the substantial difference between private and public companies is the share transferability and offering.[349] Other collateral differences are trust relationships among members,[350] the minimum share capital requirements, number of directors, having a company secretary, Ltd or plc, rule for distribution of income and account requirement.[351]

It is consistent with the system that a listed company must be a public company and its liability is limited by shares. It is a public company in which shares can be offered on or out of the market exchange.[352] Therefore, it makes sense that a public company belongs to the public at large and subsequently the private interest of each holder of shares or other securities is inferior to that of other members and the company as a whole. However, the CA 2006 covers not only private companies but public companies. This fact makes the CA 2006 to be a combination of private and public laws.

Without the inclination of the CA 2006 being a public or private law, it is to press on the public affairs of a public company. Since all of its disclosures, the direction where the profit resorts to, and its ultimate responsibilities have to be adapted with the public elements, it will be doubtful whether the CA 2006 can be used to settle the disputes within business affairs of a

345 TUN, *supra* note 284, at 222–234.
346 DIGNAM & LOWRY, *supra* note 68, at ¶1.15.
347 CA 2006, § 4(1).
348 Id, § 4(2).
349 DAVIES & WORTHINGTON, *supra* note 70 , at ¶1.18.
350 That a trust relationship was absent in public companies was noticed by the case law and not from the CA 2006.
351 SZELEPET, *supra* note 86, at §33.2.
352 See DAVIES & WORTHINGTON, *supra* note 70, at ¶¶1.22–1.26.

public company. If the courts of law will not have the jurisdiction over the public interest,[353] the unfair prejudice action was right in its own rationale not to be opened to the affairs of public companies. However, the trend appears to urge the courts of law to have jurisdiction in economic interests of the public.[354] If such a proposal cannot help concessions and courts of law will not have jurisdiction to settle the unfairness within a public company, there is another way.

That other way is to build a mechanism for the public-related interests to be settled under the administrative agency of the government,[355] especially the trade department. However, it will be too arbitrary for petitioners to go to the executive department to claim for the remedies. In a Hong Kong case, an unfairness of the public company was remedied under the Stock Exchange Act.[356] This way of settling unfairness might solve the problems in the listed companies. Therefore, the unfairness problem within the unlisted public companies still remains unsolved. Due to this defect, inclusiveness of unfairness of the public done to private into the jurisdiction of the courts of law is the best policy.

4.2. Japanese way of Approaching Shareholder Remedies

Japanese courts in settling the issuance of new shares and their allocation have used different sources. The first source which the courts have used was the legal right provided in the Companies Act. The second focused on the economic right of shareholders or corporate value theory adopted under the principles set in the guidance issued by METI & MOJ. The third was that the courts checked with the principle adopted by the Commercial Code and settled the existence or non-existence of the issuance before the enactment of the Act or the adoption of the principles.

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353 The scenario in the U.K. was similar to that of Japan in that the bureaucrats and politicians controlled the courts and the judges were aware of such situation and limited themselves to deviate from the two groups' desires. See generally RAMSEYER, J. MARK & NAKAZATO, MINORU, JAPANESE LAW: AN ECONOMIC APPROACH, 214–5 (The University of Chicago Press, 1999).

354 The intensive remarks appeared in the 21st century literature which pointed out the situation. Such remarks did not appear in 20th century literature. Compare JOFFEE QC ET AL. (2008) , *supra* note 20, with JOFFEE QC ET AL. (2018), *supra* note 13.

355 It would be odd to implement the scheme of interference of the administrative department in the judicial department. The general theory of separation of power would not be valuable where such mechanism is applied.

356 JOFFE QC ET AL. (2018), *supra* note 13, at ¶6.129.

To look at the history of the JCA, it began with the Commercial Code enacted in 1899.[357] The company law was contained in Part I, Chapter 6 of the Code.[358] The Code was amended in 1938 and became the new Commercial Code and it was an amendment due to the circumstances of the capitalists' need.[359] The new Code was also amended many times to liberalise the shares and shareholder rights related to the business as well.[360] The last significant change of the new Code was in 2005 in which the JCA was separated from it. The JCA was amended in 2014 and 2019 (up to the time of writing) for the facilitation of corporate governance to appoint an outside director as the option of the companies and to promote corporate transparency.[361]

With regard to the remedies for the new share or other securities issuance-related provisions, that is, Arts. 210, 247 which are the provisions of both the Commercial Code and the JCA, the courts used the shareholder equality principle (Art. 109 in JCA) even before the statutory provision.[362] Even though this principle tended to be inconsistent with the shareholder democratic system,[363] the principle has been implanted in the JCA. The insertions to those articles were not yet found. In addition to the consolidation of the JCA, the principles of the corporate value creation were adopted by the METI and MOJ. They adopted the principles while listed companies were interested in hostile takeovers in terms of a tender offer and takeover defence, business synergy and greenmail.[364] Even though Japan had the rules on takeover defence measures during the bubble economy, it historically did not have much

