RECHTSPRECHUNG / CASE LAW

Japanese Corporate Law: The Bull-Dog Sauce Takeover Case of 2007

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I. INTRODUCTION

Japanese business culture has already generally accepted hostile takeovers.[1] As of the end of July 2007, 381 listed companies had adopted defensive measures to hostile takeovers,[2] and 353 of those companies, or 92.7 percent, had sought approval for defensive measures at shareholders' meetings.[3] Defensive measures to protect management itself should not be allowed. One question is whether putting in place defensive measures by which management treats a specific shareholder, who is a hostile takeover bidder, differently from other shareholders, should be allowed by the courts. This paper reports a case in which such defensive measures were approved at a shareholders' meeting and the Supreme Court found that there was no breach of the principle of equal treatment of shareholders (Art. 109, Para. 1, Company Code[3a]).

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1 For recent developments in Japanese takeover law, see M. YANAGA, Use of Share Options as an Anti-Takeover Measure in Japan, in this issue of the ZJapanR / J.Japan.L, *infra* p. 63 ff.; S. KOZUKA, Recent Development in Takeover Law: Changes in Business Practices Meet Decade-Old Rule, in: ZJapanR / J.Japan.L 11 (21) (2006) 5; H. BAUM, Takeover Defenses in Japan: Corporate Value Reports and Guidelines, in: ZJapanR / J.Japan.L 11 (21) (2006) 130; E. TAKAHASHI / T. SAKAMOTO, Japanese Corporate Law: Two Important Cases Concerning Takeovers in 2005, in: ZJapanR / J.Japan.L 11 (21) (2006) 231. For current trends in defensive measures and cases, see, W. TANAKA, *Baishû bôei-saku to hanrei no tenkai: Nippon hôsô jiken kara no nagare* [Defensive Measures and the Development of Case Law: Trends after the Nippon Hôsô Case], in: Jurisuto 1346 (2007) 8.

2 A. FUJIMOTO ET AL., *Tekitaiteki baishû bôei-saku no dônyû jôkyô* [The Current Situation in the Adoption of Defensive measures] in: Shôji Hômu 1809 (2007) 31.

3 FUJIMOTO, *supra* note 2, 37.

3a *Kaisha-hô,* Law No. 86/2005.

II. THE BULL-DOG SAUCE CASE [4]

1. Facts

Bull-Dog Sauce Co. Ltd (hereinafter, cited as Bull-Dog Sauce) was a company limited by shares and was mainly engaged in the business of producing and selling sauces and other seasonings. Its shares were listed in the second section of the Tokyo Stock Exchange. As of 8 June 2007 (hereinafter, dates written without a year number are those of 2007), the total number of shares that Bull-Dog Sauce could issue was 78,131,000. It had 19,018,565 issued and outstanding shares.

Steel Partners Japan Strategic Fund (Offshore), LP (hereinafter, cited as Steel Partners) was an investment fund. As of 18 May, Steel Partners held about 10.25 percent of the outstanding shares of Bull-Dog Sauce, together with its partners. Steel Partners' wholly owned subsidiary, Steel Partners Japan Strategic Fund – SPVII LLC (hereinafter, cited as "SPVII") was incorporated under the law of Delaware of the United States for the purpose of purchasing shares for Steel Partners. On 18 May, SPVII made a public announcement that it would begin a takeover bid to acquire all outstanding shares of Bull-Dog Sauce (hereinafter, this takeover bid is cited as the "Takeover Bid"). A takeover bid report was submitted to the head of the Kanto Local Finance Bureau on the same day. Initially, the purchasing period of the Takeover Bid was from 18 May until 28 June, and the price offered per share was 1584 yen. However on 15 June the purchasing period was extended to 10 August, and the price was increased to 1700 yen per share. The initial share offer added a premium of between 12.56 and 12.82 percent, which Steel Partners thought appropriate, to the average market price, as calculated over several periods before the commencement of the Takeover Bid.

On 25 May, Bull-Dog Sauce submitted to the head of the Kanto Local Finance Bureau a report detailing questions it had regarding SPVII's Takeover Bid. In response, on 1 June SPVII submitted a report with its reply to the head of the Bureau (hereinafter, cited as "Report of Answers").

