

RECHTSPRECHUNG / CASE LAW

Japanese Corporate Law: Important Cases in 2010

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I. INTRODUCTION

The *Tôhoku Chihô Taiheiyô Oki Earthquake* of 11 March 2011 brought with it an incredibly large tsunami and both have been a terrible disaster for Japan. According to the National Police Agency¹, as of 11 April 2011, about a month after the Earthquake, the number of deaths was 13,130; 13,718 people were missing, and 145,565 had evacuated the area. The disasters caused both human and economic damage in the Tôhoku area and throughout East Japan, and the chaos rippled out through the entire country.

The nuclear power plant in Fukushima prefecture is completely destroyed and leaking both radiation and radioactive material. Residents around the power plant have been forced to evacuate, while workers at the plant struggle to prevent further tragedy. Radiation has spread over the surrounding areas, including farmland. Consumers avoid buying produce from these areas, causing farmers to suffer further economic hardship. In the Tôhoku and Tokyo region, gasoline, food, and other daily items are in short supply.

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1 <http://www.npa.go.jp/archive/keibi/biki/higaijokyo.pdf>

Planned blackouts by Tokyo Electric Power Company cause further confusion in the Tokyo region. The manufacturing industry suffers too, with suppliers unable to deliver their goods to customers, who then cannot produce complete products. The number of visitors from overseas has decreased, seriously affecting the Japanese tourism industry. The earthquake and tsunami have brought a level of tragedy not experienced by Japan.

The listlessness of the Japanese economy also appears set to continue. It has been reported that the GDP of Japan will decrease by approximately 0.2% – 0.5%.² Shortly after the earthquake, the value of the Yen sharply rose; it was reported that the Yen broke 79.75 Yen to the U.S. dollar, last reached in April 1995, and later reached 76.25.³ After this, the rise of the Yen seemed to calm down.⁴ According to the Nikkei Newspaper, companies' performance is expected to worsen due to the rise of the Yen and a slump in consumer activities and investment in plant and equipment.⁵ If low share prices in the stock markets continue because of this drop in performance, further drops in company results can be expected. Thus the economic mess caused by the Great Disaster in East Japan (*Higashi-nippon Dai-shinsai*) is a present and serious danger.

The four cases that this paper discusses were decided when the Japanese economy was in good shape and business prospects were positive, as the Nikkei Shinbun reported.⁶ The first case is a Supreme Court decision relating to transferring employment contracts in company splits. The second case, also a Supreme Court decision, addressed whether the directors of a parent corporation breached their duty of care in determining the price of shares of a subsidiary corporation when the parent company purchased those shares. In the third case, the issue was whether a shareholder deprived of shareholder status as a result of a resolution at an ordinary general meeting had legal standing for a suit to void the resolution. This case further decided whether the standing for the lawsuit was lost due to the corporation merging after the resolution. In the fourth case, shareholders sought redemption of their shares in the division of a public corporation by absorption, and the court decided on a fixed date to determine fair value, the redemption value of the shares, and specified a method to determine fair value. This paper discusses these important cases below.

2 Nihon Keizai Shinbun, 24 March 2011, 5.

3 Nihon Keizai Shinbun, Evening Issue, 17 March 2011, 1.

4 Nihon Keizai Shinbun, 18 March 2011, 1, 3; Nihon Keizai Shinbun, Evening Issue, 18 March 2011, 1; Nihon Keizai Shinbun, 19 March 2011, 1, 5.

5 Nihon Keizai Shinbun, 18 March 2011, 8.

6 Nihon Keizai Shinbun, 11 February 2011, 1; Nihon Keizai Shinbun, 18 February 2011, 3.

II. SUCCESSION OF LABOR CONTRACTS IN INCORPORATION-TYPE COMPANY SPLITS⁷

1. *Facts*

A US corporation (“IB”) and a Japanese corporation (“H”) agreed that they would establish a joint venture to engage in the business of hard disk drives (“HDD”). Y, a subsidiary of IB incorporated in Japan, separated its HDD department by way of incorporation-type company split (hereinafter: the Company Split). Through this split Y created ST, made it a joint venture under the agreement between IB and H, and transferred Y’s HDD department to it. Y also transferred the employment contracts of employees of its former HDD department to ST.

Y sought to undertake measures to obtain the understanding and cooperation of employees in conducting the Company Split, pursuant to Art. 7 of the Act on the Succession to Labor Contracts upon Company Split (hereinafter: Labor Succession Act)⁸. To do so, it allowed employees in each work area to select representatives, divided the representatives into four groups and explained to each group the background and purpose of the Company Split, including the treatment of employees in ST, the standard which would be used to determine whether employees were mainly engaged in the business area which would be transferred, and ways of resolving problems with employees. It also put the information in a database on the company intranet so that the employee representatives could read it.

Y provided materials for consultations for the transfer of employment contracts to line area specialists in the HDD department as per Art. 5, Para. 1 of Supplementary Provisions to the Act to amend the Commercial Code (“Art. 5 Consultation”)⁹. Y directed these line area specialists to provide materials on and explain the Company Split to employees, confirm employees’ intentions regarding the transfer of employment contracts, and have a minimum of three consultations with employees who did not agree on the contract transfers. In accordance with this the specialists held explanatory meetings and many employees agreed to the transfers.

X were a group of employees primarily engaged in Y’s HDD business. X selected the labor union to which they belonged as their representative. Art. 5 Consultations occurred seven times between Y and the labor union representatives, and written exchanges took place three times. During these consultations and exchanges, Y explained the decision that X were primarily engaged in the business area to be transferred.

7 Supreme Court, 12 July 2010, in: Hanrei Jihô 2096 (2010) 145. For the District Court Decision, see Yokohama District Court, 29 May 2007, in: Hanrei Taimuzu 1272 (2007) 224. For the High Court Decision, see Tokyo High Court, 26 June 2008, in: Hanrei Jihô 2026 (2008) 150.

8 *Kaisha bunkatsu ni tomonau rôdô keiyaku no shôkei-tô ni kansuru hôritsu*, Law No. 103/2000, as amended by Law No. 87/2005.

9 *Shôhō-tô no ichibu o kaisei suru-tô no hôritsu, fusoku*, Law No. 79/2001.

X argued that X had not received sufficient explanations from Y and that the consultations were conducted dishonestly. X then submitted to Y written objections to the transfer of their employment contracts.

Y held for inspection a company split plan for the Company Split at its main office. An attached document stated that the employment contracts of X would be transferred. The Company Split was then registered and ST was incorporated.

X claimed that although the documents stated that the employment contracts for X were transferred to ST as a consequence of the division of the HDD business area though the Company Split, the contracts were not validly transferred to ST due to a deficiency in the transferring procedure. X claimed confirmation of the status of their employment contracts.

The District Court and the High Court dismissed X's claim. X then appealed to the Supreme Court.

2. *Held*

“Where Art. 5 Consultations have not been held in relation to certain employees, such employees can dispute the effectiveness of the succession of employment contracts stipulated in Art. 3 of the Labor Succession Act...”

“Even if Art. 5 Consultations have been held, if there is a clear violation of the intention the Act requires is present in Art. 5 Consultations, due to the seriously insufficient content of explanations or consultations by the splitting company, the court may find that the splitting company failed the obligation to hold Art. 5 Consultations and the affected employees can dispute the effectiveness of the succession of employment contracts stipulated in Art. 3 of the Labor Succession Act...”

“On the other hand, Art. 7 measures only require splitting companies to make an effort to obtain the understanding and cooperation of their employees in conducting a company split. Art. 7 imposes only an obligation to make efforts. A violation of Art. 7 will not, by itself, be a deciding factor on the effectiveness of the succession of employment contracts. If Art. 5 Consultations lose their character due to the insufficient information and explanations provided under Art. 7 measures, the Art. 7 measures will only be one factor in determining if Art. 5 has been breached.”

3. *Comments*

In this case, although the company split was comprehensive in transferring the corporate division and the contracts of employees who primarily worked in that division, X claimed a violation of the obligations to hold Art. 5 Consultations and denied the effective transfer of employment contracts for X. The Supreme Court held that Art. 7 measures and Art. 5 Consultations undertaken by Y were not insufficient, and therefore

it could not be said that the transfer of employment contracts of X to ST was ineffective. The Supreme Court dismissed X's appeal.

This case is significant in that the Supreme Court made a decision as to whether the effectiveness of transferal of employment contracts can be disputed if Art. 5 Consultations and measures taken under Art. 7 are insufficient. The Supreme Court held that if Art. 5 Consultations were not held, or if they were held but the intention of the Labor Succession Act was violated due to the insufficient content of the consultations, employees could dispute the effectiveness of the transfer of their employment contracts. The court also held that a violation of Art. 7 measures would not necessarily lead to a finding that Art. 5 Consultations were ineffective.