357 KAWAMOTO ET AL., *supra* note 82, at ¶126
358 Id, at ¶127.
359 The amendments were related to the liability of directors and others and the introduction of limited liability of shareholders, nonvoting shares, convertible shares and separation of ownership and control. Id, at ¶¶129–131.
360 Id, at ¶¶75–88; NOTTAGE, LUKE ET AL., *Introduction: Japan's Gradual Transformation* in CORPORATE GOVERNANCE IN CORPORATE GOVERNANCE IN THE 21ST CENTURY, *supra* note 218, at 13–20.
361 KAWAMOTO ET AL., *supra* note 82 at ¶¶173–74; JUDICIAL SYSTEM DEPARTMENT OF MOJ, OUTLINE OF ACT PARTIALLY AMENDING THE COMPANIES ACT, http://www.japaneselawtranslation.go.jp/common/data/outline/191212145736_70.pdf.
362 The invalidation of new share issuance was statutorily provided in the old Commercial Code of Japan. However, the code did not expressly provide the shareholder equality principle. SUZUKI, TAKEO ET AL., KAISHAHŌ ENKAKU I: SŌRON. KABUSHIKI-KAISHA (SETSURITSU, KABUSHIKI), 207–228 (Yūhikaku Books, 1983); BAN, *supra* note 272.
363 Accord, Id.
364 TAKEI, KAZUHIRO, *Kigyō Kachi Hōkoku-Sho Baishū Bōei Shishin To Baishū Bōei-Saku No Jitsumu: Baishū Bōei-Saku No Hōteki Infura Seibi*, No.1735, SHŌJI HŌMU (2005.6.25), 16.

experience as did the EU and the U.S.[365] Therefore, the preamble of the principles are not seen to reduce the takeover defence but rather to use the takeover defence in a proper way. Nevertheless, since the principles in the guidelines had not been adopted to have compulsory binding force, it was hard for the courts to view that a misuse of the principles happened.[366] Even though the guidelines did not bear the compulsory binding nature, this research takes the view that the principles in the guidelines were persuasive and indirectly applied to a large extent in rendering judgement.

The guidelines set the three principles.[367] First, the principle of protecting and enhancing corporate value and shareholders' common interests was described as Principle No. 1. Second, the principle of prior disclosure and shareholders' will was described. Third, the principle of ensuring the necessity and reasonableness to issue new shares and the acquisition right was adopted. The overall purpose of those principles is not to ban the takeover defence but rather not to abuse the defence.

Since the defence measure of a company has belonged to the internal affairs of the company, the court will not interfere to the extent the measure does not inflict any other rights. Here, the rights have to be taken into the legal interest or economic rights.[368] The principles take into account the right related to the economic interest only.[369] This means that only if the takeover defence causes gross economic harm to the minority shareholder will the company be liable, as analysed in *Bulldog Sauce*.

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365 Id (This research views that since the ideas of introducing the takeover defense and the practice of greenmailing were copied from those countries, the principles might be taken from those jurisdiction. The U.K. is reasonably to be excluded from the EU countries because takeover for the shareholders' benefit is freely done in accordance with the Civil Takeover Code).

366 See id (The author thought that if the principles did not bear a binding force and the court referred to them but without strict application, it could not be said that their abuse occurred).

367 The original text is in Japanese and its English translation is also available with disclaimer. METI & MOJ, *supra* note 158.

368 HOLLINGTON QC, *supra* note 2, at ¶¶7.11, 7.64 (The distinction between legal and economic interest rights was that the right of the creditor to participate in the meeting as a separate class of member was the former and the right to the constitution of classes was the latter).

369 METI & MOJ, *supra* note 158 (If the share issuance as a takeover defense measure causes an excessive financial loss to shareholders at the time of the issuance, there is a high probability that the issuance will be considered as a grossly unfair method under Art. 210 of the Companies Act).

In fact, a reason for the new share issuance and free allotment of acquisition rights in Japan was mainly to hedge against the hostile takeover. To meet this end, when the problems of new share issuance and its allocation rights occurred, the related parties pledged and the courts considered reflective with the principles of creating corporate value in the guidelines adopted by METI and MOJ. A reason why the courts had taken the principles into consideration might be that they had to inclusively consider economic rights of the related parties. With regard to the comparability of the legal right and economic right, the former was more voluminous than the latter.[370]

In a nutshell, the problems had been that a decrease in shareholding ratio of the minority shareholders followed the new share issuance and its acquisition rights. Since such shareholding dilution has to be sanctioned *ex post* under the JCA, this research prompts to focus on the JCA. In this way, even if the procedure for the fair takeover has not been statutorily supported in Japan,[371] the fairness for making the business synergy or takeover measure has to be carried out.