The Report of Answers showed: (1) that Steel Partners had no experience of managing companies in Japan, and had no plans of doing so, (2) that Steel Partners, at that time, had no intention to directly manage Bull-Dog Sauce, (3) that Steel Partners was unable to show how it would provide the management of Bull-Dog Sauce with proposals that could enhance the corporate value of Bull-Dog Sauce, and finally, (5) that as Steel Partners did not intend to directly manage the daily operations of Bull-Dog

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4 Supreme Court, 7 August 2007, in: Shôji Hômu 1809 (2007) 16. For the Bull-Dog Sauce Case, see, *Buru-Doggu Sôsu Jiken no Hôteki Kentô: Baishû Bôei-saku ni kansuru Saibankeika to Igi* [A Legal Analysis on the Bull-Dog Sauce Case: the Case Proceedings and the Significance Concerning Defense Measures for Takeovers] in: Bessatsu Shôji Hômu 311 (2007); M. IWAKURA / S. SASAKI, *Buru-Doggu sôsu ni-yoru tekitaiteki baishû ni-taisuru Taikô sochi (jô)* [Defensive Measures by Bull-Dog Sauce for a Hostile Takeover (I)], in: Shôji Hômu 1816 (2007) 4.

Sauce, it was not necessary to respond to questions relating to particular production and sales issues. In addition to the above points, the Report of Answers contained no specific policies regarding collecting invested capital.

On 7 June, the board of Bull-Dog Sauce decided to oppose the Takeover Bid. On the same day, the board decided to propose, at a shareholders' meeting on 24 June, defensive measures to counter the Takeover Bid (hereinafter, this shareholders' meeting is cited as "Shareholders' Meeting"). The first proposal was that the articles of incorporation be changed so that extraordinary approval by shareholders would be required for any matter concerning allotting rights to purchase new shares without consideration (hereinafter, cited as "Proposal to Change the Articles"). The second proposal was that if the Proposal to Change the Articles was approved, an allotment of rights to purchase new shares (hereinafter, cited as "Proposal of Allotment") be enacted. According to the Proposal to Change the Articles, Bull-Dog Sauce would make a decision regarding allotting rights to purchase new shares, including treating certain shareholders differently to other shareholders in terms of acquiring and exercising the rights. Bull-Dog Sauce would make this decision through its board of directors and also via the approval of a shareholders' meeting. The level of approval of such a matter at a shareholders' meeting would naturally be extraordinarily high.

At the Shareholders' Meeting on 24 June, both the Proposal to Change the Articles and the Proposal of Allotment were approved by 88.7 percent and 83.4 percent, respectively, of attending shareholders' total voting rights.

The outline of the allotment of rights to purchase new shares without consideration, adopted at the 24 June Shareholders' Meeting (hereinafter, the rights to purchase new shares are cited as "Rights", and the allotment without consideration as "Allotment of Rights without Consideration"), is as follows.

(A) By means of the Allotment of Rights without Consideration, three Rights per share would be allotted to shareholders who were in the record book of shareholders on 10 July.
(B) The Allotment of Rights without Consideration would become effective on 11 July.
(C) Bull-Dog Sauce would issue one ordinary share when each Right was exercised.
(D) When Bull-Dog Sauce issued an ordinary share for the exercise of a Right, there would be a nominal subscription price of one yen per share.
(E) The period during which the rights could be exercised would be from 1 to 30 September.
(F) Steel Partners and its associates, including SPVII (hereinafter, cited as "Steel Partners' Associates") would not be qualified to exercise the Rights (hereinafter, cited as "Condition on the Rights").
(G) Bull-Dog Sauce would be allowed to acquire the Rights, excluding those Rights that Steel Partners' Associates would hold as of 10 July, and as consideration Bull-Dog Sauce would be allowed to issue ordinary shares, at the previously mentioned rate of one per Right as of 10 July.

(H) Bull-Dog Sauce would be allowed to acquire Rights that Steel Partners' Associates would hold from 10 July, but instead of providing a share as consideration, would provide 396 yen per Right (hereinafter, this clause is cited as "Acquiring Clause"). The total amount of this payment would be equivalent to a quarter of the price Steel Partners initially offered for the Takeover Bid.

(I) Approval by the Bull-Dog Sauce board of directors would be required for transferring Rights.

On 24 June, following the approval for the Proposal of Allotment, the Bull-Dog Sauce board of Directors adopted an outline of the Allotment of Rights without Consideration. After confirming the matter to the Tax Agency, the board of directors, made the decision to acquire all the Rights that Steel Partners' Associates possessed at the rate of 396 yen per Right, without imposing any burdens or duties on Steel Partners' Associates (hereinafter, this decision is cited as "Decision on Payment").

