

# Squeeze-out of Minority Shareholders

## The Constitutionality Question

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### I. INTRODUCTION

The special controlling shareholder’s right of squeeze-out in stock companies (*kabushiki kaisha*) was a new regime introduced by the 2014 Amendment to the Companies Act. The subject of significant controversy, it faced strong opposition when it first came up for discussion at the Justice System Reform Council. Concerns have also been raised as to the constitutionality of the squeeze-out regime during Diet deliberations of the 2014 Amendment bill, and in the academic literature both before and after the reform passed into law.

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This Article proceeds as follows. Part II provides an overview of the debate over the squeeze-out regime in Japan thus far. In Part III, I introduce the jurisprudence of the German Federal Constitutional Court on the constitutionality of squeeze-outs in Germany. Finally, in Part IV, I will consider the constitutionality question in the context of Japan's constitutional order and draw some conclusions.

## II. THE DEBATE IN JAPAN

### 1. *The Companies Act of Japan and Squeeze-out of Minority Shareholders – The Influence of German Legislation*

Debate over a regime of squeeze-outs by special controlling shareholders is not new – it had previously occurred during the process leading up to the enactment of the Companies Act 2005. One of the catalysts for the debate was the fact that Germany had earlier enacted its own squeeze-out regime as part of the 2001 reforms to the Stock Corporations Act (*Aktiengesetz*).<sup>1</sup> The salient provisions of Germany's regime are as follows:<sup>2</sup>

#### *§ 327a Transfer of Shares for Cash Compensation*

(1) 1 The shareholders' meeting of a stock corporation or of partnership limited by shares may resolve upon request of a shareholder holding 95 per cent of the share capital (principal shareholder) the transfer of the other shareholders' (minority shareholders') shares to the principal shareholder against the payment of adequate cash compensation. [...]

#### *§ 327b Cash Compensation*

[...]

(3) Before the shareholders' meeting is convened, the principal shareholder must deliver to the management board the declaration of a credit institution authorised to operate within the territorial scope of this law by which the credit institution guarantees the performance of the principal shareholder's obligation to pay the minority shareholders the set cash compensation for the transferred shares immediately after registration of the transfer resolution.

#### *§ 327c Preparation of the Shareholders' Meeting*

[...]

(2) [...] 2 The adequacy of the cash compensation shall be reviewed by one or more expert auditors. [...]

[...]

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1 E. TAKAHASHI, *Principles of German Corporate Law* (Yūhikaku, Tōkyō 2012) 434 高橋英治『ドイツ会社法概説』四三四頁(有斐閣、二〇一二年)。

2 The translated provisions that follow are excerpted from *Aktiengesetz* [AktG] [Stock Corporation Act] as of 18 September 2013 (Ger.) (translated by Norton Rose Fulbright, October 2013) at <http://www.nortonrosefulbright.com/files/german-stock-corporation-act-109100.pdf>

§ 327e *Registration of the Transfer Resolution*

[...]

(3) 1 Upon registration of the transfer resolution in the commercial register, all shares of the minority shareholders shall be transferred to the principal shareholder. [...]

§ 327f *Judicial Review of the Compensation*

[...] 2 If the cash compensation is inadequate, the court [...] shall set the adequate cash compensation.

The influence of the German regime is apparent in the Draft Principles on the Modernization of Corporate Law issued by the Corporate Law Subcommittee of the Justice System Reform Council on October 22, 2003. This document called for further consideration of ‘whether a regime that grants a shareholder holding over 90% of the voting rights the right to buy out<sup>3</sup> other shareholders should be created’.<sup>4</sup>

2. *Companies Act Reform and the Introduction of the Special Controlling Shareholder’s Squeeze-out Right*

a) *Debate in the Justice System Reform Council*

The key provisions of the special controlling shareholder’s squeeze-out regime introduced by the Companies Act reform of 2014 are as follows.<sup>5</sup>

A shareholder who owns either directly or indirectly 90% or more of a stock company’s shares (‘special controlling shareholder’) may make demand on the company’s other [minority] shareholders for the sale of all of their shares for cash consideration (Article 179(1)). When making the demand, the special controlling shareholder must specify the quantum of cash consideration, the time of acquisition of the shares of the shareholders to be squeezed out (‘selling shareholders’), and other conditions of acquisition (Article 179-2(1)).