4.2.1. Institutional Independence

According to the analyses of the four cases in this research, the disadvantage of shareholders whose shareholdings were diluted was favoured in two cases, *Quanz* and *NBS*. The courts' reasons in these two cases pressed on the provisions of the Companies Act and used the principle of the main purpose rule, the corporate value, as a collateral reason. The issue in law had not been appealed to the superior court in *Quanz*. However, *NBS* appealed to the superior court in order to reconsider the infringement of the law and regulations. Here, the research finds that even though the principles had often been referred to in the previous cases and that the procedure was said to be a precedent rule, this rule had not existed as a law.[372]

370 HOLLINGTON QC, *supra* note 2 at ¶¶3.19–3.33 (Lord Esher MR and Bowel LJ opined that the legal rights of the creditors as members were superior to the interest rights of the class member in Sovereign Life Assurance Co v Dodd [1892] 2 QB 573 and in Re BTR plc [2000] 1 BCLC 740 and the later cases. This can be drawn to cover the legal and economic interest rights of the shareholders).

371 KANDA, *supra* note 162, at 267.

372 Although there were cases in which the courts took the precedent rule into account, in the new share issuance cases, all of the courts did not use the rule.

This fact could prove that all courts in Japan did not use the mixed system of the Common Law idea and Civil Law practice. This trend is considerably proper because using the mixed system has been said to be less impossible.[373]

Conversely, in the other two cases, *Bulldog Sauce* and *Ide Mitsu Kōsan*, the respective courts stressed the corporate value principle. The petitions which were based on the equality of shareholders in *Bulldog Sauce* and disadvantages to shareholders and management control in *Ide Mitsu Kōsan* did not satisfy the courts as an unfair manner. The court's reason in the former case was that the tender offer made by the plaintiff was considered to be the act of hostile takeover. Thus, it was fair for the defendant to install the takeover defence measure by a discriminatory acquisition of shares by shareholder resolution even not in peace time. In the latter case, the court was satisfied that the issuance of new shares was not an unfair manner because the new share issuance was made in need of funds and the resolution was made by the special majority vote.

In addition, some lawyers were impressed by the doctrine of precedents to which the common law courts had adhered.[374] However, the precedent rule has a limitation to be applied to the extent that the situation and circumstance of the current cases has not changed.[375] Furthermore, at least in the common law sense, it would be tough for Japan to take into account which cases are required to be assumed by the courts as the *ratio decidenti* because the institutions of the judicial authority were less centralised.[376] This research takes the view that the decisions of the courts which stressed only the economic rights of a party and emphasised the primary purpose rule of corporate value had to be taken as *obiter dictum*.

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373 See also FREDRICK, *supra* note 280.

374 From the reviews of the mentioned four cases, some lawyers suggested to adhere to the precedent rule because they were the supporters of the takeover defence. They apprehended the corporate platforms would be harmful where there was a takeover market.

375 Colum Gavan-Duffy, *A Note on the Limitation of the Doctrine of Stare Decisis in the Republic of Ireland*, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, vol. 14, no. 4, 1965, 1382–1394, JSTOR, www.jstor.org/stable/757336.

376 Japanese judicial institutions are said to be independent of each other within the scope of the non-binding force of the decisions of the Supreme Court upon the other courts. The courts are not organised under the control and supervision of the Supreme Court.

Based on the aforementioned cases, it is proper to say that the judicial institutions in Japan are independent from each other. Although there were cases in which the courts cited the precedent cases in an indirect way, there were also cases in which the courts used their own consideration to give the judgement independently. Although the courts are named as the Supreme Court, High Courts or lower level of courts,[377] it is hard for this research to use the superior or lower levels of courts. This concept covers only in non-binding force of the decisions of the Supreme Court to be referred to in cases before the other courts. The appealable power has to be irrelevant with the compulsory use of the precedent rule.

The justification of the decentralisation can be seen in the constitution of Japan. It empowers the Diet to constitute high courts and other courts.[378] The Supreme Court does not establish the other courts. Therefore, the Supreme Court is not responsible to appoint the judges of the other courts. The Supreme Court is to nominate the judges of the other courts and those judges are appointed by the Cabinet. Because of the judicial independence among each other, the consideration of the Supreme Court will not affect the whole judicial settlement of Japan. This is a good result of the decentralisation prospect.

4.2.2. Stereotype of Case Reviews

Case reviews which this research draws upon as impressive are numerous. To mention a few, they are as described in Chapter 2 of this research paper, HANREI JIHŌ (The Hanrei Periodical), HANREI TAIMUZU (The Hanrei Times), SHŌJI HŌMU (The Business Law Review), KINYŪ SHŌJI HANREI (The Business and Financial Law Precedents) and BESSATSU SHŌJI HŌMU (Special Business Law Review).[379] Beside these reviews, there are also short reviews on cases, such as THE JURIST and HŌGAKU-KYŌSHITSU. The reviews are in different styles. The review for *Art Nature* is taken as an example in this research and discussed as the structure of each review.

