

KÜRZERE ABHANDLUNGEN  
SHORT ARTICLES AND COMMENTS

**In the Shadow of Delaware?  
The Rise of Hostile Takeovers in Japan**

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SYNOPSIS

The unthinkable has happened. Just a few years ago, it could confidently be asserted that “[t]here is no market for corporate control in Japan, and there is not likely to be one.”<sup>1</sup> No conventional wisdom seemed more accurate and enduring than the disdain for U.S.-style hostile takeovers in Japan – the land of stable, friendly shareholders, expansive views of corporate purpose that go well beyond shareholder wealth maximization, and abiding social concern for the preservation of harmonious relationships. But things change, and predictions are risky. For the past year, Japan has been riveted by a series of contests for corporate control, featuring sharp-elbowed tactical maneuvering, strategic litigation, and creative use of corporate law to craft defensive measures. To be sure, the number of hostile deals to date is small. The significance of these transactions derives not from their prevalence but their mere existence and the potential changes they may bring about. Two of the recent deals have generated important judicial rulings.<sup>2</sup> Public discourse – down to the sports pages – has been filled with blow-by-blow accounts of the deals, along with corporate law arcana such as the intricacies of the poison pill.<sup>3</sup> Virtually every major actor in the Japanese political economy has mobilized to respond to this development.

Equally notably, a small state on the Eastern seaboard of the United States casts a long shadow over these developments. Perhaps predictably, perhaps not, Delaware’s

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\* The Essay was published in volume 105(7) of the *Columbia Law Review* (2005). Readers are encouraged to view that publication for a complete analysis.

1 N. FLIGSTEIN, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* (Princeton 2001) 187.

2 An analysis of the pertinent Japanese case law can be found in the contribution of S. KOZUKA; *supra* p. 5 ff. (*the Editors*).

3 See, e.g., T. ZAUN, *Rebel Raider Takes Aim at Broadcast Giant in Japan*, in: *N.Y. Times*, March 24, 2005, C9 (reporting on sensation created by recent takeover attempt).

experience with takeovers looms large in the Japanese consciousness.<sup>4</sup> In the most recent and high profile case – a takeover attempt by an upstart internet service provider of a radio broadcasting firm affiliated with Japan’s largest media conglomerate – both sides briefed the trial court, deciding whether to enjoin the target’s defensive measure, on how the case would be resolved under *Unocal* and its progeny.<sup>5</sup> The trial court enjoined the defensive measure and the decision was affirmed on appeal. These rulings generated judicial standards for review of the most common defensive measure in Japan that would resonate well with the Delaware judiciary – a kind of *Unocal* rule with Japanese characteristics.<sup>6</sup> Meanwhile, Japan’s Ministry of Economy, Trade and Industry (METI) formed a group of experts and business representatives to craft a governmental response to the rising tide of unsolicited bids. The group’s interim report prominently noted that its purpose was “to begin developing a framework for fair and reasonable hostile takeover defensive measures that would enhance corporate and shareholder value based on Western measures that are accepted as a global standard.”<sup>7</sup> The group conducted an in-depth investigation into U.S. takeover precedents and defensive techniques, and its report relies heavily on the “threat” and “proportionality” rules familiar to American corporate lawyers in suggesting appropriate standards for Japan.<sup>8</sup> Based on this report, Delaware takeover law was adopted wholesale in guidelines promulgated jointly by METI and the Japanese Ministry of Justice in May 2005.<sup>9</sup> The shareholder rights plan, better known as the poison pill, symbol of U.S. hostile mergers and acquisi-

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4 Full disclosure: the author organized a Tokyo conference in 2003 entitled “Hostile M&A and the Poison Pill in Japan: Prospects and Policy,” at which prominent academics and lawyers from both countries, a Delaware judge, and a Japanese shareholder activist discussed the U.S. experience with the poison pill and the possible lessons it offered for Japan. Conference proceedings are published at *Columbia Business Law Review* 1 (2004).