The demand must be approved by the directors of the company (or in the case of a company with a board of directors, the board of directors) (Article 179-3(1), (3)). Where approval is given, the company must give notice or public notice to the selling shareholders (Article 179-4, Companies Act; Article 161(2), Book Entry Transfer of Bonds and Shares Act<sup>6</sup>).

For the period beginning on the date of notice or public notice and ending six months after the date of acquisition, the company must make available at its registered headquar-

3 For avoidance of doubt, this is the right of the 90% controlling shareholder to compel the other shareholders to sell their shares to himself.

4 Draft Principles on the Modernization of Corporate Law, in: Issues on the Draft Principles on the Modernization of Corporate Law, Bessatsu Shōji Hōmu 271 (2004) 131.

5 The following is not a direct translation of the statutory provisions, but rather of a summary of those provisions. For the original summary (in Japanese), see E. TAKAHASHI, Principles of Corporation Law [『会社法概説〔第三版〕』二六七頁以下] (3<sup>rd</sup> ed., Chūō Keizai-sha, Tōkyō 2015) 267 ff.

6 Law No. 75 of 27 June 2001.

ters for inspection by selling shareholders during business hours a document specifying the special controlling shareholder's identity and other information (Article 179-5, Companies Act). After acquisition of the shares, the company must without delay make available at its registered headquarters for inspection by selling shareholders during business hours a document specifying the number of shares acquired and other information (Article 179-10).

The time of notice or public notice to selling shareholders is deemed to be the time of demand for sale (Article 179-4(3)). The date of acquisition is the date specified in the conditions of acquisition (Article 179-9(1)).

Selling shareholders may apply for an injunction restraining the acquisition where the demand is in violation of statute or regulation, or where the consideration is significantly inadequate and there is a risk that selling shareholders would be prejudiced (Article 179-7(1)). Selling shareholders may apply for judicial appraisal of the acquisition price during the period beginning twenty days before date of acquisition and ending on the day before date of acquisition (Article 179-8(1)). Shareholders and corporate officers<sup>7</sup> of the company at the date of acquisition may apply for a declaration of nullity of the acquisition within six months after the date of acquisition (Article 846-2).

During the legislative process, the following points came up for debate in the Corporate Law Subcommittee of the Justice System Reform Council.<sup>8</sup> First, it was suggested that shareholders subject to the squeeze-out should be granted the opportunity to ask substantive questions and express their views to the controlling shareholder, as is the case under German law.<sup>9</sup> A second suggestion was to create a sell out regime<sup>10</sup> that would be complementary to the squeeze-out regime. Under the proposal shareholders could put their shares to a controlling shareholder who came to hold 90% or more of the shares. The rationale for this was minority shareholder protection.<sup>11</sup> The third suggestion was to exclude from the scope of the squeeze-out regime companies for which share valuation would be difficult, or companies with share transfer restrictions on all issued shares. The concern was with potential abuse of the squeeze-out regime to get rid of minority shareholders at an undervalue.<sup>12</sup>

The third suggestion elicited the following responses. First, in companies with a special controlling shareholder holding 90% or more of the shares, it is meaningless for mi-

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7 This term includes directors, statutory auditors, and other officers.

8 Responsible for what eventually became the 2014 Reforms, this Corporate Law Subcommittee is not the same as the one responsible for the enactment of the Companies Act referred to in *supra* note 4.

9 Minutes of the 12<sup>th</sup> Meeting of the Corporate Law Subcommittee, 6 (*H. Kansaku*).

10 A note on terminology: the 'sell out' right in the Japanese context (セル・アウト権) follows UK usage: see e.g. Explanatory Notes to the Companies Act 2006 (UK), para. 1242. For avoidance of doubt, it refers to the right of minority shareholders to be bought out by the controlling shareholder.