The District Court held, regarding violations of Art. 5 and Art. 7, that there is no way of making void the comprehensive succession of employment contracts as a result of a company split unless the company split itself is found to be void.¹⁰ The court stated that violations of Art. 7 and Art. 5 could be reasons to void a company split.¹¹ The High Court held that even if Art. 7 measures were insufficient, this would not have an influence on the validity of the company split, and even if it did, at most it would result in a rebuttable presumption that the Art. 5 Consultations were insufficient.¹² The High Court held that where splitting companies did not hold Art. 5 Consultation, or where they substantially did not hold Art. 5 Consultations, the violation of Art. 5 Consultation obligations could be a reason to void company splits.¹³ If there is a violation against the Art. 5 Consultation obligations in relation to certain employees, those employees could dispute the effectiveness of the transfer of their employment contracts, but such a violation would not void the company split.¹⁴ The High Court also held that only if Art. 5 Consultations were not held or substantially not held, could employees dispute the effectiveness of the transfer of employment contracts. The High Court thus distinguished between cases where the effectiveness of employment contracts were disputed and cases where the validity of the company split was disputed, as a consequence of a violation of Art. 5.¹⁵

The Supreme Court did not make a clear finding as to whether a breach of Art. 5 Consultation obligations could be a reason to void company splits, but held that on the grounds of such a breach the effectiveness of transferring employment contracts could be disputed.

Egashira, an influential corporate law scholar, takes the view that if corporations breach their Art. 5 Consultation duties, the breach can be a reason to void the company split, but if the breach occurred accidentally in relation to some employees, the breach

10 Yokohama District Court, 29 May 2007, in: Hanrei Taimuzu, 1272 (2007) 237.

11 *Ibid.*, 237, 238.

12 Tokyo High Court, 26 June 2008, in: Hanrei Jihô 2026 (2008) 158.

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*, 159.

will not necessarily be considered a reason to void the company split. In this case Egashira argues the solution that should be adopted is that those employees affected by the accidental breach are given a choice to transfer or remain.¹⁶ This view distinguishes between voiding the company split and the effectiveness of transferring employment contracts.¹⁷

Professor Nishitani compares German and Japanese law, introducing the theory that Japan should allow employees the right to object to the transfer of their own employment contracts at the time of the company split, as under Art. 613a Para. 6 of the German Civil Code.¹⁸ On the other hand, Professor Bälz, Chair of Japanese Law in the Faculty of Law at the Goethe University of Frankfurt am Main, takes a view that the Labor Succession Act is more desirable for Japan than the adoption of Art. 613a Para. 6 of the German Civil Code on the grounds that (1) compared against other international standards, the German provisions tend to protect employees, (2) even when the right of objection is exercised under German law, cases where employees are fired can still be found, so the significance of the right is limited, and (3) adopting a stance extremely protective of employees in corporation restructurings makes bankruptcy dealings difficult for corporations.¹⁹ Professor Nishitani maintains that employees should have the freedom to choose employers, taking into consideration the principle²⁰ that the agreement of each employee for transferring employment should be necessary to transfer employment contracts as a result of company splits.²¹

The Supreme Court in this case held that in certain cases where Art. 5 Consultation obligations are violated employees can dispute the effectiveness of a transfer of their employment contracts. Therefore, the Supreme Court takes the position of allowing employees to object to the succession of their employment contracts as a result of a company split, only to an extent.²²

16 K. EGASHIRA, *Kabushiki kaisha-hô* [Stock Corporations Act] (Tokyo 2009) 823 footnote 4.

17 An influential view in the area of labor law takes a similar position: K. SUGENO, *Rôdô-hô*, [Labour Law] (Tokyo 2010) 475. For an academic view from corporate law, which maintains that employees should be given a right for injunction of corporation division under certain conditions, see E. TAKAHASHI, *Kaisha-hô to rôdô-sha ri'eki* [The Company Code and the Interests of Labourers], in: *Kigyô Kaikei* 61 (12) (2009) 136.

18 S. NISHITANI, *Vergleichnde Einführung in das japanische Arbeitsrecht* (Köln 2003) 176.

19 M. BÄLZ, *Die Spaltung im japanischen Gesellschaftsrecht* (Tübingen 2005) 214 f.

20 S. NISHITANI, *Rôdô-hô* [Labour Law] (Tokyo 2008) 236.

21 A statement of Professor S. NISHITANI at a study meeting *Kaisha-hô to rôdô-hô no kôsaku ryôiki* [Mixed Areas of Company Code and Labour Act], held on 27 August 2009.

22 For a literature discussing company splits and succession of employment contracts, see M. IWADA, *Rôdô keiyaku shôkei-hô no jitsumuteki kentô (jô) (chû) (ge)* [Study from a practical approach on the Act on Labor Contract Succession (1) (2) (3)] (2000), in: *Shôji Hômu* 1570 (2000) 4; 1571 (2000) 4; 1572 (2000) 14. For literature discussing this case, see M. IWADA, *Kaisha bunkatsu ni tomonau rôdô keiyaku shôkei tetsuzuki to dô-tetsuzuki ihan*

III. THE DUTY OF CARE OF PARENT CORPORATION DIRECTORS IN DECIDING A SUBSIDIARY CORPORATION SHARE PURCHASE PRICE PURCHASING SHARES FROM THE SUBSIDIARY ²³

1. Facts

Z, a corporation limited by shares, was engaged in a franchise business of renting real property as part of a corporate group which included ASM. Based on consolidated accounts as at September 2006, Z managed assets of approximately 103,800,000,000 Yen, revenue of approximately 49,700,000,000 Yen and recurrent profits of approximately 4,300,000,000. ASM was a corporation limited by shares primarily dealing in furnished monthly mansions. At the time ASM was incorporated, payment for shares was 50,000 Yen. Z held 6,630 shares of ASM, or 66.7% of the total 9,940 issued shares. Apart from Z, member stores participating in the franchise business also held shares of ASM. Z was progressing with restructuring to position Z as a holding company and increase the competitiveness of the corporate group. According to the plan in place at the time, ASM would be merged to ASL, a wholly owned subsidiary of Z, and the merged corporation would carry out business including renting and managing real property.

Z had a consultative committee for assisting the president carry out his duties. This committee was composed of senior directors, and discussed general management issues and issues that concerned Z and other corporations within the group. Representative director Y1 and directors Y2 and Y3 (hereinafter: Y) attended the committee meeting held on 11 May 2006. At this meeting, proposals concerning the merger of ASM and ASL were raised, including that (1) ASM needed to become a 100% subsidiary before the merger took place, (2) to ensure Z's smooth performance in making ASM a 100% subsidiary, Z should not engage in a share exchange but should, as much as possible, purchase shares from ASM based on agreement, and (3) the appropriate purchase price for the shares was 50,000 Yen. Z obtained legal advice that stated that the proposals were basically a matter of business judgment and there were no legal problems; fixing a purchase price based on agreement should be balanced with the needs that arose. The lawyers further advised that since the overall amount for the purchase was not so high, if

no kôka – *Nippon IBM jôkoku jiken* [Proceedings for Succession of Labor Contracts in Company Splits – Nippon IBM Supreme Court Case], in: *Shôji Hômu* 1914 (2010) 4. For literature from the commercial law or the corporate law perspective on the District Court decision, see, Y. OZAKI, *Kaisha bunkatsu ni okeru kaisha no kyôgi gimu to rôdô kankei no shôkei* [Consultation Duty of Corporation and Succession of Relationship of Labour in Company Split], in: *Jurisuto* 1394 (2010) 105. For the High Court Decision, see M. YAMASHITA, *Kaisha bunkatsu ni okeru rôdô keiyaku tetsuzuki ihan no umu to sono kôka* – *Nippon IBM jiken (Tôkyô kôhan heisei 20.6.26)* [Establishing Breach in Succession Proceedings of Employment Contract in Company Split and its Validity – The Nippon IBM Case (Tokyo High Court Decision 26 June 2008)], in: *Kinyû Shôji Hanrei* 1348 (2010) 2.

²³ Supreme Court, 15 July 2010, in: *Kinyû Shôji Hanrei* 1353, 26. For the District Court Case, see Tokyo District Court, 4 December 2007, in: *Kinyû Shôji Hanrei* 1304, 33. For the High Court Case, see Tokyo High Court, 29 October 2008, in: *Kinyû Shôji Hanrei* 1304, 28.

it was necessary to maintain a good relationship with participating stores which were the remaining shareholders of ASM, the price determination was within permissible bounds.

As a result of the discussions it was decided that the ASM shares would be purchased at 50,000 Yen per share (“the Decision”). Share exchange processes were also agreed to for shareholders who would probably not agree on the purchase due to a separate dispute with Z.

Z hired two auditing companies to calculate the rates for share exchange in preparing their plan to make ASM a 100% subsidiary. One of the calculation documents evaluated the share value at 9,709 Yen, and another such document compared ASM with similar companies and came to a price per share between 6,561 Yen and 19,090 Yen.

