Legal Settlements of Unfairness in New Share Issuance and Allocation Rights in Japan

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要　旨

判例分析は、日本の裁判所が新株および新株予約権に関連する問題を、いくつかの判例では会社法に従って、その他の判例では法の原則に従って解決してきたことを示している。裁判所はまた、敵対的買収または不公正のいずれかを考慮する判断を行った。この研究は、非常に多くの救済上の意見の相違を終わらせるために、日本の少数派株主が遭遇した不公正を防ぎ解決する必要性を強調している。救済のための方法はたくさん存在するが、この研究は日本の会社法（平成 17 年法律 86 号）の規定の適用に焦点を置く。ガイドラインや法原則の適用は好ましくないのである。

Keywords: share issuance, allocation rights, takeover defence, shareholders' remedies in Japan

1 Introduction

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 to receive either the rights or damages.

The courts in Japan substantially applied the Commercial Code before the enactment of the Companies Act (Act No.86 of 2005) of Japan (the Companies Act). Later, they used the Companies Act and the principles adopted by the Ministry of Economy, Trade, and Industry (METI) and Ministry of Justice (MOJ) to settle these shareholder remedies.[1] 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 judgment principle. Therefore, this research is to take a stand against the courts regarding whether to stress the

legal right of shareholders granted under the Companies Act or whether to focus on the economic right of shareholders adopted within the purview of the principles.

Based on the aforementioned ideology, courts in Japan received different views from lawyers in settling the legal disputes involved with the issuance and allocation of new shares. In order to be confirmed, the main contexts which the courts stressed to be unfair provided under the Companies Act are analysed in this research. To be specific, two legal cases are analysed; these involve the issuance of new shares on which the courts gave judgments based on different reasons. Regarding the share allocation rights, two legal cases, the results of which are grounded on different reasons, are critically analysed. Furthermore, the legal cases relating to the conceptual relation between invalidation and non-existence of the share issuance are also explored. Finally, the preventative effect of granting damages to shareholders regarding share allocation rights with a favourable price is also analysed.

2 Research Findings

This research views that the courts' reasonings, which were the background of the judgments in cases relating to the issuance of new shares and their allocation, derived from different sources. The first source focused on 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. 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 principles being adopted. The overview of this research is that the courts were reasonable to rely on the provisions within the Companies Act in settling the shareholder remedy issues. Therefore, in order for the courts to largely apply the provisions in the Companies Act, the articles in the Act have to be clarified and made aware that they resort to the first priority for legal settlement.

3 Research Questions

Grounded on the various reviews, this research bears four questions. The first question is based on the suspension or injunction of the issuance of new shares. Although it had not been decided that only majority shareholders who hold strong economic power could be of interest to the company, the courts were in favour of the issuance of new shares done under majority shareholder control. Secondly, for the allocation rights of

the new shares, even though there is a general provision in the Companies Act, the courts used the principle of shareholder equality. For the third question, regarding the invalidation and non-existence of the new share issuance, there were so many reviews that the courts took up the cases beyond the time limitation. No wonder, therefore, the Companies Act does not cover the general concept of the time limitation to bring legal action. Finally, regarding claiming damages (not equitable compensation) from a company for the allocation rights, the question of whether the reflective loss is counted is uncertain.

4 Suspension of New Share Issuance

The new share issuance related to 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 Companies Act and the second one involved the principles set up by METI and MOJ. The third issue was the 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.[2] and Showa Shell Ltd. v. Idemitsu Kōsan Ltd[3] are selected as the cases for analysis of the new share issuance.

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.[4] However, the evidence from the legal cases reveals that the concerned companies issued the new shares with other purposes.[5] These ideas had also spread in the EU from the 1970s and in American corporate society from the 1980s.[6] The U.S. termed new share issuance for other purposes as issuing poison pills or rights plans.[7] Japan corporate society imported the strategy of poison pills.[8] There were also many problems resulting from the ideas other than to increase investment cash flow.[9] However, in the selected case from the U.K., a strong investor in a U.K. company was aware of a decrease in shareholdings and a reluctance to issue new shares.[10]

There are other reasons for why U.K. corporate society might be sufficiently worried to make the new issuance.[11] These other reasons can be identified using the Companies Act of the U.K., which was

upgraded in 2006 (CA 2006). One reason can be derived from the provision in the unfair prejudice action covered with both *ex-ante* and *ex-post* actions against the unfairness of the corporate industry. Another reason might be that as the new share issuance had to be confirmed by the board of directors (BOD), the CA 2006 has given the duties of directors as the first priority to be abided comparing the other parts of the Act.[12] Thus, in order to discover the reasoning of Japanese courts, this research analyses the cases involved with the new share issuances. The two cases are selected because the parties involved were recorded without a confidential purpose.