11 Minutes of the 12<sup>th</sup> Meeting of the Corporate Law Subcommittee, 12 (*Y. Aratani*).

12 Minutes of the 18<sup>th</sup> Meeting of the Corporate Law Subcommittee, 2 ff (*M. Saitō*), Minutes of the 20<sup>th</sup> Meeting of the Corporate Law Subcommittee, 49 (*Y. Itō*).

minority shareholders to remain as shareholders in a company provided that there are safeguards to ensure that appropriate consideration is paid in exchange for their shares. Second, as other extant cash out regimes<sup>13</sup> apply to companies with share transfer restrictions, in the interests of legal consistency, it would not make sense to carve out an exception specially for companies with share transfer restrictions for all shares.<sup>14</sup> The view that it would be difficult to justify affirmatively an exception for such companies soon became mainstream,<sup>15</sup> and it was ultimately adopted by Corporate Law Subcommittee.<sup>16</sup>

b) *Debate in the House of Councillors Committee on Judicial Affairs*

At the 16<sup>th</sup> meeting of the 186<sup>th</sup> Diet of Japan House of Councillors<sup>17</sup> Committee on Judicial Affairs<sup>18</sup> held on 20 May 2014, the constitutionality of the special controlling shareholder's right of squeeze-out came up for debate.

Former Minister for Justice and Opposition Councillor Toshio Ogawa argued that it is oppressive of a 90% controlling shareholder to purchase the shares of the remaining 10% in the minority against their will. As it is a private matter in which the controlling shareholder gets rid of minority shareholders he does not like, Opposition Councillor Ogawa argued, the public interest is not engaged.<sup>19</sup> Then-Minister of Justice Tanigaki Sadakazu responded by arguing that squeeze-outs benefit the public by increasing the speediness and flexibility of corporate management. Rejecting the Opposition's proposal to amend the reform bill by guaranteeing fair consideration for squeezed out shareholders, the Minister pointed out that the Opposition's proposal would contradict the corporate law principle that shareholders rank after creditors in priority.<sup>20</sup> The Chief of the Civil Affairs Bureau of the Ministry of Justice took the view that minority shareholders in special controlling shareholder squeeze-outs would be adequately protected with existing rules, such as the requirement of board approval, and the possibility of judicial appraisal or even injunctive relief where the share consideration is grossly inadequate.<sup>21</sup>

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13 'Cash out' (キャッシュ・アウト) refers to other corporate law regimes such as the (once prevalent) reverse stock split that can be used to achieve squeeze-outs. For a concise introduction to the reverse stock split equivalent in Japan, see ALAN K. KOH, *Appraising Japan's Appraisal Remedy*, *The American Journal of Comparative Law*, 62 (2014) 417, at 424–425.

14 Minutes of the 18<sup>th</sup> Meeting of the Corporate Law Subcommittee, 2 (*M. Maeda*).

15 Minutes of the 18<sup>th</sup> Meeting of the Corporate Law Subcommittee, 5 (*T. Fujita*).

16 Minutes of the 20<sup>th</sup> Meeting of the Corporate Law Subcommittee, 51 (*Chairman S. Iwahara*).

17 The House of Councillors is the upper house of the bicameral Japanese Diet.

18 Translation from Committee on Judicial Affairs, House of Councillors Website, <http://www.sangiin.go.jp/japanese/joho1/kousei/eng/committ/list/10065e.htm>. The committee handles not only 'judicial affairs' stricto sensu, but also 'matters under the jurisdiction of the Ministry of Justice'. Id.

19 Minutes of the Committee on Judicial Affairs, 186<sup>th</sup> Diet, No. 16, 5 (*T. Ogawa*, DPJ).

20 Minutes of the Committee on Judicial Affairs, 186<sup>th</sup> Diet, No. 23, 7 (Minister of Justice *S. Tanigaki*, LDP).