Between 9 June 2006 and 29 June 2006 Z purchased shares from all but one ASM shareholder. The remaining ASM shareholder did not agree on the purchase. Z purchased 3,160 shares at a price of 50,000 Yen per share, with the transaction totaling 158,000,000 Yen (“the Transaction”).

Z and ASM subsequently agreed on a share exchange at a rate of 1 ASM share to 0.192 Z shares, such that Z shares would be allotted in exchange for ASM shares.

X, a shareholder of Z, argued that Y breached their duty of care as a director in their decision that Z would purchase ASM shares at a price of 50,000 per share. X stated that Y owed Z damages, under Art. 423 Para. 1 of the *Kaisha-hô* (Company Code)²⁴, and filed a derivative suit demanding Y pay Z 130,040,320 Yen and interest under Art. 847 of the Company Code.

2. *Held*

“The Transaction was carried out to make ASM a 100% subsidiary corporation of “Z as part of a restructuring plan of the businesses of the corporate group in which ASM and ASL would merge and engage in real property rental and management. The decision regarding such a restructuring plan, including estimates of merits of making a wholly-owned subsidiary, is entrusted to special business judgment. In this case the directors can decide a method and price of share purchase taking into consideration factors including the evaluated price of shares, the necessity of purchase, financial burden of Z, and the necessity for smoothly conducting a share purchase. As long as the process and substance of the decision is not seriously irrational, each director will not breach their duty of care as a director...

“... It is rational for Y to purchase ASM shares on the basis of voluntary agreements as a measure to smoothly promote the share acquisition. The 50,000 Yen amount used as a basis for the share purchase price cannot be said to be unreasonable after considering that ASM had been incorporated only five years earlier. The ASM shareholders other than Z included stores participating in Z’s franchise arrangements, and it was therefore

24 *Kaisha-hô*, Law No. 86/2005, as amended by Law No. 109/2006.

beneficial to Z's and all the corporate group subsidiaries' business to maintain good relations with these stores by purchasing shares without incident. The appraised value of the ASM shares, which were unlisted, was broad. It could also be expected that the corporate value of ASM would be enhanced by the effect of the business organization. In light of these factors, even if the appraised of the ASM share price and the actual share exchange value were as mentioned earlier, the decision that the purchase price be 50,000 Yen was not seriously irrational. In the process of making the Decision, the issue was discussed by the consultative committee that considered general management matters affecting Z and other corporate group members, and lawyers' opinions were heard, and therefore the decision process was not irrational.

"Y's judgment in relation to the Decision is not seriously irrational as the judgment of directors of Z, thus Y did not breach their duty of care as directors."

3. *Comments*

In this case one issue was whether the court should take an active or passive position when scrutinizing the business judgment exercised when the directors fixed a purchase price for the parent company to purchase its subsidiary's shares. In other words, the issue was whether the business judgment rule was applied to the Decision fully or only in a limited sense.²⁵ The District Court found that as the restructuring of Z's corporate group included making Z a holding company and concentrating business and management resources in key corporations, it was necessary to make ASM a wholly owned subsidiary. It also found that as the Z group was generally involved in franchise businesses it was necessary to maintain good relationships with participating stores.²⁶ The court stated in its decision that based on the 3,310 shares that were to be purchased the total expenditure was estimated at 165,500,000 Yen; in view of the financial scale of Z the influence this would have on Z's financial condition was not large, 50,000 Yen per share was not appropriate, and the District Court further found that Y had consulted at the management committee and obtained advice from lawyers.²⁷ The District Court thus rejected a breach of duty of care for Y.²⁸

Contrary to these findings, the High Court held that there was no examination or determination as to whether the share purchase could not be smoothly carried out at a lower price than the 50,000 Yen per share that was decided upon, and that there was no examination of the beneficial effect that would be gained by making ASM a wholly owned subsidiary in comparison to the status quo, as Z already held more than two

25 S. OCHIAI, *Apaman shoppu kabunushi daihyô soshô saikô-sai hanketsu no igi* [Significance of Supreme Court Decision of Apaman Shop Shareholder Derivative Action], in: *Shôji Hômu* 1913 (2010) 7.

26 Tokyo District Court, 4 December 2007, *Kinyû Shôji Hanrei* 1304, 36 *et seq.*

27 *Ibid.*, 37.

28 *Ibid.*

thirds of ASM's outstanding shares the value of which had been appraised (for the share exchange) at approximately 10,000 Yen.²⁹ The High Court held that due to this, no rational grounds or reasons could be found for fixing the purchase price at 50,000 Yen per share, and the fixing of the purchase price went beyond the discretion allowed for the business judgment of directors. Even though legal opinions were obtained, Y could not escape liability for breaching their duty of care.³⁰

In the final appeal the Supreme Court held that as a means of ensuring the share purchase went smoothly the decision to proceed on the basis of voluntary purchases was rational, and that fixing the price to purchase shares at 50,000 was also rational. The Supreme Court went on to say that as some ASM shareholders were important franchise stores, it was beneficial for the future business of Z and other corporate group members to have good relations with the franchise stores, and that as the prices of ASM shares, which were unlisted, were estimated to fall to some extent, and the corporate value of ASM would be enhanced by the effect of the corporate restructuring, deciding on a purchase price of 50,000 Yen per share was not seriously irrational.³¹ The Supreme Court also stated in its decision that there was no irrationality in the process of the Decision, as consideration was given to the matter at the committee meetings and lawyers' opinions were heard.³² The Supreme Court did not find that Y had breached their duty of care.³³

As can be seen above, the District Court allowed greater scope for the directors' discretion in deciding a purchase price. The High Court took a more limited position in terms of the directors' discretion and rejected the District Court position. The Supreme Court did not follow the High Court and instead took a more passive position on judicially intervening in the decision on the grounds that it was a business judgment.

The Supreme Court thus actively allowed the business judgment rule in this case. Severe criticism has been made of the High Court decision,³⁴ while the Supreme Court decision is considered to follow earlier cases.³⁵ German law has had clear provisions

29 Tokyo High Court, 29 October 2008, Kinyû Shôji Hanrei 1304, 32 *et seq.*

30 *Ibid.*, 33.

31 Supreme Court, 15 July 2010, Kinyû Shôji Hanrei 1353, 30.

32 *Ibid.*

33 *Ibid.*

34 OCHIAI, *supra* note 25, 4.

35 M. YANAGA, *Torihiki sôba no nai kabushiki no shutoku to kei'ei handan gensoku* [Acquisition of Shares without Market Price and the Business Judgment Rule], in: *Jurisuto* 1406 (2010) 110. For literature discussing this case, see T. FUJIWARA, *Jigyô saihen katei ni okeru ko-gaisha kabushiki kakaku kaitori no kettei to keiei-jô no sairyô – Apaman shoppu kabunushi daihyô soshô saikô saiban-sho hanketsu o keiki toshite* [Decision of Purchase Price of Shares of Subsidiary Corporation in Process of Business Restructuring and Management Discretion – on the Occasion of the Supreme Court Decision of the Apaman Shop Shareholder Derivative Action], in: *Kinyû Shôji Hanrei* 1350 (2010) 2; Y. YAMADA, *Keiei handan gensoku ni motozuku torishimari-yaku no ninmu ketai no nintei hôhō – Saihan heisei 22-nen 7-gatsu 15-nichi (Apaman shoppu kabunushi daihyô soshô jiken)* [Methods of Finding Breaches

concerning the business judgment rule since 2005, in the Stock Corporate Act, which provides that “a Breach of Duty does not exist when making a business decision if the member of the board can rationally assume that he or she acted in the interests of the company based on appropriate information (§ 93 Abs. 1 Satz 2 Aktiengesetz)”.³⁶ Japan will now attempt to develop the business judgment rule through case law, following US practice.³⁷ Law concerning the business judgment rule is a field where the content of Japanese law approaches that of German law and is under the influence of American legal standards, and can be thought of as a new type of ‘legal interaction’ between Germany and Japan.³⁸

IV. THE LEGAL STANDING OF A FORMER SHAREHOLDER DEPRIVED OF SHAREHOLDER STATUS BY RESOLUTION WHO SEEKS TO VOID THE RESOLUTION, AND THE LOSS OF INTEREST DUE TO A SUBSEQUENT ABSORPTION-TYPE MERGER³⁹

1. *Facts*

Corporation A issued only ordinary-class shares. On 26 September 2008, A held an extraordinary shareholder meeting and made three relevant resolutions. The first resolution modified A’s articles of incorporation such that A was able to issue A-class shares. The second resolution modified A’s articles of incorporation such that A could issue new ordinary shares, and modified all old ordinary shares into a class of shares that had acquisition rights attached to them. The third resolution was that A would acquire the class of shares that had acquisition rights attached, and in exchange A would deliver new ordinary shares at a ratio of 1 share with acquisition rights to 1/1850th of a new share. On the same day, these resolutions were adopted. A shareholders’ meeting composed of ordinary shareholders was held which adopted a resolution to modify the articles incorporation consistent with the earlier three resolutions.

of Director’s Duties under Business Judgment Rule – Supreme Court Decision of 15 July 2010 (Apaman Shop Shareholder Derivative Action Case)], in: *Kansayaku* 578 (2011) 113.