5 See, e.g., Opinion of J. C. COFFEE, JR, Filed with Tokyo District Court Civil Department No. 8, March 8, 2005.

6 *Unocal* authorizes defensive measures in response to a threat to corporate policy and effectiveness, provided the response is proportionate to the threat. *Unocal Corp. v. Mesa Petroleum Co.*, *Atlantic Reporter* 493 (1985) 946.

7 KIGYÔ KACHI KENKYÛ-KAI [Corporate Value Study Group], *Tekitaiteki baishû bôei-saku (kigyô kachi bôei-saku) no seibi* [Preparing Defensive Measures toward Hostile Takeovers (Measures to Defend Corporate Value)] (March 2005) 2. [Hereinafter, METI Interim Report]. An English summary of the report is available at <[www.meti.go.jp/english/information/downloadfiles/Corporate%20Value.pdf](http://www.meti.go.jp/english/information/downloadfiles/Corporate%20Value.pdf)>. An abstract of the report is reprinted in this issue; cf. *supra* at the “Documentation” section (*the Editors*).

8 *Id.*, especially 4, 10-11, 14-20, 33 (after extended discussion of the U.S. situation, concluding that defensive measures recognized in the U.S. and Europe can be introduced into Japan under existing corporate law.)

9 MINISTRY OF ECONOMY, TRADE AND INDUSTRY / MINISTRY OF JUSTICE, *Kigyô kachi, kabunushi kyôdô no riei no kakuho mata wa kôjô no tame no baishû bôei-saku ni kansuru shishin* [Takeover Guidelines for Protecting and Enhancing Corporate Value and the Interests of Shareholders as a Whole], May 27, 2005 [Hereinafter, Takeover Guidelines]. The Guidelines are reprinted in this issue; cf. *supra* at the “Documentation” section (*the Editors*).

tions (M&A), is validated as a defensive measure by the guidelines and is on the verge of widespread adoption in Japan.

What happened? What are the implications of these developments? If, as now seems distinctly possible, the world's second largest economy is in the process of embracing hostile M&A (however reluctantly), and along with it literally the entire body of Delaware takeover jurisprudence, it may represent an epochal moment for Japan and for the "global" standards movement in corporate governance.

The Essay explores the emergence of hostile takeovers in Japan as a case study in market and legal development in a global era. In its ambitions, the paper parallels work by prominent scholars who have sought to explain the rise of hostile M&A and related Delaware jurisprudence at a formative period of U.S. corporate law development, the 1980s.<sup>10</sup> Like those scholars, the Essay "seek[s] to understand the relationship between legal doctrine and the world of takeovers, and to assess the significance of corporate law from a broader perspective."<sup>11</sup> It does so, however, with a very different frame of reference – Japan in the 2000s. The task, however, is complicated by the overlay of Delaware doctrine on a foreign legal and economic system. Discerning the significance of Japan's emerging takeover market and related legal developments requires nuanced comparative assessments of how legal standards and governance technologies whose evolution is deeply enmeshed with the U.S. political economy will operate in a very different institutional setting.

Beyond the intrinsic importance of this moment for Japanese corporate governance,<sup>12</sup> this phenomenon bears directly on the two major debates in comparative corporate governance literature today, which grapple intensely with the significance and evolution of corporate law in a global economy. One debate focuses on a provocative line of empirical research suggesting that differences in the "origin" and "quality" of corporate law among legal systems explain the differences in corporate ownership structures and capital markets around the world.<sup>13</sup> A second line of debate asks whether

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10 See, e.g., M. KAHAN/E.B. ROCK, How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law, in: *University of Chicago Law Review* 69 (2002) 871; J.R. MACEY/G.P. MILLER, Toward an Interest-Group Theory of Delaware Corporate Law, *Texas Law Review* 65 (1987) 469.

11 KAHAN/ROCK, *supra* note 10, 872.

12 Given that the absence of a market for corporate control figures in virtually every academic account of corporate governance in Japan, see, e.g., FLIGSTEIN, *supra* note 1; J. M. RAMSEYER, Takeovers in Japan: Opportunism, Ideology and Corporate Control, in: *UCLA Law Review* 35 (1987) 1, the emergence of hostile takeovers may require substantial re-thinking of the entire field.