377 See KAWAMOTO ET AL., *supra* note 82, at ¶28.
378 Supreme Court of Japan, Courts in Japan, https://www.courts.go.jp/english/vc-files/courts-en/file/2020_ Courts_in_Japan.pdf.
379 They are selected based on the vocabulary 'Hanrei' tag. Hanrei is defined as the case reviews and it is the Japanese Jurisprudence.

The structure of the case review in HANREI JIHŌ is like the digest of cases. For the reviews of the cases related with new share issuance, the usual form is set to explain the case scenario first. Then the application of the Articles of the JCA and the history of the application of the Articles follows. If there was a distinction between the application of the Article in the former cases, the then case, and the different courts which tried the then case, the discussion on that point followed. Finally, the review ended with a deduction upon the judgement of the then cases. Similarly, the review in HANREI TAIMUZU started and ended with the similar style of HANREI JIHŌ. The scripts of the cases were also annexed at the end.

The reviews for *Art Nature* appeared in SHŌJI HŌMU and KINYŪ SHŌJI HANREI were started with the case scenario first. Then the reasons and consideration of the judges of the different courts, that is, the court of first instance and, if there is an appeal, that of the appellate court. The interpretation of the applied Articles was next to the discussion upon consideration and reasons of the courts. The problems of the judgement were also discussed. Finally, the review concluded with the intention of an author as to why he or she wanted to introduce the case and to distribute the idea of the practice of the court. What was included more in KINYUŪ SHŌJI HANREI was the discussion of the rules as the compliment of the application of the Articles of the JCA.[380]

The review style of *Bulldog Sauce* in BESSATSU SHŌJI HŌMU[381] was the problem centric review. The review was started with the case scenario. Then a discussion on the judgement of the court followed. As part of the attributes of the judgement, the rules related to the judgement and the general law were discussed. An expansive part of the review was the discussion upon the problems in the judgement, that is, the points which the courts overlooked or overemphasised. The points on whether there was a problem in the corporate culture,[382] JCA or general law [383] or with the strategy of the courts in settling the dispute [384] were

380 See MORIMOTO and YOSHIDA (2018), *supra* note 208.
381 TANAKA, *supra* note 234.
382 See generally NELKEN, DAVID, *The Changing Of Role Of Law In Japan: Empirical Studies, in* CULTURE, SOCIETY AND POLICY MAKING, (Dimitri Vanoverbeke et al. eds), 15–31 (Edward Elgar Publishing Limited, 2014).
383 The general law here means the civil code of Japan,

comprehensively included. With regard to the strategy of the court, the review was a comprehensive one by the inclusion of the application of the principle behind the JCA. Further, the analysis of the facts of the case, the issues of the case, the arguments, judgements of the case in different levels of courts and the comparative analysis between Japanese judicial settlement and that of other countries for the same case were also included as the most expansive part.

For other reviews, such as THE JURIST and HŌGAKU-KYOSHITSU, they appeared as very short reviews but gave sharp comments on the points. Overall, these aforementioned reviews seen in this research could be viewed as a contribution to the development of the Japanese judicial system. The case reviews are considered to be more massive than the reviews upon the JCA. Regarded with the JCA, remarkably there are a series of commentaries. Those commentaries did not point out the defects in the law.[385] Therefore, there will be no doubt that Japanese scholars have been on the trend to develop the judicial settlement much more massively than the development of the JCA. They are on the right path because the existence of the law is not enough. The application of the law can override the existence of law depending on the strategy of the judicial settlement mechanism.

4.2.3. Liberal Thoughts of Legal Scholars

According to the aforementioned discussion, Japanese scholars have been inclined to point out the judicial settlement much more than the statutory development. This research takes the view that their thoughts were initiated by some legal thoughts of other countries or by their own. In other words, there are two groups of scholars: those who are inspired by western countries and those who have their own motions. As the liberal thoughts from the U.K. have already been discussed, despite that they would be slightly uncommon as compared with other western countries, only the Japanese way of liberal thought is clarified in this section.

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384 This kind of strategy is considered to be the philosophical thinking, reasoning, justification and other trial methods.

385 There have been many commentaries on the Articles in the JCA. They are published as a single author or in the name of a research group. The commentaries for Article by Article which this research has relied upon are published, that is, from Art. 1 to Art. 979 of the JCA. SHŌJI HŌMU, KAISHAHŌ KONMENTARU, (SHŌJI HŌMU, 2nd ed., 2020) (2013).