21 Minutes of the Committee on Judicial Affairs, 186<sup>th</sup> Diet, No. 16, 5 (Civil Affairs Bureau Chief *T. Miyama*).

c) *Debate After the Companies Act Reform*

The debate over the constitutionality of the special controlling shareholder continued after the reform bill was passed. The requirement of board approval for a squeeze-out, touted as a safeguard for minority shareholders, was criticized as being insufficient for ensuring the squeeze-out regime's constitutionality because directors could be removed without cause by ordinary resolution of the shareholder meeting (Article 339).<sup>22</sup> Also, if Japan were to introduce a squeeze-out regime as many European jurisdictions did but without corresponding sell out rights for minority shareholders, only majority shareholders would have a unilateral right of purchase. Minority shareholders are left in the precarious position where the 90% controlling shareholder can expropriate them as and when he pleases. As only majority shareholder interests are given weight, the regime lacks balance. It is also severely doubtful whether the present regime adequately protects the property rights of shareholders who have been shareholders since before the reform.<sup>23</sup>

### III. THE GERMAN FEDERAL CONSTITUTIONAL COURT'S DECISION ON MINORITY SHAREHOLDER SQUEEZE-OUT

In the May 30, 2007 decision of the Federal Constitutional Court of Germany, the court applied the principle of proportionality (*Grundsatz der Verhältnismäßigkeit*) in reviewing the constitutionality of the minority shareholder squeeze-out regime. The court held that the regime satisfied the principles of proportionality and full compensation at constitutional law and therefore did not infringe upon the constitutional protection of property rights as guaranteed under Article 14 of the Basic Law of the Federal Republic of Germany.<sup>24</sup> However, the court left open the question of whether it would be sufficient in the family-owned company context for the law to provide only for compensation of the squeezed out minority shareholder's property interest.<sup>25</sup>

### IV. ANALYSIS OF JAPANESE LAW

#### 1. *Shareholder Rights and the Constitutional Protection of Property*

Shareholder rights in Japan should be understood as coming within the ambit of the constitutional protection of property rights as guaranteed under Article 29 of the Consti-

22 T. SEKI, Viewpoint: What If the Diet Made 'Forced Purchase' Permissible by Legislation? [視点 国会が『押し売り』を許容する立法をしたら?], *Shiryōban Shōji Hōmu* 371 (2015) 3.

23 S. IWAHARA ET AL., Panel Discussion: The Significance of the Companies Act Reform and Future Issues [座談会 改正会社法の意義と今後の課題], in: S. Sakamoto (ed.), *Draftsman's Commentary on the 2014 Companies Act Reform* [立案担当者による平成二六年改正会社法の解説], *Bessatsu Shōji Hōmu* 393 (2015) 33 (Comment by Y. Masao).

24 BVerfG NZG 2007, 587.

25 BVerfG NZG 2007, 587 at para 26.

tution of Japan. Shares are the embodiment of shareholders' respective interests in the company,<sup>26</sup> and these membership rights are a variant of rights of ownership.<sup>27</sup> The Supreme Court of Japan has recognized rights under the Forestry Act and profits from securities trading as property rights within the meaning of Article 29.<sup>28</sup> It would therefore be irrational to exclude only shares from the ambit of Article 29. Should shares be denied constitutional protection as property, there would be no rationality-based limit to corporate law legislation. The Supreme Court has laid down the following principles applicable to constitutionality review of laws regulating property rights. First, a regulatory measure violates Article 29(2) of the Constitution only where the legislative purpose is clearly inconsistent with public welfare, or where the means of regulation are either unnecessary or irrational for the purpose of achieving regulatory objectives. Second, to determine whether regulation of property rights is consistent with the public welfare within the meaning of Article 29(2), the court will balance the purpose, necessity, and content of the regulatory measure with the type and nature of the property right to be restricted under the regulatory measure, and the extent of the restriction.<sup>29</sup>

2. *The Constitutionality of the Special Controlling Shareholder's Squeeze-out Right under Companies Act Article 179 et seq.*

Applying the principles laid down by the Supreme Court, I now consider the issue of whether the special controlling shareholder's squeeze-out right can withstand constitutionality review.

The first inquiry concerns the compatibility of the regime with the 'public welfare'. Under Article 29(2) of the Constitution, the 'public welfare' refers to the 'interests of society as a whole'. This is not restricted to the 'public interest', but also encompasses anything that increases the wealth of society as a whole. A regime that creates an increase in private benefit, so long as it increases the wealth of society as a whole, is compatible with 'the public welfare' even if it does not by itself possess a public character.