13 The seminal articles are R. LA PORTA ET AL., Legal Determinants of External Finance, in: *Journal of Finance* 52 (1997) 1131; R. LA PORTA ET AL., Law and Finance, in: *Journal of Political Economy* 106 (1998) 1113 (providing extensive empirical evidence that the common law ("English origin") systems have "higher quality" corporate law than civil law (particularly "French origin") systems; greater shareholder protections in the "better"

corporate law and governance structures around the world are converging on a U.S. shareholder-oriented model.<sup>14</sup> The events examined in the Essay prompt questions going to the heart of these debates: Is Delaware law becoming a “global” standard, and if so, what dynamics are pushing in that direction? Does the appeal of Delaware corporate law lie in its superior protections for shareholders, as the economic literature would suggest, or might the foreign gravitation to Delaware signal something broader, and more ambiguous for the convergence hypothesis? How does “good” corporate law evolve anyway,<sup>15</sup> and perhaps even more saliently, can it be *imported* from abroad? The Essay does not provide definitive answers to all these questions, of course. But Japan’s recent experience with hostile takeovers provides unique insights into the significance and evolution of corporate governance in an era when law, like capital and information, can move around the world at great speed.

Part I of the Essay describes the rise of hostile M&A in Japan. It begins by providing brief factual sketches of several recent contests for control, including the high-profile Livedoor bid for Nippon Broadcasting. It then explains the significance of these developments and the immense public fascination with the transactions as the product of several factors: the clash between old and new Japan, the novelty of the tactics employed by the bidders, and the concerns they sparked over the rise of “American-style” capitalism in Japan.

Part II contextualizes these deals by examining the corporate scene in Japan from the mid-1990s to the present. The rise of hostile M&A in Japan can be seen as the culmination of a process of interlinked market and corporate law developments over the past decade. On the market side are the rise of foreign institutional shareholders, steady declines in stable and cross-shareholding patterns, and a modest but potentially significant increase in the activism of Japanese institutional investors. The corporate law developments include substantial changes in board governance and incentive structures, major developments in the areas of directorial duties and personal liability, and expansions in organizational flexibility. This period witnessed the growth of Japanese corporate law judicial doctrine with distinct parallels to Delaware jurisprudence. Not unlike the U.S. in the mid-1980s, by the end of this period of substantial change, the market and legal climate was conducive to hostile M&A, while relatively little attention

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corporate law system give rise to more dispersed share ownership structures and larger capital markets).

14 Compare H. HANSMANN/R. KRAAKMAN, *The End of History for Corporate Law*, in: *Georgetown Law Journal* 89 (2001) 439 with L. BEBCHUK/M. ROE, *A Theory of Path Dependency in Corporate Ownership and Governance*, in: *Stanford Law Review* 52 (1999) 127.

15 This question is just beginning to receive the attention it deserves. See K. PISTOR ET AL., *The Evolution of Corporate Law: A Cross-Country Comparison*, in: *University of Pennsylvania Journal of International Economic Law* 23 (2002) 791 (analyzing the evolution of statutory corporate law in ten countries, and concluding that continuous evolution is the key to “good” corporate law).

had been paid to defensive measures available to target boards, setting the stage for the deal activity and defensive maneuvering currently under way.

Part III interprets the recent Japanese developments, using analytical perspectives that have proven powerful in understanding the evolution of Delaware corporate law. In brief, I argue that when markets changed in the 1990s, corporate law that was formerly irrelevant or complementary to presently waning Japanese economic institutions became problematic. Dissatisfied with the constraints imposed by law, market participants responded as they did in the United States two decades earlier: by pursuing legal strategies, adapting to governance or incentive structures outside the legal system, and making use of the new environment to push the edges of “acceptable” market conduct, thrusting novel transactions into the realm of contemplation, and in turn, raising new questions that the legal system had to answer. The parallels with Delaware in the 1980s are striking. In both systems, market and legal changes reverberated through the political economy, transforming existing corporate governance institutions and catalyzing further development of the corporate law. In contrast to developments in the United States, however, these changes in Japan involve large-scale transplantation of foreign legal technologies and standards.