Apart from the corporate liberalists, there were three intellectualists adhering to the political liberalism during the Meiji era.[386] They could not contribute to extend the liberal thoughts to Japan due to the misunderstanding of the society that liberalism was the western culture and could not be compatible with the Japanese way of thinking. This was reasonable because 'liberal' was translated into Japanese as oneself (Jiyū and Jibun jointly).[387] In fact, the interpretation could be Jiyū with the synonym of private freedom. It was also to be noted that private freedom was not to insult others; just to use as a defence when others insulted it. It was not a right; it was considered to be a responsibility of an outsider to take into account in relations with others. It could guarantee that 'no one will ever be harmed for the greater good of the society'.[388] Capitalism has been used to overwhelm in Japan for quite a long time.[389]

Nevertheless, Japanese capitalism centred upon shareholders collapsed after World War II and the corporate society was driven by the management team.[390] One of the thoughts was seen through the comments on the ideas of Adam Smith and Noam Chomsky.[391] KARIYA appeared to be unsatisfied with Adam Smith's opinion on humans being economic persons who tended to be selfish. One more point on which KARIYA showed the opposite view was Smith's favouritism towards domestic investment and that investment might bring the wealth of nations.

386 TANAKA, HIROSHI, *Liberal Democracy In Japan: The Role Of Intellectuals*, HITOTSUBASHI JOURNAL OF SOCIAL STUDIES, vol. 20, no. 1, 1988, 23–34, JSTOR, www.jstor.org/stable/43294304.

387 QUO, FANG-QUEI, *Jiyushugi: Japanese Liberalism*, THE REVIEW OF POLITICS, vol. 28, no. 4, 1966, 477–492, JSTOR, www.jstor.org/stable/1405283.

388 The quote was excerpted from the text under competitive market versus democracy. It meant that the existence of a competitive market was not enough for the public good; it must have a safeguard not dependent on the plurality or majority in order to make the market efficient and supportive to the general welfare. This research shares the same view in that as democracy is an economic market (democratisation supported economic development), there must be a mechanism to safeguard the system. Larry Diamond & Marc F. Plattner eds., Capitalism, socialism, and Liberalism revisited, 84 (John Hopkins University Press, 1993).

389 KAWAMOTO ET AL., *supra* note 82 , at ¶¶63–9.

390 Id, at ¶¶66–70.

391 KARIYA, *supra* note 298.

KARIYA viewed that the international investment would promote the nation's economic development. He shared the same view with Chomsky in international investment.[392] However, he also suggested to consider neo-liberalism (Shin Jiyū Shugi) which made balance among the properties, labour and capital. He appeared to be fond of neo-liberalism. This research takes the view that he positioned neo-liberalism well so that it can be interpreted as the new consensus of economics. KARIYA agreed with Chomsky's view that he seemed to be a liberalist. However, he suggested not to be reflected with what the world told and to be one's own self with one's own beliefs. Therefore, he may be one of the neutralists or neo-liberalists. Nevertheless, this research would not agree with him more if he could suggest contributing to look after the world.

4.3. Enforcement of Shareholder Remedies in Myanmar

By referring to the lessons learned from the U.K. and Japan, to shift from the plutocratic corporate regime to the democratic corporate environment, the rationale of the majority rule and the equitable principle have to be succinctly clarified. The majority rule needs to be defeated by the attributes of the fraud, suppression or oppression upon the minority. It would mean that an investor with greater economic power would not reach the top in this way. Based on the idea that the element of economic right cannot take over the individual legal right, it would be fair not to let strong economic power holders maintain their economic interest at the expense of weak economic power holders. If the equitable consideration of the minority shareholders creates a chaotic situation for business affairs,[393] then such a situation must be controlled by the liberal democratic theory. This shareholder democratic ideology shares the

392 In fact, Chomsky was in favour of liberalism. A regime which was not consistent with liberalism was neo-liberalism. As the new consensus on economics was born of liberalism, he was further considered to be a creator of the new consensus on economics.

393 Accord ANITA ANAND & CHRISTOPHER PUSKAS, *Legal and Economic Rationales for Shareholder Duties and Their Enforcement, in* ENFORCING SHAREHOLDERS' DUTIES, 17–38 (Hanne S. Birkmose & Konstantinos eds.), (Edward Elgar Publishing, 2019) (It is based on the concept that, if the economic right of the majority was not favoured, most of the investors would disinvest and chaos would ensue. However, defining the legal duties of shareholders *per se* is considered to be an agenda similar to shareholder democracy. This way of letting shareholders themselves confine their duties is useful in a country in which neo-realism has been valued).

same view as the judiciary defining shareholders' duties within the section on the unfair prejudice action.[394]

Further, the oppression of minority shareholders can be prevented *ex ante* by either the articles of the corporation or the separate documents of the shareholders' agreement, that is, by the soft power among the shareholders.[395] As a separate shareholder agreement is a kind of contract law, there will be other issues to consider. The first issue is that the Contract Act of Myanmar has not been updated for nearly a century and a half. If the current contract law is compared with the international norm on contracts, Myanmar still has to endeavour to develop it. The last but most effective point is the judicial organisation for law enforcement. The highest court in Myanmar needs to inform the subordinated courts through the enforcement of the law, court instructions or a manual. On the other hand, if the Myanmar judiciary intends to harmonise the common law system with the civil law system, a law commission of the Union Parliament needs to be supported with a consultation paper [396] to revisit the MCL. Nevertheless, amending the MCL cannot solve the disputes that will ultimately be encountered.