The squeeze-out regime makes it possible for minority shareholders holding 10% or less to be removed from the company, and for the company to become a wholly owned subsidiary. Through this method, flexible management with a view to the long term becomes possible, and as a wholly owned subsidiary the company no longer requires decisions to be made by shareholder resolution, which increases the speed of decision-

26 K. ŌSUMI/H. IMAI, *On Corporate Law*, vol 1 [会社法論上巻 [第三版] ]二九二頁 (有斐閣、一九九一年) (3<sup>rd</sup> ed., Yūhikaku, Tōkyō 1991) 292.

27 K. ŌSUMI, *Commercial Law Precedents and Me* [私と商事判例], Shōji Hōmu Kenkyū-kai, Tōkyō 1976, 132.

28 Supt. Ct. G.B. 22 April 1987, 41-3 Minshū, 408; Supt. Ct. G.B. 13 February 2002, 56-2 Minshū, 331 (available at [http://www.courts.go.jp/app/files/hanrei\\_jp/285/052285\\_hanrei.pdf](http://www.courts.go.jp/app/files/hanrei_jp/285/052285_hanrei.pdf)).

29 Supt. Ct. G.B. 22 April 1987, 41-3 Minshū, 408; Supt. Ct. G.B. 13 February 2002, 56-2 Minshū, 331; Supt. Ct. 27 November 2006, 222 Saibanshū Minji 275; Supt. Ct. 15 July 2011, 65-5 Minshū, 2269.

making. Additionally, after squeeze-out, the company can save costs that would otherwise have been incurred with regards to shareholder meetings, such as delivery of notice of shareholder meetings and venue rental.<sup>30</sup> Therefore, as the squeeze-out regime benefits the ‘interests of society as a whole’ through benefiting the 100% parent (the erstwhile special controlling shareholder), the legislative purpose is compatible with the public welfare within the meaning of Article 29(2) of the Constitution.

The second point concerns the nature of the share. It is a special characteristic of shares that in listed companies, the smaller the percentage shareholding, the smaller the possibility of influencing the management of the company as a shareholder becomes. The ‘property’ aspect of the share becomes more salient. However, as was hinted at by the Federal Constitutional Court of Germany in their decision on the constitutionality of squeeze-out rights,<sup>31</sup> in family-owned companies it is meaningful and significant that a shareholder has the opportunity to exercise his right to ask questions at a shareholder meeting (Article 314) even if he owns only a single share.<sup>32</sup> Japan’s squeeze-out regime only requires board approval, and does not call for a shareholder resolution (Article 179-3(1), (3)). We have seen that there were calls during the legislative process objecting to the inclusion of companies with share transfer restrictions on all shares within the squeeze-out regime. However, as the squeeze-out regime that ultimately came into force does not restrict its scope to public companies, there is increased danger that in family-owned companies, shareholders not to the liking of corporate management would be squeezed out and deprived entirely of any right to speak at shareholder meetings. On this point, under the current regime the means adopted are inappropriate for achieving the regulatory objective, and therefore vulnerable to challenge as irrational legislation in contravention of Article 29(2) of the Constitution.

Third, the squeezed out minority shareholders bear the entire risk of the special controlling shareholder’s insolvency. By contrast, under German law, minority shareholders’ claims for payment against the special controlling shareholder are guaranteed by banks.<sup>33</sup> This is another factor weighing in favor of finding Japan’s squeeze-out regime unconstitutional.

Fourth, in contrast with German law, the Japanese regime does not provide for review of the adequacy of cash consideration by court-appointed special auditors.<sup>34</sup> It is unlikely that the squeeze-out regime would be found unconstitutional on this difference alone, given that the final decision on the quantum of consideration is left to the court following non-contentious litigation procedure.<sup>35</sup> However, as there is still uncertainty

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30 S. IWAHARA, Commentary on the Draft Principles on the Reform of the Companies Act Regime (Part IV) [『会社法制の見直しに関する要綱案』の解説IV], *Shōji Hōmu* 1978 (2012) 39.

31 See Part III.

32 Minutes of the 12<sup>th</sup> Meeting of the Corporate Law Subcommittee, 6 (*H. Kansaku*).

33 See § 327b paragraph 3, AktG.

34 Compare § 327c paragraph 2 sentence 2 AktG.

over standards used for the appraisal of unlisted shares in Japan,<sup>36</sup> there is a risk that minority shareholders would be compelled to sell their shares at undervalue due to the lack of judicial expertise in valuation matters. The absence of court-appointed valuation experts can therefore be a factor towards a finding of unconstitutionality in the context of squeeze-outs in unlisted companies.