Part IV explores the implications of the foregoing analysis. For Japan, the rise of hostile takeovers presages further acceleration in the reconfiguration of its postwar economic system. Among other possible changes, the judiciary is likely to take on a higher profile as arbiters of market conflict, and independent directors may assume a new role in structuring transactions and mediating between conflicting corporate constituencies. For comparative corporate law scholars, the Japanese events add an important piece of empirical evidence to the ongoing theoretical debates about convergence, stasis, and evolution in corporate law and governance structures.<sup>16</sup> At one level, the evidence provides powerful support for convergence theories, illustrating the intellectual appeal of the Delaware model in the world today. But further analysis suggests other possibilities, including a cryonic suspension of institutional transition if the poison pill proves too powerful a tool of managerial protection in Japan’s nascent shareholder movement. This possibility is heightened by the fact that the Japanese poison pill will operate in an institutional environment that is less highly developed than the one in the U.S. that allows the pill to function relatively well as a screening device rather than simply as an entrenchment device for incumbent management: efficient financial markets, active institutional investors, sophisticated judicial review of takeover defenses, and independent directors. In all likelihood, however, the wholesale transplantation of Delaware takeover jurisprudence and the poison pill will lead neither to strong convergence nor to path dependent blockage of further reforms. Rather, preliminary evidence suggests that Delaware law will be adapted by the judiciary and other actors to suit local interests –

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16 For a range of perspectives on this debate, see J.N. GORDON / M.J. ROE (eds.), *Convergence and Persistence in Corporate Governance* (Cambridge 2004).

indeed, a struggle for the “proper” interpretation of Delaware takeover jurisprudence in Japan is already taking shape. This struggle may well lead to a new governance regime, but its contours may look quite different from those in the United States.

The important dynamics at work in this Japanese experiment are masked by the prevailing analytical constructs in the comparative corporate governance literature. In practice, successful economies do not abandon their institutions for foreign models. Rather, foreign legal technologies thought to reflect a superior solution to a common problem are selectively adopted locally, then adapted by coalitions of market and governmental actors to suit their own interests. The potential to enhance shareholder protections is one motivation for the foreign borrowing, but many other motivations are also at work. The result is not so much a *convergence* of systems on the Anglo-American model as the unsettling *telescoping* and *stacking* of borrowed legal institutions on top of domestic governance structures. The true appeal of Delaware corporate law may be its suitability to this process of selective adaptation, rather than its superior protections for shareholders.

#### ZUSAMMENFASSUNG

*Der Beitrag faßt eine umfangreiche rechtsvergleichende Untersuchung des Verfassers zum Geschehen am japanischen Markt für Unternehmenskontrolle zusammen. Trotz gegenteiliger Prognosen steigt seit kurzem die Zahl feindlicher Übernahmen in Japan. Dies ist eine – wenn auch noch nicht zahlenmäßig – bedeutsame Entwicklung, die große Auswirkungen auf Corporate Governance in Japan hat. Einen prominenten Platz in der Diskussion nimmt das Recht des US-Bundesstaates Delaware ein. Sowohl die japanischen Gerichte als auch die gemeinsam vom japanischen Wirtschafts- und vom Justizministerium herausgegebenen Richtlinien zu Abwehrmaßnahmen gegen feindliche Übernahmeangebote orientieren sich stark am Übernahmerecht Delawares. Die jüngsten japanischen Erfahrungen geben einen informativen Einblick in die Bedeutung und Entwicklung von Corporate Governance in einer Zeit, da das Recht ebenso wie Kapital und Information rasch auf der ganzen Welt Verbreitung findet.*

*(Zusammenfassung durch d. Red.)*