With regard to the enforcement of shareholder remedies in terms of the directive action and the unfair prejudice action, the Union Supreme Court of Myanmar must focus on two points. The first point is to add the time limitation for the derivative action to the Limitation Act of Myanmar and issue a procedural rule for the derivative action. The second point is to issue instructions relating to the majority rule and its restraint and to succinctly grant

394 Id (It is reasonable for a country in which realism is the state policy. It is to confine shareholders' duties by the courts rather than let shareholders themselves impose their duties *per se*).

395 PHILLIPS, CHRISTINE, *United Kingdom* in SHAREHOLDER'S RIGHT AND OBLIGATION: A GLOBAL GUIDE, ¶5.2 (Marcel Willems ed., Globe Law and Business Ltd., 2019); but see DE GRUYTER, INTERNATIONAL HANDBOOK ON SHAREHOLDERS' AGREEMENTS: REGULATION, PRACTICE AND COMPARATIVE ANALYSIS (Sebastian Mock eds. et al., Walter de Gruyter GmbH, 2018) (The *ex ante* protection agreed upon among shareholders themselves is a non-exhaustive minority shareholder protection, its guarantee will be weaker than the statute and the articles of incorporation in the British common law; however, the fact that the American common law has given the shareholders' agreement stronger effect than the statute and articles of the corporation requires much consideration).

396 See THE LAW COMMISSION, LC246, SHAREHOLDER REMEDIES (1997), https://www.lawcom.gov.uk/project/shareholder-remedies/, (The report was submitted by the Law Commission constituted with a Judge from the High Court or Appeal Court as a Chairperson, and the other four Commissioners are experienced judges, barristers, solicitors or teachers of law as full-time members).

remedies other than the common law remedies. Among the legal remedies under the unfair prejudice action, 'damages' have to be clarified with regard to whether they should be interpreted as equitable compensation.

With regard to the time limitation to file a derivative suit, it must be considered that a derivative action has to be filed within six years from the accrual of the right to sue.[397] However, this limitation was not directly defined. The clause in the schedule only provides that a suit for which no period of limitation is elsewhere provided in the schedule has to be within six years. As duties of directors have differences in their nature, the infringements of the duties have to be varied depending on the nature of the duties. Therefore, the clarifications of HOLLINGTON QC should be added into the First Schedule of the Limitation Act. As described in 3.2.2 this research suggests adding to clause No. 120 of the First Schedule of the Limitation Act 1980 to be considered according to the following contexts:

- action against a director to recover profit or obtain equitable compensation for breach of duty is to be within six years from when the duty is breached;
- action against breach of duty of care is to be within six years starting from the date when the duty was breached
- action against the infringement of the duty to avoid conflict of interest is to be within six years from the date the cause of action accrues, that is, the date of infringement of duties;
- action against infringement of the duty of loyalty has also to be drawn as fraud and abuse of power and not to have a time limitation;
- action against infringement of the duty to act within powers, the duty to exercise independent judgement to the best interest of the company, duty to exercise reasonable care, skill, and diligence, and duty to declare interest in proposed transactions or agreements need to be within six years from the date of the commitment; and
- action against oppressive or unfair prejudicial conduct is to be unlimited.

397 Limitation Act, 1908, First Schedule, No.120.

With regard to the majority rule and equitable principle, as the MCL does not authorise the Union Supreme Court to make any rules for the shareholder rights and remedies, it will not be simple to adopt the principles. However, neither does the MCL prohibit the Union Supreme Court to issue any instruction to the lower levels of courts. Since the highest court in Myanmar can issue any direction or instruction pursuant to §72 of the Union Judiciary Law, 2010, it is proper to issue the instructions on how to use the principles.[398] According to this section, the Supreme Court of the Union may issue rules, regulations, notifications, orders, directives, procedures and manuals as may be necessary.

The insertion of the equitable principles in the sections of the court manual is considered because its preamble permits such additions. The manual was originally written in English. Later, the Myanmar translation was also available. It had been edited from time to time. The purpose of issuing the Manual can be seen in its preamble. According to the preamble, Chief Justice MAUNG MAUNG said that to have an efficient law is not enough. For the sake of justice and fairness, the law has to be applied in a justified manner. Justice would not be maintained where there would be a deviation from court procedure and management. The court manual is issued with the purpose to instruct and correct the malfunctions of the court procedure. Its ultimate aim is not to let the law be written in black letter only; the law has to be applied in a proper manner.