Fifth, there are no disclosure obligations imposed upon special controlling shareholders when exercising their right to squeeze-out. As information relevant to share valuation such as the development of new products and the acquisition of patents would not be subject to disclosure, minority shareholders face the risk of a forced sale at undervalue.<sup>37</sup>

Sixth, other squeeze-out regimes such in the UK,<sup>38</sup> Germany,<sup>39</sup> and the EU<sup>40</sup> do not stand alone; they are paired with a regime of minority shareholder's sell out rights. Japan is unique amongst developed corporate law jurisdictions in providing for only a squeeze-out regime – sign of a biased legislative program focused solely on the interests of major shareholders.

It is clear from the above that Japan's current special controlling shareholder's right to squeeze-out minority shareholders under the Companies Act (Articles 179 et seq.) is clearly biased in favor of majority shareholder interests and fails to give sufficient regard to the interests of minority shareholders expropriated under the regime. As such, it cannot be said that its constitutionality is beyond doubt.

Professor Egashira in his leading treatise has observed that a squeeze-out of minority shareholders in the context of internal conflict within a closely held stock company may be 'an act of the special controlling shareholder for an improper purpose' and therefore subject to injunction (Article 179-7, Companies Act) as an abuse of right (Article 1 paragraph 3, Civil Code).<sup>41</sup> Egashira's interpretation has its merits as it is consistent with the principle that where legislation is subject to multiple interpretations, the preferred

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35 For a brief analysis of non-contentious litigation procedure (in the context of the dissenting shareholder's appraisal remedy) see KOH, *supra* note 13, 427–431.

36 E. TAKAHASHI/H. FLEISCHER/H. BAUM, Unternehmensbewertung im Recht der Aktiengesellschaft: Ein japanisch-deutscher Rechtsvergleich [Corporate Valuation in Stock Corporation Law: A Comparison of Japan and Germany], *Journal of Japanese Law* 36 (2013) 32–35.

37 K. SHIBATA, The Squeeze Out Regime: Structure and Problems [株式等売渡請求制度——その骨格と問題点], *Hōritsu Jihō* 87 (3) (2015) 35 ff.

38 Companies Act 2006, ss. 974–991 (U.K.).

39 Wertpapiererwerbs- und Übernahmegesetz (WpÜG) [Securities Acquisition and Takeover Act], §§ 39a–39c (Ger.), available at: [http://www.bafin.de/SharedDocs/Aufsichtsrecht/EN/Gesetz/wpueg\\_en.html?nn=2821360](http://www.bafin.de/SharedDocs/Aufsichtsrecht/EN/Gesetz/wpueg_en.html?nn=2821360).

40 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, Arts. 15–16.

41 K. EGASHIRA, The Laws of Stock Corporations [株式会社法] (6th ed., Yūhikaku, Tōkyō 2015) 281. H. FUKUSHIMA, The Squeeze Out Right of Special Controlling Shareholders [特別支配株主の株式等売渡請求], in: Toriyama/Fukushima (eds.), 2014 Companies Act Reforms: Analysis and Development [平成二六年会社法改正の分析と展開], *Kinyū Shōji Hanrei*, Special Issue 2461 (2015) 73.

interpretation is one that incorporates constitutional values and leads to a finding of constitutionality.<sup>42</sup> However, in practice the circumstances under which a court would enjoin a special controlling shareholder's exercise of his squeeze-out right as an abuse of right are likely to be extremely limited. Therefore, I argue that the mere possibility of an injunction is insufficient to guarantee the constitutionality of the regime as a whole.

To avoid a finding of unconstitutionality, it behooves the legislator to amend the current squeeze-out regime to increase protection for minority shareholders. As a matter of balance, a corresponding sell out right for minority shareholders should be introduced. Finally, under current law, minority shareholders in family-controlled, closely-held stock companies can be expropriated without any opportunity to speak at a shareholder's general meeting. This is unacceptable. Therefore, an exception from the current squeeze-out regime should be created for companies with share transfer restrictions on all shares.