36 For further content of the German Business Judgment Rule, see, K. HOPT/M. ROTH, in: Hopt/Wiedemann (eds.), *Aktiengesetz: Großkommentar* (Berlin 2006) § 93 Abs. 1 Satz 2, 4 n.F., margin note 1 *et seq.*; H. FLEISCHER, in: Spindler/Stilz (eds.), *Aktiengesetz* (München 2010) § 93, margin note 67 *et seq.*; S. KALSS/G. SPINDLER, in: Goette/Habersack (eds.), *Münchner Kommentar zum Aktiengesetz* (München 2008) § 93, margin note 35 *et seq.*; U. HÜFFER, *Aktiengesetz* (München 2010) § 4a *et seq.*; G. KRIEGER/V. SAILER-COCEANI, in: Schmidt/Lutter (eds.), *Aktiengesetz* (Köln 2010) § 93, margin note 10 *et seq.*

37 H. MERKT/S. GÖTHEL, *US-amerikanisches Gesellschaftsrecht* (Frankfurt a.M. 2006) 429 *et seq.*

38 E. TAKAHASHI, *Doitsu to nihon ni okeru kabushiki kaisha-hô no kaikaku* [The Reform of Stock Corporation Law between Germany and Japan] (Tokyo 2007) 231.

39 Tokyo High Court, 7 July 2010, Kinyû Shôji Hanrei 1347, 18; Tokyo High Court, 7 July 2010, in: *Hanrei Jihô* 2095 (2010) 128. For the District Court decision, see Tokyo District Court, 23 October 2009, Kinyû Shôji Hanrei 1347, 27.

As a result of the resolutions X, a shareholder of A, received a fraction of a new share. On 1 January 2009 A merged with B in an absorption-type merger, and on 1 February 2009 B merged with Y in an absorption-type merger. In the merger between A and B, shareholders of A received 6,355.66127 shares for each new share of A. In the merger between B and Y, shareholders of B received 32,000 Yen monetary compensation per share.

On 24 December 2008, X filed an action to void the resolutions. There was no dispute between the parties making B the defendant at the commencement of the action. Due to the merger between B and Y, Y took over B's status as defendant for the suit.

The District Court held that X did not have standing for an action to void the resolutions and dismissed the matter.⁴⁰ X appealed.

2. *Held*

“Shareholders deprived of shareholder status by resolution at shareholder meetings have standing for actions to void those resolutions. Unless the resolutions are voided, the former shareholder will not have the status of a shareholder. This can happen only as the result of a legal technique which construes the suit to void the resolutions as a formative litigation. As long as there is a possibility that such shareholders will regain their shareholder status, they should be treated as shareholders in relation to Art. 831, Para. 1 of the Company Code...”

“Under the former provisions of the *Shô-hô* (Commercial Code)⁴¹, it was rare to find a situation where shareholders had been deprived of their status through shareholder meetings, and so there were very few relevant lower court decisions. Thus when the Company Code was drawn up, express provisions were not adopted to address lawsuits concerning former shareholders involuntarily deprived of their status through shareholder resolutions. This failure to adopt such provisions was not due to an intention to deny the lawsuits of these kinds of shareholders. It is well known that because of the newly introduced class of shares with acquisition rights attached at the enactment of the Company Code, the incidence of shareholders forcibly deprived of their status by resolutions has substantially increased since the entry into force of the Code. The court cannot find that the legislature's intent was to deny legal standing for matters where it has not expressly provided for it, and it would be unreasonably to interpret the latter part of Art. 831 para. 1 as having such a restrictive intention...”

“...corporations that reorganize as a result of shareholder resolutions may subsequently cease to exist or cause their shareholders to lose shareholder status of the corporations before or after the restructuring. There are many types of interests relevant to lawsuits to void these resolutions, including disputing the effectiveness of corporate restructuring, and it is thus inappropriate to conclude the question of legal standing in a

40 Tokyo District Court, 23 October 2009, Kinyû Shôji Hanrei 1347, 27.

41 *Shôhō*, Law No. 48/1899, as amended by Law No. 50/2008.

uniform manner. It is more appropriate to treat the former shareholder as having standing generally, and then examine whether the shareholder has a valid interest based on the facts of each specific case...”

“... There is no express provision stating that lawsuits to void shareholder resolutions are unlawful if shareholders do not file claims regarding the redemption of shares or to fix a share purchase price.

“The act of an opposing shareholder demanding the redemption of shares or the fixing of a share purchase price is used only to establish an assumption that the resolutions are effective. If there is sufficient reason to void a resolution to establish a new class of shares with acquisition rights attached, or for the company to acquire all such shares, then the resolutions should be voided and it is unreasonable to force shareholders to demand the redemption of shares or the fixing of share purchase prices on the assumption that the resolutions were effective...”

“... The court cannot adopt Y’s argument that shareholders cannot bring actions to void resolutions unless they exercise the right of redemption of shares.

“Y argued that voiding the purchase by the company of the shares with acquisition rights attached can only be accomplished by voiding the issuance of the shares. Y claimed that if new shares are issued, even if there were a defect in the resolution for the issuance of such shares, shareholders lose their legal interest in a suit to void the resolutions. The only path is to file a suit to void the issuance of the shares, and because of this the shareholder in the current lawsuit to void the resolutions lacks interest.

“However the basis of the argument that it is necessary to void the issuance of new shares in order to void the acquisition by the corporation of all shares with acquisition rights attached is unclear.... If this court decides to void the resolutions to modify the articles of incorporation that allowed the issuance of the new shares, the shares will revert to the old ordinary class of shares, and the shares that the corporation forcibly acquired will be returned to shareholders. There is not a significant need for the court to consider the stability or safety of these transactions....

“... If this court affirms a decision to void the resolutions, X will reclaim shareholder status in A and the modification of the articles of incorporation establishing the new share class will be voided. X will thus have standing, barring special circumstances....

“... If there is reason to void the resolutions, X will have standing for actions to void the merger of A and B. X, as a shareholder of A at the time the merger came into effect, falls within the criteria found in Art. 828 para. 2 no. 7 of the Company Code of “a person who was a shareholder of a corporation subject to an absorption-type merger”. Of course if the shareholder’s claim to void the resolutions is rejected, the shareholder will not gain such standing. Unless the resolutions are voided by a legally binding decision, X will not obtain status as a shareholder in A. This can occur only as the result of legal methods that classify decisions voiding resolutions as formative litigation. As long as X has the possibility of recovering shareholder status in A through the voiding of the

resolutions, X may be treated as A's shareholder in relation to Art. 828 para. 2 no. 7 of the Company Code.

"X may thus recover his shareholder status as owner of A's former ordinary shares if a judicial decision voids the merger as well as voiding the resolutions. Accordingly, where X brings an action to void the merger, X will have the potential to regain shareholder status in A. It is clear that in the present litigation X has standing to sue....

"... If there is reason to void the resolutions, using the same reasoning as above X will have legal standing for suits to void the merger as "a person who was a shareholder of a corporation subject to an absorption-type merger" (Company Code Art. 828 para. 2 no. 7). It is of course necessary for X to bring an action to void the merger within the limitation period, and if the court does not void the resolutions, or the merger, X will lose standing.

"Where corporations party to an absorption-type merger have been subject to corporate restructuring, it is natural that "a shareholder of a corporation subject to an absorption-type merger" includes shareholders of a corporation before the restructuring that later became the company party to the merger, including where restructuring has occurred twice or more. This is limited to cases where actions are brought to void all the reorganizations that subsequently happened....

"... The restructuring of a company following a shareholder meeting is not sufficient cause to extinguish X's legal standing for lawfully filed actions to void corporate restructuring following a shareholder resolution....

"X hasnot sought the voiding of the merger between A and B within the limitation period. Even if the resolution for the merger contract was defective in that it was passed without adhering to procedure for convening shareholders such as X, the validity of the merger cannot be disputed and that it should be treated as a valid merger is affirmed to the world at large.

"... A ceased to exist as a corporate entity as a result of the merger contract with B that was predicated on X no longer being shareholders of A (Company Code Art. 47 no. 4). X can no longer dispute the effectiveness of that merger....

"Accordingly, even if the resolutions are voided, X will not regain shareholder status and the accompanying rights for either A or B... these reasons are sufficient to find that X does not have interest for a suit to void the resolutions."