The highlights of the procedures or manual have also to be considered. As for the first point, the Supreme Court requires that the principles which have developed through the cases and have been settled by the House of Lords to be learned by the other levels of courts. Therefore, this research points out just to refer to the principles and not to transform them. For example, the contexts within the principle for derivative action which are worth learning, as described in section 1.2 of this research, are according to the following:

- Proper Plaintiff Rule
- Ratification and *Ultra Vires*

398 Union Judiciary Law was issued by the State Peace and Development Council guided Myanmar Parliament in accordance with of §443 of the Constitution of the Republic of the Union of Myanmar, 2008.

- No Reflective Loss Principle
- Equitable Principle

Further, as for the procedure of unfair prejudice action, the principles which are worth adopting are numerous. Therefore, this research points out the highlights to be inclusive in Chapter XIV, section 5 of the manual according to the following:

- unfair prejudicial conduct, legitimate expectations, no fault divorce and capacity in which prejudice was suffered as decided in *O'Neill* (as discussed in section 1.3 of this research);
- examples of remedies given by the consideration of the court (as discussed in section 1.3.2 of this research);
- injunctive relief by oppression remedy or under the Specific Relief Act (as discussed in section 1.3.1 and section 2.3.1 of this research);
- the jurisdiction of the courts to try the economic interest of the public (as concluded in Chapter 1 of this research); and
- the extinguishment of newly issued shares or other securities (as discussed in section 2.3 of this research).

This research is to be in favour of the realism with regard to the implementation of the legal remedies of shareholders in Myanmar.[399] It is to make a breakthrough in this way because the political economy of Myanmar has run under the initiation of the government department. Similarly, law enforcement is hard to be implemented without accountability of the Supreme Court of the Republic of the Union of Myanmar. On the other hand, as prevention is better than cure, there is also another strategy which can deter oppression and unfairness among shareholders. It is to rely on the government administrative department which can issue various regulations. The stock exchange commission has not been included to deter unfairness because Myanmar Securities Exchange Law, 2013 does not authorise it to do so. One of the

399 Realism is suitable to be used for Myanmar; however, for Japan, realism may not currently work well due to its advancement of the civilian cooperation in industrial development. Specifically, in order to install a mechanism for shareholder protection, using the authority of the administrative and judicial departments will be effective much more than letting the shareholders protect themselves in Myanmar.

administrative departments, Ministry of Finance and Planning has the authority to issue the regulations.[400] It can issue the regulation by §462 of the MCL.

Conclusion

The essence of this research is that the experiences of the U.K. and Japan are worthwhile for Myanmar courts in settling shareholder disputes among each other and disputes between shareholders and the BOD on behalf of a company. The U.K. courts try to conserve the common law rule, and the match of political structure and economic culture are quite impressive in this research. Similarly, the explorations of shareholder problems in Japan, the consideration of Japanese courts in harmony with the corporate society and the contributions of Japanese scholar in reviewing legal cases are remarked as the value of this research. With the backdrop of these experiences, Myanmar can envision how to protect shareholder issues first. If an act is beyond the protection, the remedies can be accessed efficiently by referring to the experiences of the U.K. and Japan as well.

To extend those values, the common law rule relating to shareholder action should be looked at first. The U.K. has not left its common law rule to impose shareholder duties following the EU. It has not done so because it believes in its shareholder democracy. The best of U.K. policy is that it has installed the unfair prejudice action to safeguard the shareholder democracy. This also means that the CA 2006 conserves the economic policy with the liberal thought that no one could be harmed for the public interest. Nevertheless, it is not the end of trying to be in accordance with the maxim. The U.K. is considered to be a country getting along with the market democracy and if shareholders in a public company have to lose their rights for the sake of the larger interest of the whole company, it is not sure whether shareholder democracy is the market for its economic development.

Similarly, Japan wants to improve its corporate industry amid numerous problems of shareholder remedies. Since Japan has been one of the countries with capitalism encroachment,

400 OECD, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE, https://www.oecdilibrary.org/docserver/9789264236882en.pdf?expires=1605936678&id=id&accname=guest&checksum=0BB74472C141C9F0E97813DB3457284E.

the economic focus is directed to be the first. Even though the political system of Japan has changed into the liberal democratic system, its society is hard to adapt with the political foundation. This situation is reflected in the judicial settlement of shareholders issues related with unfairness in the issuance of shares or other securities. Notwithstanding that this mismatch has taken place, many scholars are contributing to point out the issues by reviewing the legal cases. This culture is the best of Japan which Myanmar requires to transplant not only for the monitoring of corporate governance but also for development of the justice sector.