4-1 Dilution of Shareholding as Unfairness

A case was filed by the Open Loop Inc. (O), a shareholder of Quanz Co.Ltd. (Q), for the injunction of the new share issuance by Q in the Tokyo District Court.[13] 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 Companies Act 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 up by the respective organisations. On the other hand, if the court did not stress on the statutory provision and rather considered emphatically 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 to grant the injunction on the grounds of an unfair issuance.[14] 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.[15] 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.

One of the comments also showed that the court stressed the dilution of shareholding and management control.[16] The judgement was passed without taking the main purpose rule into consideration.

However, this research views 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.[17] The other comment was made based upon the idea that a public company must not consider the existing shareholders' interests only.[18] 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 not a disadvantage on the part of shareholders where the new shares would be issued.

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

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.[19] The mandatory provisions have a compulsory enforcement, whilst the application of the enabling or default rules is dependent on the consideration of the court.[20] 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.[21] Therefore, the Tokyo District Court, in this case, using Art.210 of the Companies Act as a mandatory application is legally reasonable.

4-2 Management Control Not as Unfairness

The reasons of the courts in Tokyo in granting decisions or giving judgements for new share issuance were on different grounds.[22] This can be proved through the cases.[23] For example, new share issuances and allocation rights were approved in cases of Bulldog Sauce[24] and Autobacks Seven[25]; whilst injunctions were granted in Dalton[26] and Nireko[27]. As these cases happened over ten years ago, it might be that there were no such cases later. However, Showa Shell Ltd v. Idemitsu Kōsan Ltd (Tokyo D. Ct. July 18, 2017)[28] and the other case[29] 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.

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 July 18, 2017 and then appealed to the Tokyo High Court. The first instance court 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 first instance court, 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 incomer shareholders were independent from Idemitsu.

MORIMOTO discussed the doubt in raising the funds to build a joint venture with Showa.[30] 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 to 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 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 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 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 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 broadly corporate value.

5 Invalidation of New Share Issuance

There were 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 Companies Act.[31] Moreover, there were also 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.[32] Remarkably, even in Otojirō FUJII v. Fujii Co.ltd,[33] that was brought beyond the time for invalidation, the Supreme Court gave the judgement to invalidate the new shares or allocation rights issuance. The judgement was not consistent with the judgements of the previous cases.[34] However, one comment stated that the 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.[35] Since the claim is rationally for the whole interest, the court is correct not to set the limitation of time within the scope of the Companies Act. KAWAMOTO et al. also pointed out the time limitation applied in filing the share issuance invalidation, whilst there was no time limitation in claiming a declaratory judgement for the non-existence of the issuance.[36] On the other hand, since the court could reason that an unfairness was a criminal wrong, such case could not be overruled by the time limitation.

Another claim related to the source authorising issuance of new shares. As the new shares were issued by the resolution of BOD in non-public companies, some shareholders filed the issuance against Arts. 199 and 201 of the Companies Act.[37] Those cases were settled in favour of the claimant shareholders by invalidating the issuance of new shares. Feedback to the judgement stated that the suspension of the issuance was better to be considered than invalidated in such a case. However, this research views that it is not possible to suspend the issuance after the shares have been issued and paid. The court was therefore reasonable to decide to invalidate the shares.

However, an updated case claiming the new share issuance invalidation, of which the reviews can be read (at the time of writing), involves the defects in the issuance procedure.[38] 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.[39] However, a literal paradox in considering 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.