3. *Comments*

This case contains two important issues. The first is whether X had legal standing for an action to void the resolutions.⁴² The second is whether the court found that X had sufficient interest.⁴³

42 For the framework of lawsuits for voiding shareholder meetings under the Company Code, see H. KANSAKU / M. BÄLZ, *Gesellschaftsrecht*, in: Baum / Bälz (eds.), *Handbuch Japanisches Handels- und Wirtschaftsrecht* (Köln 2011) § 3, margin note 108; H. ODA, *Japanese*

Regarding the first point, the court held that shareholders deprived of shareholder status by the resolutions of a shareholder meeting have standing for suits to void those resolutions. In finding this the court cited Art. 831 para. 1 of the Company Code. Under that provision, shareholders can take legal action to void the resolutions. The latter part of that paragraph allows those who would become directors or other company officers if the resolutions are voided, to take action to void the resolutions. However, there is no express provision for persons deprived of shareholder status by shareholder resolutions. The court stated that the latter part of the paragraph does not provide for former shareholders, but that this does not mean that former shareholders cannot bring actions to void shareholder resolutions.

Under the former provisions of the Commercial Code there were very few situations where shareholders were forcibly deprived of shareholder status by resolution, and even fewer legal decisions. Due to this, express provisions for the legal standing of former shareholders were not included in the Corporate Code when it was developed. As discussed above the latter part of Art. 831 para. 1 is interpreted to include such shareholders. Art. 247 of the Commercial Code prior to the 2005 amendment had the same purpose as Art. 831 of the Company Code, and the prevailing opinion was that a person who lost shareholder rights had legal standing on the grounds that the person had potential shareholder rights recoverable through voiding the resolutions.⁴⁴ The court in this case followed that view.

Regarding the second point, the court found that if the resolutions were voided, X would recover its status as a shareholder in A. The amendments to the articles of incorporation subject authorized by the resolutions, including the creation of a new class of shares, would be rescinded, barring certain factors. In considering the effect of corporate restructuring and mergers on the claim to void the resolutions, the court held

Law (Oxford 2009) 245; H. BAUM/E. TAKAHASHI, *Beschlussmängelrecht in Japan*, in: H. Fleischer (ed.), *Beschlussmängelrecht in Kapitalgesellschaften* (forthcoming, 2011).

43 For literature discussing this case, see M. YANAGA, *Zenbu shutoku jôkô-tsuki shurui kabunshiki no kabunushi sôkai o arasou uttae no genkoku tekikaku to uttae no ri'eki* [Legal Standing for Lawsuits to Dispute Resolutions of Shareholder Meeting on Shares with Acquisition Rights Attached, and Interests for Lawsuit], in: *Jurisuto* 1407 (2010) 106; T. YAMAMOTO, *1 Kabunushi sôkai ketsugi ni yori kabunushi no chi'i o ubawareta kabunushi no tōgai ketsugi torikeshi soshō no genkoku tekikaku*, *2 Kabunushi sôkai ketsugi ni yori kabunushi no chi'i o ubawareta kabunushi ga teiki shita tōgai ketsugi torikeshi soshō ni tsuite, ketsugigo no kaisha no kyūshū gappei ni yori shōmetsu-tō ni yori uttae no ri'eki ga shōmetsu shita to sareta jirei* [1 Legal Standing of Shareholder Deprived of Shareholder Status by Resolution of Shareholder Meeting for Lawsuit Voiding the Resolution, 2 A Case Where Lawsuit Interests Concerning Lawsuit Brought by Shareholder Voiding Resolution of Shareholder Meeting Depriving the Shareholder of Shareholder Status Were Found Lost by Extinction of Corporation and etc., by Merger by Absorption After that Resolution], in: *Kinyū Shōji Hanrei* 1357 (2011) 2.

44 S. IWAHARA, in: Ueyanagi *et al.* (eds.), *Shinpan chūshaku kaisha-hō (5)* [New Edition Company Code Commentary (5)] (Tokyo 1986) 328, 333; H. TANIGAWA, in: Ōmori *et al.* (eds.), *Chūshaku kaisha-hō (4)* [Company Code Commentary (4)] (Tokyo 1968) 193.

that where the actions to rescind the restructuring were lawfully brought, the restructuring would not be sufficient to terminate X's interest. However, in the present case X had not brought an action to void the merger between A and B within the limitation period, and as such X's interests were extinguished.

The court thus held that X potentially had legal standing and sufficient interest, but had his interests extinguished as no action was taken to void the merger within the appropriate time period.

This case is significant in that the court held that a person forcibly deprived of shareholder status by a shareholder resolution will be protected as a shareholder under Art. 831 para. 1 of the Company Code. The former shareholder's interests would not be extinguished where legal action was taken to void corporate restructuring that occurred after the resolutions, but the interests would be extinguished where such action was not taken.

German case law considers former shareholders who lose shareholder status through a process referred to as "squeezing out" (§§ 327a, 327e Aktiengesetz), not to have lost the right to void the results of the shareholder meeting that decided on the squeeze out based on analogical application (§ 265 Abs. 2 Zivilprozessordnung).⁴⁵ This position is consistent with the point of view of guaranteeing the constitutional right to protect the private property of shareholders (Art. 14 Grundgesetz).⁴⁶

V. CALCULATING THE FIXED DATE AND THE CALCULATING METHOD FOR FAIR VALUE CONCERNING A SHARE REDEMPTION CLAIM BY A SHAREHOLDER OF THE SPLITTING COMPANY IN AN ABSORPTION-TYPE SPLIT⁴⁷

1. Facts

X was a corporation primarily engaged in managing and assisting the business activities of broadcasting companies who acted under the Broadcast Act, by holding the shares of such companies. As at 1 April 2009, X's capital was 549,986,892,896 Yen, and it had 190,434,968 outstanding shares listed on the first section of the Tokyo Stock Exchange. Y was a corporation in the marketing, retailing and consulting industry. Y held 37,770,700 shares in X (approximately 19.83% of X's outstanding shares at 8 May 2009).

On 16 December 2008, X held an extraordinary shareholder meeting. At this meeting the shareholders passed a resolution approving a contract for an absorption-type split. The substance of the contract was that X allowed A, a wholly owned subsidiary, to succeed the rights and duties which X owned in relation to the television broadcasting,

45 BGHZ 169, 221, 225 *et seq.*

46 U. HÜFFER, in: Hüffer (ed.), Aktiengesetz (München 2010) § 245, margin note 8a; U. HÜFFER, in: Hüffer (ed.), Aktiengesetz (München 1986) § 245, margin note 28.

47 Tokyo High Court, 7 July 2010, in: Hanrei Jihô 2087 (2010) 3; Kinyû Shôji Hanrei 1346, 14; Hanrei Taimuzu 1330, 70. For the District Court decision, see Tokyo District Court, 5 March 2010, Kinyû Shôji Hanrei 1339, 44.

visual design and cultural business areas by way of an absorption-type split. A would not deliver to X its shares, debentures, new share subscriptions rights or cash. The effective date was 1 April 2009. The purpose of the division was to meet conditions under the Broadcast Act in order to get a license to become a licensed broadcasting holding company.

Y opposed the proposal to approve the division at the shareholder meeting, and sought redemption of the shares from X on the last day of the period for the exercise of the right of redemption. The parties did not reach an agreement on the purchase price within the stipulated period. X and Y both sought a decision from the court on a purchase price, in accordance with Art. 786 para. 2 of the Company Code.

The District Court decided on a purchase price of 1,294 Yen per share.⁴⁸ Y objected and immediately appealed.

2. *Held*

“In determining the “fair value” of shares where share value and corporate value has synergistically increased as a result of the restructuring, the court’s decision should be calculated on the basis of reflecting this increase in value. Where corporate and share value has decreased, the “fair value” should be calculated on what the value would be if not for the resolution to restructure, or the “but-for value”.

“...The absorption-type split in this case consists of X, the splitting company, assigning A, a wholly-owned subsidiary, as the successor company. A succeeds the rights and duties X has in relation to television, visual and cultural business areas. A provides no consideration to X. In absorption-type split cases such as this where the splitting company lets the subsidiary successor company succeed the business of the splitting company, and the splitting company becomes a holding company due to the split, corporate and share value of the splitting company will not be damaged, and no synergies will arise in the successor company.”

“... In cases like the present one where the wholly owned subsidiary is designated as the successor company, the “fair value” of the shares for which opposing shareholders claim redemption is calculated on the basis of the value the shares would have if not for the resolution to approve the absorption-type split contract. Consideration should not be given to any synergies or other factors arising out of the restructure that would increase value.“

“However, there may be cases where this type of company split is combined with other restructuring acts and consequently causes damage to the corporate or real share value. In this case the company split occurred in conjunction with X becoming a licensed broadcasting holding company. In calculating “fair value” consideration should be given as to whether the company split, together with X becoming a licensed broad-

48 Tokyo District Court, 5 March 2010, Kinyû Shôji Hanrei 1339, 44.

casting holding company, has an influence on or damages the corporate value and the real share value.”