Taking into consideration the endeavours of the courts from the U.K. and Japan, Myanmar can envision how to monitor its corporate governance by granting shareholder remedies and adapt its market economy reflective with its political system. The market economy of Myanmar is considered to be democratic. It can be considered so because the socialist system cannot be run successfully in Myanmar. Capitalism has not been what Myanmar has fancied either. Therefore, Myanmar has no better choice than to make its economic development with a democratic market. As realistic theory has been efficient to open the market for Myanmar, the government departments are still responsible to install the mechanism. This fact prompts the Ministry of Finance and Planning and the Supreme Court of the Republic of Myanmar to lead to install a safeguard of shareholder democracy by settling the oppression or unfairness upon shareholders. Ultimately, even if there will be the end of the political democracy, the safeguard can be useful in every circumstance because there is a marginalised concept among all of the constituencies of corporate society.

Conclusion

The outcome of the study and analysis of the law relating to the legal settlement of unfairness upon shareholders in this research is that the presumption of Japanese courts was not distinguished from the U.K. courts. The commonality was found in the application of the shareholder equality treatment principle before the statutory provision in the Commercial Code or the JCA. The purpose of the provision of shareholder equality treatment is considered to be as a safeguard of shareholder democracy even though some scholars appeared to be the fans of the shareholder democracy. However, depending on the circumstances of the cases, the courts used that principle or Art. 109 of the JCA, which was the transplant of the shareholder equality principle. The petitioners had not often referred to the principle or that Article. What the disputant parties had often cited was Art. 210 and Art. 247 of the JCA under the title of disadvantage and unfairness to a shareholder.

These two articles were the original provisions in the old Commercial Code. According to the analysis of the application of the two articles by the courts, the challenge of the courts was in fact findings of the disadvantage and unfairness. The disadvantage to shareholders was inclined to be that it is not only meant as commercial disadvantage but also the status of shareholder legal rights. However, according to the case analysis, the inclination of the status of shareholder regardless of his or her financial contribution could not balance with the Japanese perspective that majority shareholders' control could bring the interest of the whole company. Therefore, when a company was to expand its business by issuing shares or other securities or to merge with any other promising business entity, the courts could not ignore the capitalist ideology in order to justify the minority shareholder rights.

By the same token, as there was an apprehension that corporate takeover and greenmailing arena threatened the stability of corporate society, there was also a time when the courts overlooked the market for corporate control and were in favour of the takeover defence. This was a reason the remedies for shareholders after the issuance of new shares or other securities was the extinguishment of the new shares rather than the exit right. All shareholders did not claim their shares to be bought back by the company to get the exit right. Even in case

of issuance with a favourable price, they did not claim the exit right; they rather claimed the damages for the unfair price. The good point of the consideration of Japanese courts was that they did not stress on the existence or non-existence of trust in public or non-public company. This situation was uncommon in the U.K.

In the U.K., the arena of public and private issue was taken into account in order to give shareholder remedies by way of unfair prejudice action. When the externalities theory was taken as the public nature of the companies, not only the public companies but also the private companies are to be of a public nature. On the other hand, when the property theory to defend the intervention of the government agency is taken into account, either a public or private company is to be of the private nature. The CA 2006 let the incorporations choose whether they wanted their companies to be a public or private company. Nevertheless, the distinctions also remain as a consequential circumstance. For example, freedom of share transferability and the power of the BOD of a public and private company cannot be the same. This research agrees with the expectation of the existing shareholders in order to erase the concept of the non-existence of mutual trust among each other in a public company. Moreover, this research takes the view that as the secretary of the trade department can claim the judicial settlement under the unfair prejudice action, it is a trend of vesting the representative power for settlement of unfairness in public issues to the administrative agency. This fact shows the uncertainty of the U.K. courts having the absolute power to give the settlement of the public interest where there is a deprivation of the individual interest. The reflection of the creation of corporate form initiated by British Royal Accent has never disappeared.

On the other hand, the U.K. could not make shareholder democracy irrelevant because the democratic market could bring economic development. Based on this background, the unsuccessfulness of shareholders in claiming the unfair prejudice action is considered to be a bargain between shareholder democracy and conservation of the administrative department. The secretary of state for the trade department might be aware of this reason. Therefore, the literature of the minister for trade department claiming the settlement for unfairness under the title of unfair prejudice action could hardly yet be found. This research views that only if the

liberal democratic system can be drawn to the shareholder remedies will the courts consider the individual interest, whether financial or non-financial, in congruence with the public financial interest.

Drawing the lesson from the U.K., Myanmar had better install the liberal democratic idea for shareholder remedies within the provisions of the action against oppression or unfair prejudice in a public or private company. From Japan, what is worthwhile for Myanmar to learn is the effort of Japanese judicial institutions when the path dependency for legal settlement is not in existence. Thus, the most valuable are the endeavours of the courts and numerous research teams in building a bridge between the capitalist idea as shareholder democracy and the new-liberal idea.

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