6 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 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.[40] 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 BOD.[41] The first instance court for this case was Kanazawa District Court and the first appeal court was Nagoya High Court, Kanazawa Division. The first instance court 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 first instance court and the first appellate court. 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.[42]

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 No.5 of this research article, 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.[43] The district court upheld the non-existence of the share issuance. The judgement debtor appealed to Nagoya 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 a 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 reasonable doubt.[44] The appellate court turned the judgement of the first instance court down. The appeal court stressed on that since almost all of the shareholders were at that time the 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 BOD was also unnecessary. Therefore, that court mainly stressed on generating the increasing capital and the official registration of the new shares. As a result, it rejected non-existence of the new share issuance confirmed by the first instance court.

7 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 Companies Act.[45] The rights could be issued to the existing shareholders, third parties, or

public offering.[46] In addition, the rights could also be issued to the designated persons as the options.[47] 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 has been 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.[48] As the right to request their shares be bought back at a reasonable price is hardly considered to be an absolute right, such rights are beyond this research. The research holds the concept that only the share acquisition or allocation right can fully satisfy those who want to remain shareholders.

7-1 Discrimination by Share Qualifications, not Unfairness

With regard to the issue of share allocation rights as a rights plan for 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.[49] Moreover, the case reviews of various lawyers in Japan also appeared in Hanrei Taimuzu (The Hanrei Times), Shōji Hōmu (The Business Law Review), Kinyū Shōji Hanrei (The Business and Financial Law Precedents), Bessatsu Shōji Hōmu (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.[50] The first appeal court affirmed the decision of the first instance court. Therefore, a third motion was made to the Supreme Court of Japan.

The issue in law was mainly whether the stock acquisition rights and allocations violated Art.247 of the Companies Act and was contrary to the principle of shareholder equality and Article 109 of the Companies Act based on the interpretation of the equality of shareholders. Nevertheless, the unanimous opinion was built mainly on 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.[51] AOTAKE first noted that there was no precedent rule that the gratis allotment had been unfair. Then, he looked at the Companies Act 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 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 received irreparable harm, he would wait and see how the court would have decided.

In addition, there was another critical review by TANAKA.[52] 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 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.[53] Based on this background, there is a parallel between the role of minority shareholders in times of merger and takeover defence measures.[54]

The most significance was pointed out by 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 Companies Act was central regarded with hostile takeovers and defence.[55] He also was of the opinion that the courts played an important role in applying the rules under the Companies Act. He did not think, however, that 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.[56] He addressed that the Tokyo High Court and the Supreme Court of Japan in the Bulldog Sauce case did not get through the theory of market for corporate control. He expressed that the theory of market 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 case. 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;[57] 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.

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.[58] This research also adds that the court 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.

7-2 Exclusion of Shareholder Participation in Making Decisions as Unfairness

A **s**hareholder 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;[59] others prefer to create a policy,[60] to gain corporate value as a whole,[61] or to bring about community interests.[62] Due to their different perceptions, when legal problems arose among stakeholders in a company, judicial institutions are designed to render the settlement mechanism. The courts in Japan, in settling such disputes, 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.[63] Livedoor consulted on computer networks, managed computer networks, and developed and sold computer programmes. Livedoor Partners 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 too. Fuji TV also submitted the intention to suspend the transaction to NBS. Additionally, BOD of Sangyo Keizai Shimbun resolved that it

would liquidate the 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 59% approximately. 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 judgment of the first instance court. 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.[64] Coffee stressed the primary purpose rule discussed and lectured by Hideki KANDA, Kenjiro EGASHIRA, Ichiro KAWAMOTO and reflected in this case. He commented 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[65] 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 skips to 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 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.[66] 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)[67] was not meant to refer to the common interest of shareholders, but for disadvantaged shareholders only. Regarding the new share issuance by the resolution of BOD, he raised that it was not really a problem; it was fair to issue new shares by 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 injunction. He then added that the 2001 revision of the Commercial Code also allowed the issuance of stock acquisition rights for corporate defence purposes.[68] 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.

The consequence of such disputes was that the popularity of cross shareholding appeared to prevent the hostile takeover.[69] Up to 2018, there were companies involved in cross shareholding,[70] and the percentage of introductions of the takeover defence measure was not decreased sharply.[71] 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.