“Shareholders lawfully claiming the redemption of shares invoke a duty on the part of the corporation to redeem those shares at “fair value”, and in the exercise of this right of redemption a legal relationship naturally arises. This legal relationship, not requiring the consent of the corporation, otherwise appears to be similar to a contract to purchase and sell shares between the corporation and opposing shareholders respectively⁴⁹. The date for the purpose of deciding “fair value” can naturally and reasonably be the time of the conclusion of the contract, which could be understood as the date at which the redemption right was exercised.”

“The period for exercising the redemption right is the twenty days before the effective date of the restructure, and as a result the date on which each opposing shareholder exercises their redemption rights may differ. If the opposing shareholders who exercised their redemption rights are unable to reach agreement on the purchase price with the restructuring company and request the court determine “fair value”, the fixed date for the purpose of determining this value should be the same for all shareholders on the basis of treating all opposing shareholders equally. Fixing the date on which to base “fair value” at the time redemption rights were exercised makes it possible for opposing shareholders to anticipate this and exercise their redemption rights in anticipation of some variation in share prices. The court’s function is to address equally the interests of shareholders and the relevant company under the Company Code in determining the “fair value” for the purposes of the claim of redemption. In light of this and to limit speculative actions by opposing shareholders it is appropriate that the date for estimating “fair value” is the expiration date of the period in which redemption rights can be exercised.”

“... Therefore the date for the purpose of determining “fair value” for share redemption claims by shareholders of an absorption-type splitting company, as in this case, is the expiration date of the period for claiming redemption of relevant shares. The “fair value” to be determined means the price the shares would have had on that date but for the resolution approving the company split.”

“... Y argued regarding the fixed date that (1) as the company split was carried out in conjunction with X becoming a licensed broadcasting holding company, damaging the corporate and share value of X, the fixed date to decide “fair value” should be the time of the resolution approving the company split, (2) moreover, the influence of X becoming a licensed broadcasting holding company extended for a period until the Act amending the Broadcast Act was passed on 21 December 2007, so a determination of the share price should consider the period from six months before the passing of the amended Broadcast Act, and (3) it was impossible for Y, holding approximately 20% of X’s shares, to sell the shares on the market after the resolution; Y was thus unjustly burdened with the risk of share price variations between the resolution and the effective date.

49 See Supreme Court, 1 March 1973, *Minshû* 27, 161.

“To address the first point, the purpose of redemption claims guaranteeing shareholders a “fair value” that would have eventuated if not for the relevant resolutions is to give opposing shareholders the right to exit from corporations, receiving “fair value”. It is not to guarantee the value which shares should have had at the time the resolutions approving restructuring were passed. If the fixed date for deciding “fair value” was the date of the resolution, there would be a substantial period from the resolution until the date the redemption claim period expired, in this case approximately three and a half months. If share prices went down in this period, opposing shareholders would be able to force the corporation to redeem shares at the earlier, higher price; if share prices rose, the shareholders would be able to sell at a profit. The burden would thus be placed with the corporation and by extension the shareholders more generally. As discussed earlier the decision of the court in determining a “fair value” share purchase price for share redemptions is intended to balance the interests of corporations and opposing shareholders. It is not appropriate to give opposing shareholders such opportunities for speculation.

“As for the second point... the court is unable to recognize any facts showing that X becoming a licensed broadcasting holding company had an ongoing influence on share value for the six months prior to the passing of the Act amending the Broadcast Act.

“In regards to the third point, Y held approximately 20% of the outstanding shares in X and could not easily sell such an amount of shares on the market. Y was thus exposed to the risk that share prices would vary from the time of the resolution until the expiration date of the redemption claim period. Investors assume risks and responsibilities in trading shares, and the risks in a case where an investor decides to obtain a number of shares so large that they cannot easily be sold on the market should fall with the party who decided on the acquisition – the investors themselves.

“Therefore the court is unable to adopt Y’s arguments that the fixed date for deciding “fair value” should be the time the company split was passed.

“... The District Court held that the fixed date for deciding “fair value” would be the effective date of the company split. However, within different types of restructuring acts, the effective date for redemption claims of opposing shareholders of corporations that will cease to exist due to merger activity would be the effective date of the merger, but in an absorption-type company split the effectiveness of redemption would be at the time shares are paid (Company Code Art. 786 para. 5).

“For absorption-type company splits there are not reasonable grounds for making the fixed date the date the split was effective, so the court is unable to adopt this approach...”

“Y argued that the combination of the company split and the licensing of X as a broadcasting holding company damaged the corporate value, or share value of X...”

“... To gain a license as a broadcasting holding company under the Act amending the Broadcast Act, X assigned to its subsidiary A through a company split its television license and the broadcasting business relating to the license. This was based on the

understanding that two general broadcasting enterprises, A and B, would exist below X, which would become the holding corporation. This structure would be established to increase stability and efficiency in managing the corporate group, and so that by becoming a licensed broadcasting holding company X would be excepted from the principles prohibiting concentration of mass media ownership, allowing it to variously operate terrestrial broadcasting stations, BS stations and CS stations which would contribute to both X's and the shareholders' common interests. This can be understood to be rational. Further, at the shareholder meeting in question, the proposal to approve the company split and turn X into a licensed broadcasting holding company was overwhelmingly approved by shareholders excluding Y. Additionally no facts indicate that X's share price fell beyond the Tokyo stock price index (TOPIX) parameters on the day the company split and turning into a broadcasting holding company were publicly announced as compared to before that day."

"Accordingly the court is unable to find that the absorption-type company split, together with X becoming a holding company, had an influence on or damaged corporate or share value."

"... Y referred to the 41.4% decline of X share prices from the period one day before the Cabinet passed the Act amending the Broadcast Act (5 April 2007) to when the amending act was passed in Parliament (21 December 2007), substantially higher than the rate of decline of TOPIX during the same period."

"However, the period surrounding 5 April 2007 overlaps with a period of other unrelated but influential events. On 28 February 2007 X and Y closed discussions on a potential business alliance. Tensions between X and Y developed from the end of March and the end of May. Tensions flared again when a published report stated that Y would purchase more shares of X through the stock market. The trading of X shares continued with these expectations, and share prices temporarily peaked. The fact that X shares dropped by a high percentage as compared against TOPIX during the period from the day before the Act to amend the Broadcast Act passed Cabinet and the day it was passed in Parliament, is most likely attributable in large part to the influence of Y's conduct. Further, as mentioned above the market price of X shares did not significantly decline immediately before or after the announcement that X would become a broadcasting holding company, or the date of the shareholder resolution. It is thus difficult to consider that the rate of the decline of X shares during the period specified by Y is a reason that X turning into a licensed broadcasting holding corporation damaged its corporate or share value."

"... How should "fair value", or the price the shares would have had at the time of expiration of the period for the redemption claim if it had not been for the resolution of the shareholder meeting, be calculated?"

"... The relevant shares are listed in the first section of the Tokyo Stock Exchange. Generally, while shares are influenced by certain speculative expectations by investors in a stock market, share prices reflect the objective value of corporations including

corporate assets, financial conditions, earnings, business prospects and other factors. Accordingly in calculating “fair value” of these listed shares it is appropriate to employ the market price as the basis for calculation, unless there are special circumstances where the market price is influenced by certain factors such as the intentional wrongful manipulation of share prices.”

“... Regarding the purchase price of the shares... the “fair value” should be calculated based on the expiration date of the redemption claim period, 31 March 2009. ... Since the shares are listed, it is appropriate to take the market price as a basis for calculation, unless there are special circumstances that mean the objective value of the corporation is not reflected in the share price. ... In this case the “price which the shares would have had but for the resolution” never exceeds the actual market price at the time, as the company split and licensing of X as a broadcasting holding company has not been shown to damage X’s corporate or share value. Y has not argued that the market price is influenced by factors that do not reflect the objective value of X. Records also do not indicate the existence of such circumstances.”

“Therefore in calculating the “fair value” in the present case the basis for calculation should be the market price of X shares at the time. The closing price of X shares on the Tokyo Stock Exchange on 31 March 2009 was 1,294 Yen. It is thus appropriate to find that 1,294 Yen per share, the market price, is “fair value” for the redemption of the shares.”

3. *Comments*

This case centered on fair value, the purchase price when shareholders opposing restructuring claim the redemption of their shares under Art. 785 para. 1 of the Corporate Code. Issues were raised as to (1) standards for fair value, (2) the fixed date for determining fair value, (3) whether corporate or share value has been damaged by the resolution, and (4) the actual calculation of the share purchase price.

On the first point the Tokyo High Court held that fair value should be arrived at after considering, where share prices rise, the synergies resulting from the restructuring that enhance corporate or share value, and where share prices decrease, the value the shares would have had if the restructuring and any subsequent share value decrease did not take place.