### 3. *The 'Protection of Vested Rights' Angle*

The constitutionality of the special controlling shareholder's squeeze-out regime at current law can be challenged not only in terms of whether the regime itself is unconstitutional. It is clear that the legal status of minority shareholders has been adversely affected by the introduction of this regime as shareholders who would otherwise have been able to remain in their companies can now be squeezed out. Under Japanese constitutional law, the issue of 'protection of vested interests' arises when a legally-protected vested position is adversely affected by a legislative change.<sup>43</sup> In a departure from past jurisprudence,<sup>44</sup> a recent Supreme Court case<sup>45</sup> raising the issue of whether tax legislation that imposed ex post changes to property entitlements is compatible with the constitutional protection of property (Article 29, Constitution of Japan) did not provide support for wide legislative discretion. In light of the Supreme Court's shift in approach, it is possible that quite apart from the question of whether the current squeeze-out regime is itself constitutional, there is another avenue of attack under the 'protection of vested interests' theory. It suggests that the legislature does not enjoy wide discretion when introducing legislation harming vested interests, and the fact that the current squeeze-out regime harms the vested interests of minority shareholders is a weighty factor towards a finding of unconstitutionality.

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42 Professor *Kōji Satō* defines this principle (which may be somewhat awkwardly translated as 'the principle of constitutionally-compatible interpretation') in the following terms: "The law should be interpreted in a way that is compatible with the Constitution so as to maintain the consistency of a [legal] system with the Constitution at its pinnacle." K. SATŌ, *Japanese Constitutional Theory* [日本国憲法論] (Seibundō, Tōkyō 2011) 651.

43 J. SHISHIDO, *The Constitution: Application and Development of Interpretative Theories* [憲法 解釈論の応用と展開] (2<sup>nd</sup> ed., Nihon Hyōron-sha, Tōkyō 2014) 156 ff.

44 Supt. Ct. G.B. 27 March 1985, 39-2 Minshū, 247.

45 Supt Ct. 22 September 2011, 65-6 Minshū, 2756.

## SUMMARY

*The article discusses the constitutionality of a controlling shareholder's right of squeeze-out in stock companies that was introduced by the 2014 Amendment to the Companies Act (Articles 179 et seq.). Shareholder rights in Japan should be understood as coming within the ambit of the constitutional protection of property rights as guaranteed under Article 29 of the Japanese Constitution of Japan. The Supreme Court has laid down the two principles applicable to constitutionality review of laws regulating property rights. First, a regulatory measure violates Article 29(2) of the Constitution only where the legislative purpose is clearly inconsistent with public welfare, or where the means of regulation are either unnecessary or irrational for the purpose of achieving regulatory objectives. Second, to determine whether regulation of property rights is consistent with the public welfare within the meaning of Article 29(2), the court will balance the purpose, necessity, and content of the regulatory measure with the type and nature of the property right to be restricted under the regulatory measure, and the extent of the restriction.*

*With regard to the first principle, the squeeze-out regime is seen as benefiting the 'interests of society as a whole' through benefiting the 100% parent (the erstwhile special controlling shareholder), thus the legislative purpose is qualified as compatible with the public welfare within the meaning of Article 29(2) of the Constitution. However, with respect to the second principle the author regards the means adopted under the current regime as inappropriate for achieving the regulatory objective, and therefore vulnerable to being challenged as irrational legislation in contravention of Article 29(2) of the Constitution. In contrast, the author points out that the Federal Constitutional Court of Germany in a decision of 2007 held that the German squeeze-out regime satisfied the principles of proportionality and full compensation at constitutional law and therefore did not infringe upon the constitutional protection of property rights as guaranteed under Article 14 of the Basic Law of the Federal Republic of Germany. He emphasizes, however, that the Japanese squeeze-out regime has major shortcomings in comparison to the German regulation.*