8 Equitable Reliefs for New Share Issuance

After analysing the cases involved in claiming the 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 when the share price had fallen after the issuance. There was a conception that the shareholders as minorities could directly sue either a company or BOD where only some shareholders (not all) in the company suffered losses from the resolution or act of BOD.[72]

In the case filed against Grani Inc., it might be assumed that the court considered the shareholders' direct loss and private claim upon the directors' liability of the new share issuance and the squeeze out rule within the scope of the Companies Act.[73] 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 made the shareholders inclusive in the third party.[74] The court's focus was that the case had three substantial consequences.[75] 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 the 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, i.e. 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 of his liability for the loss. Therefore, 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 *supra*. Therefore, based

on this consideration, what the courts granted in this case was not the damages but for a certain amount of the relief which the plaintiff was entitled to in equity. The reflective 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.[76] Nevertheless, the courts could not satisfy these claims. In such cases, there were concerns upon what would be a fair price for the issuance of new shares or others. From the legal point of view, the price could be set according to book value, market value, or real value. To issue market value, there would not be a major problem. However, there were so many legal cases involved with the book building price.[77] The duties of the directors had to be irrelevant with regard to accounting finance.[78] This book price was not persuasive to be set 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.[79]

The most problematic legal cases involved with issuing new shares with the real price by BOD, and as a consequence the share price fell. According to precedent cases, the courts rarely granted damages by virtue of the share price falling resulting from the calculation of the share price.[80] The justification of the courts could be found that setting share pricing was within the scope of the business judgement rule. Focused on this point, 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 others for many reasons.

9 Analysis of Barriers to Granting the Remedies

According to the cases analysed in this research article, the disadvantage of shareholders whose shareholdings were diluted was favoured in the 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, corporate value, as a collateral reason. The issue in law had not 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 in the previous cases and that procedure was said to be a precedent, this had not existed as a law. This fact could prove that a court in Japan did not

constantly use the mixed system of common law idea and civil law practice. This trend is considerably proper because using the mixed system has been said to be less impossible.

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

With regard to the invalidation and non-existence of new share issuance, the point was the court gave the judgements focusing on unfairness. There were no extensive problems, except regarding the theoretical points of view. The debate centred around granting the remedies for the share price falling due to the price calculation under the request of BOD. The arithmetic know-how and business judgement rule rescued BOD for such liabilities.

In addition, this research article finds that some of the lawyers were impressed by the doctrine of the precedents to which the common law courts had adhered. Nevertheless, the precedent rule has a limitation to be applied to the extent that the situation and circumstance of the current cases had not changed. Therefore, it would be difficult for Japan to take into account which cases required consideration by the courts as the *ratio decidenti* because the institutions of the judicial authority were less centralised. This research article views that the decisions of the courts which stressed on only the economic rights of a party and emphasised on the primary purpose rule of corporate value had to be taken as *obiter dictum*.

10 Conclusion

The shareholder remedies claimed through the courts in Japan were 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,

which this research covers, the courts assumed the dilution of shareholding in some cases and the exclusion of shareholder participation in making decisions in other cases were the unfairness. 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 any party had to buy the newly issued shares was never made.

The good point through the judgements of the courts analysed in this research article was that the equitable relief rather than the damages was granted. However, the relief requires to be granted in all cases of shares or other securities issuance with the favourable prices, the allocation rights being distributed irrelevant to minority shareholders, and in case of either of legal or economic rights of the specific shareholders being infringed by such issuance. As the provisions in the Companies Act have not dictated the judges in imposing the sanctions, the courts are safe to grant the relief for such kinds of cases.

＜Notes＞

1 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. As METI is one of the ministries of administration, and MOJ is headed by the Supreme Court of Japan, the principles under the guidelines were persuasive to be referred by some courts in Japan. However, there would be an impact for the respective parties in claiming the judicial review against such administrative guidelines since they are not law. 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;
see generally, J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH, 191-219 (The University of Chicago Press, 1999).

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

3 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); Shigeru MORIMOTO, *Shinkabu No Fukōsei Hakkoū Mondai No Aratana Tenkai*, 6-17 SHŌJI HŌMU No.2174 (2018.8.5); Masayuki YOSHIDA, *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*, 2-6 KINYŪ SHŌJI HANREI No.1555 (2018.12.15).