Regarding the second point the court initially took the position that the date for determining fair value should be the time the redemption right was exercised. However, it then considered that if this was the case opposing shareholders would be able to choose when to exercise the right based on variations in share price and thus engage in risk-free speculative conduct. The court thus held that in the interests of limiting this speculative behavior, the fixed date for determining fair value should be the date on which the redemption claim period expires.

In discussing the third point the court held that the corporate or share value of X was not damaged by the combination of the company split with the decision to turn X into a licensed broadcasting holding company.

On the fourth point the Tokyo High Court held that the calculation of the fair value for listed shares should be based on the market price, except where special circumstances, such as wrongful share price manipulation, mean that the market price does not reflect the objective value of the corporation.

In response to the District Court decision that fair value should be based on an average market price during a period close to the fixed date, the Tokyo High Court opined that such a calculation method would correct the market price by using an average share price, and is acceptable as a general method. However, where there are no special circumstances that mean the share price does not reflect the corporation's objective value, then in principle there is no necessity to correct the share price. The market price at the fixed date should thus be considered fair value.⁵⁰

Y also argued that the enhanced value obtainable through a business alliance between Y and X should be added to the fair value. The court rejected this as the discussions between Y and X were concluded without reaching agreement, and there was thus no room for value enhancement as a result of the business alliance. The court thus denied assuming an increase in value which would never be reflected in the share prices, and did not add it to the fair value determination.⁵¹

Y then argued that a premium should be added to the fair value to reflect its controlling rights. The court held that any such controlling rights are concluded in agreements between parties concerned about such matters, and many such arrangements were in place between investors to control corporations. Its decision further stated that investors should not be allowed to regain the controlling premium and thus burden the corporation that issued the shares, and by extension its shareholders generally. The court thus refused to add a premium to the purchase price to reflect controlling rights.⁵²

As can be seen from the above, the court held that where corporate or shareholder value increased, this increase should be taken into account in calculating fair value. Where corporate or shareholder value decreased, fair value should be calculated as if the resolution approving restructuring did not occur. There is also an academic view that where corporate value is decreased through corporate restructuring, opposing shareholders ought to be able to claim redemption at a value the shares would have had if the relevant resolutions had not taken place, and the redemption right will function to distribute any gains where gains arise from the restructuring.⁵³ The court's decision in this case was consistent with that view.⁵⁴

50 Tokyo High Court, 7 July 2010, Kinyû Shôji Hanrei 1346, 24.

51 *Ibid.*

52 *Ibid.*

53 T. FUJITA, *Shin-kaisha-hô ni okeru kabushiki kaitori seikyû-ken seido* [Share Redemption Claim Rights under the New Company Code], in: Kuronuma/Fujita (eds.), *Egashira Kenjirô*

There are three mainstream academic views regarding the date on which to base a decision on the purchase price: (1) the date on which the resolution approving the restructuring was passed, but where shares of surviving corporations are provided as consideration for the restructuring, the fixed date for determining fair value should not be the date of the resolution but either when redemption rights are exercised or where the restructuring becomes effective,⁵⁵ (2) the date on which the redemption period expires (which is also when the restructuring comes into effect),⁵⁶ and (3) a date fixed by the court in its discretion for the purpose of achieving equality.⁵⁷ The court in this case held that the expiration of the redemption period should be the date for determining fair value estimates, and thus followed the view espoused in the second theory.⁵⁸

The significance of this case is that the court showed its position on the standards for determining fair value, and the date on which to base decisions about the fair value.⁵⁹ The court held that the standard for deciding fair value is that of including value increases where restructuring enhances corporate or share value, and where value has been decreased calculating fair value as if the resolutions approving restructuring did not occur. The court held that the appropriate time to determine fair value is the date on which the right to exercise redemption claims expired⁶⁰.

sensei kanreki kinen kigyô-hô no riron (jô) [Celebration for 60th Birthday of Professor Kenjirô Egashira Theories of Corporation Law (1)] (Tokyo 2007) 282. For other literature, see, W. TANAKA, *Soshiki saihei to taika jûnan-ka* [Reorganization and Making Considerations Flexible], in: *Hôgaku Kyôshitsu* 304 (2006) 80; M. YANAGA, *Hantai kabunushi no kabushiki kaitori seikyû-ken o meguru jakkan no mondai* [A Few Points Concerning Redemption Rights of Opposing Shareholder], in: *Shôji Hômu* 1867 (2009) 9; H. MATSUI, *Rakuten-tai TBS kabushiki kaitori kakaku kettei jiken no kentô* [A Study on Case of Decision on Share Purchase Price of Rakuten vs. TBS], in: *Shôji Hômu* 1902 (2010) 9.

54 For cases taking similar positions, see Kobe District Court, 13 March 2009, Kinyû Shôji Hanrei 1320, 59; Tokyo District Court, 31 March 2009, Kinyû Shôji Hanrei 1315, 26; Tokyo District Court, 17 April 2009, Kinyû Shôji Hanrei 1320, 31; and Tokyo District Court, 13 May 2009, Kinyû Shôji Hanrei 1320, 41.

55 FUJITA, *supra* note 53, 292 *et seq.*

56 W. TANAKA, “*Kôsei na kakaku*” *to wa nani ka* [What is “Fair Value”?], in: *Hôgaku Kyôshitsu* 350 (2009) 65, 68.

57 YANAGA, *supra* note 53, 11.

58 See, K. EGASHIRA, *supra* note 16, 799 footnote 3. For cases, see as to the time of resolutions approving reorganization, Tokyo District Court, 11 October 1983, Kakyû Saiban-sho Minji Saibanrei Shû 34 (9-12), 968; as to the time of claiming share redemption, Kobe District Court, 13 March 2009, Kinyû Shôji Hanrei 1320, 59; and as to the time of occurrence of effectiveness of reorganization, Tokyo District Court, 17 April 2009, Kinyû Shôji Hanrei 1320, 31; and Tokyo District Court, 13 May 2009, Kinyû Shôji Hanrei 1320, 41.

59 For literature discussing this case, see, K. TORIYAMA, *Kabushiki kaitori seikyû ni okeru “kôsei na kakaku” no kijun-bi* [Fixed Date of “Fair Value” in Share Redemption Claim], in: Kinyû Shôji Hanrei 1358 (2011) 14; and for literature discussing the District Court case before this case, M. YANAGA, *Hantai kabunushi ni yoru kabushiki kaitori seikyû to kabushiki kakaku kettei* [Share Redemption Claims by Opposing Shareholders, and Decision on Purchase Price], in: *Jurisuto* 1399 (2010) 112.

60 There is now a Supreme Court decision on this case according to which the appropriate time

VI. CONCLUSION

This paper has discussed the above four significant cases. The Supreme Court held in the first case that where Art. 5 duties to hold consultations are breached in relation to a group of employees, such employees can dispute the effects of the succession of their employment contracts. Based on such a breach employees may refuse to have their contracts succeeded. However, if employees can easily reject such successions, company splits will not function as management expects them to in terms of restructuring. Therefore, balancing the interests between employees and employers in each case is still an issue that needs to be settled.

In the second case the parent company purchased shares of a subsidiary pursuant to an agreement between the parent company and the third party shareholders of the subsidiary. The parent company fixed a purchase price per share. The Supreme Court held that the business judgment rule will be generously applied in determining whether directors breached their duty of care in determining the purchase price

The facts of the third case involve a resolution being passed at a shareholder meeting approving the conversion of all ordinary class shares into shares with acquisition rights attached. The company was subsequently merged into another company, which was then further merged into another company. In this case the core issues were whether the shareholders deprived of shareholder status as a result of the resolution had legal standing, and whether they had sufficient interest for such a case. The Tokyo High Court answered the former question affirmatively, but held that interest was extinguished as the shareholders had not taken legal action to void the merger. Shareholders deprived of shareholder status by resolutions who wish to void the resolutions thus need to take action to invalidate any corporate restructuring that occurs after the resolutions.

The Tokyo High Court decided in the fourth case that the basis on which “fair value” is to be calculated is that value gains brought about by corporate restructuring should be taken into account, but that if corporate or share value is lost then the fair value should be decided as if the resolution approving restructure never took place. The court also held that the relevant date for determining calculations is the expiration of the share redemption claim period.

Each of these four cases addresses different issues, but each case contains issues of corporate restructuring or reorganization. The first and fourth case involve restructuring through company splits, the third case involves restructuring by absorption-type merger, and the second case involves corporate group restructuring by purchasing shares from a subsidiary to make that subsidiary a wholly owned subsidiary. The cases show that regulations added to the Company Code in 2005 establishing provisions encouraging corporate restructuring have resulted in the active adoption of management strategies employing corporate restructuring in the business world.

for determining fair value is the date on which this right was exercised; Supreme Court, 19 April 2011, Kinyû Shôji Hanrei 1366, 6.