*First, the squeezed out minority shareholders bear the entire risk of the special controlling shareholder's insolvency. By contrast, under German law, minority shareholders' claims for payment against the special controlling shareholder are guaranteed by banks. This is a factor weighing in favor of finding Japan's squeeze-out regime unconstitutional. Second, in contrast with German law, the Japanese regime does not provide for review of the adequacy of cash consideration by court-appointed special auditors. The absence of court-appointed valuation experts can therefore be a factor towards a finding of unconstitutionality in the context of squeeze-outs in unlisted companies. Third, there are no disclosure obligations imposed upon special controlling shareholders when exercising their right to squeeze-out and, fourth, the German squeeze-out regime, like others, does not stand alone; it is paired with a regime of minority shareholder's sell out rights. Japan is unique amongst developed corporate law jurisdictions in providing for only a squeeze-out regime – a sign of a biased legislative program focused solely on the interests of major shareholders and failing to give*

*sufficient regard to the interests of minority shareholders expropriated under the regime. As such, the author claims that its constitutionality is not beyond doubt.*

*(The Editors)*

#### ZUSAMMENFASSUNG

*Der Beitrag befasst sich mit der Frage, ob die im Jahr 2014 in den Artikeln 179 ff. Gesellschaftsgesetz neu geschaffene Befugnis eines Mehrheitsaktionärs, Minderheitsaktionäre auch gegen deren Willen aus der Gesellschaft auskaufen zu können (squeeze-out), verfassungsgemäß ist. Aktionärsrechte unterfallen nach allgemeiner Ansicht (auch) in Japan als Eigentumsrechte dem Schutz von Artikel 29 der dortigen Verfassung. Der japanische Oberste Gerichtshof hat zwei Prinzipien formuliert, deren Beachtung als Voraussetzung der Verfassungsmäßigkeit eines Eingriffs in geschützte Eigentumsrechte angesehen wird. Danach ist eine hoheitliche Maßnahme mit Art. 29 Abs. 2 unvereinbar und damit verfassungswidrig, wenn sie entweder offensichtlich nicht im öffentlichen Interesse liegt, oder wenn sie nicht erforderlich oder ungeeignet für die Umsetzung der gesetzgeberischen Ziele ist. Zur Überprüfung, ob die Maßnahme im öffentlichen Interesse liegt, trifft der Oberste Gerichtshof als zweites eine Abwägung zwischen dem Ziel, der Notwendigkeit und der Ausgestaltung der betreffenden Maßnahme einerseits und der Art des betroffenen Eigentumsrechtes und der Schwere des Eingriffs anderseits.*

*Mit Blick auf den ersten Grundsatz bejaht der Autor die Verfassungsmäßigkeit der neuen Squeeze-out-Regelung in Japan, da diese im öffentlichen Interesse liege. Die vom Gesetzgeber gewählte Ausgestaltung der Regelung sei hingegen nicht geeignet, das gesetzgeberische Ziel zu verwirklichen, und verstoße damit potentiell gegen Art. 29 Abs. 2 der Verfassung. Ein Vergleich zur deutschen Squeeze-out-Regelung zeige zwar, dass diese im Jahr 2007 vom Bundesverfassungsgericht als vereinbar mit der Eigentumsgarantie des Art. 14 des deutschen Grundgesetzes qualifiziert worden sei, die japanische Regelung weise indes gegenüber der deutschen eine Reihe von Defiziten auf, die eine abweichende Beurteilung nahe legten. Zum einen trügen die japanischen Minderheitsaktionäre, anders als die deutschen, das Risiko einer Insolvenz des Mehrheitsaktionärs. Zum zweiten fehle in der japanischen Regelung die Möglichkeit, dass ein vom Gericht eingesetzter unabhängiger Sachverständiger die Angemessenheit der Gegenleistung überprüfen könne. Drittens fehle es an ausreichender Transparenz, und viertens sehe die deutsche Regulierung wie andere moderne Gesellschaftsrechte ein korrespondierendes Recht der Minderheitsaktionäre auf einen Auskauf vor, das in Japan hingegen fehle. Das japanische Squeeze-out-Regime bevorzuge damit einseitig die Interessen des Mehrheitsaktionärs und vernachlässige die Interessen der ausgeschlossenen Minderheitsaktionäre. Von daher beständen Zweifel an der Verfassungsmäßigkeit der neuen Regelung in Japan.*

*(Die Redaktion)*