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

5 The new shares were issued for the takeover defense and merger, respectively. Significantly, those purposes were discovered in Steel Partners Japan Strategic Fund (Offshore), L. P. v. Bulldog Sauce (Sup. Ct. Aug 7, 2007) and Showa Shell Ltd v. Idemitsu Kōsan Ltd (Tokyo D. Ct. July 18, 2017).

6 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.

7 KEN-ICHI OSUGI, *Transplanting Poison Pills in Foreign Soil: Japan Experience* in Hidei KANDA et al. eds, TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA 36-40 (Routledge, 2008).

8 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 *id.*

9 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*, *supra* note 5; *Showa Shell Ltd, id*.

10 Nyombi elaborated the strategy and effect of the merger of Cadbury and Kraft. CHRISPAS NYOMBI, UK TAKEOVER LAW AND THE BOARD NEUTRALITY RULE, 73-90 (Wildy, Simmonds & Hill Publishing, 2017).

11 The complaints by minority shareholders were frequently for the dilution of shareholdings despite the companies issuing them to raise funds. See DAVID CHIVERS QC ET AL. THE LAW OF MAJORITY SHAREHOLDER POWER: USE AND ABUSE ¶ 5.01 (2nd ed. LexisNexis, 2018).

12 The courts in the U.K. have used the provisions on the duties of directors in CA 2006 as the mandatory provisions, whilst a provision for the court to relieve a negligence done by a director has been used as a default provision. Paul Rajput, *Directors and their General Duties* (September 11, 2017), http://lewissilkin.com/Insights/Directors-and-their-general-duties.

13 (Tokyo D. Ct. June 23, 2008), *supra* note 2.

14 MIURA, *id*, at 2.

15 METI & MOJ, *supra* note 1.

16 Anonymous, *Quanz Shinkabu Hakkō Sashidome Nin-Yō Kettei Jiken*, 10-12 KINYŪ SHŌJI HANREI No.1296 (2008.8.1).

17 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. ICHIRO KAWAMOTO ET AL., CORPORATIONS AND PARTNERSHIPS IN JAPAN, 275–6 (2nd ed. Wolters Kluwer, 2016); Cf. Dan W. Puchniak & Masafumi Nakahigashi, *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.

18 *Supra* note 16.

19 See also John C. Coffee, "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*, (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 inclusive in the lecture.)

20 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*.

21 The duties of shareholders being defined either as contractual or non-contractual; non-contractual duties such as to treat equally are defined in the statute as a compulsory enforcement. See CORRADO MALBERTI, *Contractual Enforcement of Shareholder Duties* in ENFORCING SHAREHOLDERS' DUTIES 85-105 (Hanne S. Birkmose & Konstantinos eds., Edward Elgar Publishing, 2019).

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

23 This can be proved by analysing the cases: SFP Value Realization Master Fund Ltd. v. Nireko K.K, (Tokyo High Ct. June 15, 2005) 44 SHŌJI HŌMU, No.1735 (2005.6.25); Sun Telephone v. Dalton, (Tokyo D. Ct. June, 30) 7 KINYŪ SHŌJI HANREI No.1247 (2006.8.15); *Steel Partners Japan Strategic Fund*, *supra* note 5; Livedoor Ltd. v. Nippon Broadcasting System Inc., (Tokyo D. Ct. March 11, 2005) 125 HANREI TAIMUZU No.1173 (2005.5.1); and Autobacks Seven Co. Ltd. v. Silchester International Investors LL.P, (Tokyo D. Ct. Nov. 12, 2007) 53 KINYŪ SHŌJI HANREI No.1281 (2008.1.1).

24 *Steel Partners Japan Strategic Fund*, *id.*

25 *Autobacks Seven Co. Ltd., id*.

26 *Sun Telephone*, *id*.

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

28 The legal case proves the problem on the share issuance and the rights plan has still happened because it is the case decided in 2018, *supra* note 3.

29 The case was filed in the Tokyo District Court and the judgment was made on May 20, 2019. 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 O Ketsugi-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*, 18 KINYŪ SHŌJI HANREI No.1578 (2019.11.15).