VII. OUTLOOK

As stated in the introduction, these four cases were reported prior to the *Tôhoku Chihô Taiheiyô Oki Earthquake*. The earthquake and the subsequent tsunami have brought hitherto unseen levels of disaster and destruction. Months have now passed since the earthquake, but the victims still face a long period of harsh and painful days ahead of them. The destruction, damage and crises brought by the great disaster in east Japan still continue. Japan requires the recovery of the Tohoku area to help the Japanese economy to recover. Recovery and reconstruction of affected areas call for vast amounts of capital. According to the Nikkei Shinbun, Cabinet has made a tentative calculation that the cost only of direct damage will be between 16 and 25 trillion Yen.⁶¹ The main resources to fund the recovery would be either a tax increase or the issuance of national bonds.

However, opinion presented in the Nikkei Shinbun believes that Japan has the power to overcome the damage and crises brought by the disaster.⁶² According to this opinion Japan has sufficient economic power.⁶³ At the time of the *Kantô Dai-shinsai* earthquake in 1923, Japan was a developing country with fragile industry. Decreasing exports and increased imports caused growth of the trade deficit, an increase in inflation, weakening of the Yen, insufficient funds raised through public bonds, and foreign bonds with high interest rates were issued. National financial conditions worsened until Japan reduced the budget, the financial system collapsed and financial panic took hold. Modern Japan is a creditor country, and the opinion stated that although Japan lost the ability to supply approximately 10 trillion Yen due to the great disaster in east Japan, the balance of international payments was in surplus by 10 trillion Yen. Even if Japan has no trade surplus in terms of import-export earnings due to export stagnation, a decline in tourism revenue, increase of imported farm and other products, the surplus of income from foreign investments would be 12 trillion Yen, and a current account surplus of 10 trillion Yen could be achieved, indicating that a major fall in the Yen would not occur.⁶⁴ The opinion also argued that although the issuance of national bonds for raising recovery funds was difficult, there was domestic surplus capital of more than 10 trillion Yen per year, and it would be possible to raise domestic funds without a tax increase; the national wealth was 2,700 trillion Yen and the banking system was sound.⁶⁵

The opinion maintained that the Japanese people should believe in Japan's power to turn this misfortune into a blessing.⁶⁶ It continued to say that the disaster will force Japanese people to reflect on and change their consciousness and living style. Clean energy development will be accelerated, new ideas for the recovery, reconstruction and future city designs will come forth and the disaster can be a spur to break the long-felt

61 Nihon Keizai Shinbun, 2 April 2011, 3.

62 Nihon Keizai Shinbun, 8 April 2011, 17.

63 *Ibid.*, 17.

64 Nihon Keizai Shinbun, 8 April 2011, 17.

65 *Ibid.*

66 *Ibid.*

sense of helplessness in Japan.⁶⁷ There must always be hope that Japan can heal both the lives destroyed by the disaster and its national economy.

Since February 2010, the Ministry of Justice (MOJ) council has discussed amendments to the Company Code.⁶⁸ After the earthquake, these discussions by the council have been postponed. It is now necessary that Japan develop its corporate law system through legislative measures and case law to fit the new and difficult reality of the Japanese economy.

ABSTRACT

In this paper, Professors Takahashi and Sakamoto introduce four important corporate law cases and use them to illustrate recent developments in Japanese corporate law. In particular, the cases illustrate how Japanese superior courts have interpreted provisions introduced to the Company Code in 2005 designed to make corporate restructuring more easily available.

In the first case, the Supreme Court is faced with a corporate restructuring issue from the point of view of employee-employer relations, where certain employees are unwilling to have their employment contracts transferred to a new company which has been split off from their existing employer. The case addresses the scope of obligations to consult with employees and gain their cooperation, as well as the significance of breaching various obligations on the part of the employer.

The second case involves a derivative suit by a shareholder unhappy with the price their company offered to purchase minority shareholdings from a partially owned subsidiary. The company wished to wholly own the subsidiary in order to reorganize its corporate group. That the minority shareholders were franchisees intimately involved with the corporate groups business further complicated the situation. The shareholders alleged the directors breached their duty of care in setting the purchase price; the directors rely on the business judgment rule. This case represents a move by the Supreme Court in the direction of giving directors greater scope to make decisions under the business judgment rule.

The final two cases were both decided by the Tokyo High Court. In the first case a shareholder had his shareholdings forcibly acquired by the company following a series of successful shareholder resolutions. The company was absorbed into other companies through a series of mergers. As the legislation does not specifically deal with the stand-

⁶⁷ *Ibid.*

⁶⁸ K. OSUGI, Recent Reform of Japan's Corporate Law in an International Context: Who Have Participated in the Reforms, and How?, (2010), in: Japanese Yearbook of International Law 53 (2010) 341.

ing to sue, and legal interest of, a former shareholder, the court sets out its own criteria and methodology for determining when and how former shareholders may take legal action to void the resolutions that allowed to deprive them of shareholder status.

In the final case the High Court balances the interests of a company seeking to split part of its business into a subsidiary, and a shareholder who opposes the motion and exercises its rights to have its shares redeemed. The company and the shareholder cannot reach an agreement on the "fair value" of the shares and request the court do so. The Tokyo High Court establishes standards for determining fair value and clarifies the reference time at which fair value should be calculated.

ZUSAMMENFASSUNG

In diesem Beitrag stellen die Autoren vier wichtige Fälle zum Gesellschaftsrecht vor und erklären daran die jüngsten Entwicklungen im japanischen Gesellschaftsrecht. Insbesondere zeigen die Entscheidungen, wie japanische Obergerichte Vorschriften ausgelegt haben, die im Jahre 2005 in das Gesellschaftsgesetz aufgenommen worden waren, um die Restrukturierung von Gesellschaften zu erleichtern.

In der ersten Entscheidung ist der Oberste Gerichtshof (OGH) mit einem Problem der Gesellschaftsrestrukturierung im Hinblick auf die Beziehungen der Arbeitnehmer zum Arbeitgeber konfrontiert, bei dem bestimmte Arbeitnehmer sich weigern, ihre Arbeitsverträge auf ein neues Unternehmen zu übertragen, das von ihrem bisherigen Arbeitgeber abgespalten worden ist. Die Entscheidung befasst sich mit der Reichweite der Pflichten zur Beratung mit Arbeitnehmern, um deren Kooperation zu erreichen, und der Bedeutung der Verletzung verschiedener Pflichten auf Seiten des Arbeitgebers.

Der zweite Fall betrifft die Aktionärsklage eines Gesellschafters, der unzufrieden mit dem angebotenen Preis seines Unternehmens zum Erwerb weiterer Beteiligungen an einer Tochtergesellschaft war. Das Unternehmen wollte die Tochter zu einer 100-prozentigen Tochtergesellschaft machen, um seine Unternehmensgruppe zu reorganisieren. Dass die Minderheitsaktionäre zugleich Franchisenehmer waren, die eng in die Geschäfte der Unternehmensgruppe einbezogen waren, verkomplizierte die Situation zusätzlich. Die Aktionäre vertraten die Ansicht, dass die Vorstände ihre Sorgfaltspflicht verletzt hätten, als sie den Kaufpreis festlegten; die Vorstände beriefen sich auf die „Business Judgment Rule“. Die Entscheidung stellt einen Schwenk des OGH dahingehend dar, dass dem Vorstand ein größerer Entscheidungsspielraum gemäß der „Business Judgment Rule“ eingeräumt wird.

Die beiden letzten Fälle wurden vom Obergericht Tokyo entschieden. Im ersteren wurden nach einer Reihe erfolgreicher Gesellschafterbeschlüsse die Anteile eines Gesellschafters zwangsweise durch die Gesellschaft erworben. Das Unternehmen ging durch eine Serie von Verschmelzungen in anderen Unternehmen auf. Das Gesetz enthält keine näheren Bestimmungen in Bezug auf Klagebefugnis und rechtliche Interessen

ehemaliger Aktionäre. Daher legt das Gericht seine eigenen Kriterien und Methoden dazu dar, inwieweit ehemalige Aktionäre rechtliche Schritte zur Nichtigkeitserklärung von Beschlüssen, die es erlaubten, ihnen ihren Aktionärsstatus zu entziehen, ergreifen können.

Im letzten Fall gleicht das Obergericht die Interessen eines Unternehmens, das beabsichtigte, einen Teil seiner Geschäfte im Wege der Abspaltung auf eine Tochter zu übertragen, mit einem Aktionär aus, der dem Antrag widersprach und sein Recht auf Rückkauf seiner Aktien durch das Unternehmen geltend machte. Das Unternehmen und der Aktionär konnten sich nicht auf einen „fairen Wert“ der Aktien einigen und begeherten die Festsetzung durch das Gericht. Das Obergericht Tokyo legt Kriterien fest, um den „fairen Wert“ zu ermitteln, und stellt den Beurteilungszeitraum klar, der für dessen Errechnung zugrunde gelegt wird.