30 MORIMOTO, *supra* note 3 (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).

31 Kandai UKEGAWA, *Shinkabu Yoyaku-Ken No Kōshi Jōken Ni Hanshita Kenri Kōshi Ni Yo Ru Kabushiki Hakkō No Kōryoku*, 8 KINYŪ SHŌJI HANREI No.1398 (2012.9.1).

32 *Id*. (Art. 280 of the old Commercial Code was carried in the Companies Act as Art. 828).

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

34 The expression showed that the action against the unfairness had to be in accordance with the precedent rule. *Id*.

35 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. Jan. 28, 1997) 129 HANREI JIHŌ No.1592. (The Companies Act expressly provides non-existence and invalidation of the new share issuance can be filed under Art.830 (1) and (2) of the Act respectively).

36 KAWAMOTO ET AL., *supra* note 17 at 204-6.

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

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

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

40 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 Companies Act does not expressly provide the context of the non-existence of share issuance.

41 HANREI JIHŌ No.1592, *supra* note 35.

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

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

44 See Aken BAN, *Shinkabu Hakkō Fu Sonzai Kakunin No Uttae Ni Okeru Fu Sonzai Jiyū*, 161 JURISUTO

No.1294 (2005.7.15).

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

46 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. HIROSHI ODA, JAPANESE LAW, 274-8 (3rd ed. Oxford University Press, 2009).

47 KAWAMOTO ET AL., *supra* note 17, at 193-7.

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

49 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. JOHN BUCHANAN ET AL., HEDGE FUND ACTIVISM IN JAPAN: THE LIMITS OF SHAREHOLDER PRIMACY, 170 (Cambridge University Press, 2012).

50 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*, 17 KINYŪ SHŌJI HANREI, No.1271 (2007.8.1).

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

52 Wataru TANAKA, *Burudokku Sōsu Jiken No Hōteki Kentō: Baishū Bōei-Saku Ni Kansuru Saiban Keika To Igi*, 9-14 BESSASU SHŌJI HŌMU No.311 (Shōji Hōmu, 2007).

53 Gozara expounded the situation up to 2010; however, Nyombi elaborated the situation up to 2017. Therefore, the research confirms that the situation continues. *Supra* note 10, at (xvii); JEANNETTE GORZALA, THE ART OF HOSTILE TAKEOVER DEFENCE: THE ROADMAP OF FIGHTING CORPORATE RAIDER, 54-55 (IGEL Verlag, 2010).

54 The Companies Act, 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. However, the courts in Japan will find it hard to accept the default and mandatory law; they tend to use all provisions as mandatory law. *Supra* note 48.

55 HIDEKI KANDA, *What Shapes Corporate Law in Japan?* in Hideki KANDA eds. et al., TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA, 65 (Routledge, 2008).

56 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, 58 Minshū 1763 (Sup. Ct. August 30, 2004). J. MARK RAMSEYER ET AL., AN AMERICAN PERSPECTIVE ON JAPANESE LAW, 208-17, 220-32 (Yūhikaku, 2019).

57 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.

58 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 and to be extended to the shareholders' common interest. Principle No.3 is the principle of ensuring the necessity and reasonableness to adopt takeover defense measures in response to a possible takeover threat. METI & MOJ, *supra* note 1.

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

60 For example, in TIC v. J Power case, this research views that TIC intended to contribute to policy designing more than dealing with its own interest. JOHN BUCHANAN ET AL., *supra* note 49, at 225-39.

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

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

63 *Livedoor Inc*., *supra* note 5.

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

65 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., 493 A.2d 946, 956 (Del. 1985); Revlon Inc. v. MacAndrews & Forbes Holding Inc., 506 A.2d 173 (Del.1986); accord Robert A. Razaggo, Unifying the Law of Hostile Takeovers: Bridging the Unocal/Revlon Gap 35 Ariz. L. Rev. 989 (1993).

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

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

68 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 17, at 83-4.

69 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.

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

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

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

73 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.*

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

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

76 This confirmation is confirmed using the Lex Database.

77 See Masashi KITAMURA, *Shin-Kabu Yoyaku-Ken Tsuki Shasai No Yūri-Hakkō To Torishimariyaku No Sekinin*, 135 HŌGAKU KYŌSHITSU No. 463 (2019.5).

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

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

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

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