On 13 June, before the Shareholders' Meeting had occurred, Steel Partners filed an action for a provisional decision to suspend the Allotment of Rights without Consideration, claiming that Art. 247 of the Company Code (hereinafter, referred to as the "Code") would be applied either directly or using analogous interpretation. Steel Partners argued that the Allotment of Rights without Consideration would contravene the principle of equality of shareholders, the laws and regulations and the articles of incorporation (hereinafter, cited as "relevant laws"), and was grossly unfair.

The court at first instance held that where a company allotted shareholders rights to purchase new shares without consideration, and that allotment changed the relative position of shareholders, then Art. 247 of the Code would be applied with analogous interpretation, meaning that the principle of equality of shareholders would apply.[5] However, the court went on to say that the Allotment of Rights without Consideration would not be against the intended meaning of the principle of equality, would not contravene the relevant laws, and would not be grossly unfair. The Court dismissed the application for an injunction.

Steel Partners appealed. The court of appeal held that, considering that the Allotment of Rights without Consideration was necessary, reasonable and a rational measure to prevent detriment to the corporate value of Bull-Dog Sauce, and that Steel Partners' Associates was a so called 'abusive takeover bidder', the Allotment of Rights without Consideration would not be against the principle of equality of shareholders, nor would it contravene the law, or be grossly unfair.[6] The second court thus confirmed the first court's decision and dismissed Steel Partner's application.

Steel Partners appealed to the Supreme Court, but its appeal application was dismissed.

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5 Tokyo District Court, 28 June 2007, in: Shôji Hômu 1805 (2007) 43.

6 Tokyo High Court, 9 July 2007, in: Shôji Hômu 1806 (2007) 40.

2. Held

(1) On the question of the principle of equality in shareholders

Art. 109 Para. 1 of the Code establishes the principle of equality of shareholders by stipulating that companies limited by shares (hereinafter referred to as "companies") must treat their shareholders equally in accordance with the number and nature of shares each shareholder has.

Even where the allotment of rights to purchase new shares without consideration has the effect of treating different rights holders differently, this does not directly relate to the nature of the shares themselves and such an allotment, therefore, is not necessarily against the principle of equality of shareholders. However, shareholders receive the allotment in their capacity as shareholders, and Art. 278 Para. 2 rests on the assumption that the nature of the rights which will be allotted will be equal. For example, Art. 278 Para. 2 has a provision that states that any decision on the nature or number of rights to be issued or the method of enacting the rights must be directly related to the number of shares that a shareholder has. Therefore, the principle of equality of shareholders, found in Art. 109 Para. 1, will also apply to cases involving rights to purchase new shares without consideration.

The Allotment of Rights without Consideration is treated differently, however, in regards to the conditions of exercising the Rights and clauses on the acquisition of rights from Steel Partners' Associates and other shareholders. If all the shareholders other than Steel Partners' Associates exercise all their rights, or if alternatively Bull-Dog Sauce acquires all the Rights other than those issued to Steel Partners' Associates, and issues new shares for consideration, Steel Partners' Associates will suffer detriment in that the percentage of total shares they own will decrease significantly.

The principle of equality of shareholders imposes on companies an obligation to treat shareholders equally, in accordance with the nature and number of shares, so as to protect the interests of each shareholder. Generally, the interests of each shareholder essentially rely on the existence and development of the company. However, as a result of a specific shareholder acquiring controlling power over the management of a company, lowering its corporate value and violating the interests of the company and its shareholders, it may become necessary to treat that specific shareholder differently in order to protect the company's existence and development. As long as such treatment is not against the principle of balance and is reasonable, it will not necessarily breach the principle of equality of shareholders. As to whether in fact the corporate value is harmed or the interests of the company and its shareholders are threatened, the decision should be left in the hands of the shareholders themselves, as the company's interests are ultimately theirs. Provided that the decision the shareholders took was not based on false facts, and was conducted in an appropriate manner, a decision by the shareholders should be treated as definitive.

At the shareholders' meeting on 24 June, the Proposal of Allotment was approved by 83.4 percent. It is, therefore, not inaccurate to say that almost all of the existing shareholders, excluding Steel Partners' Associates, believed that Steel Partners acquiring controlling power over management would harm the corporate value of Bull-Dog Sauce, its interests and those of the shareholders. The proceedings of the shareholders' meeting were not inappropriate in any way. The decision was made in circumstances where Steel Partners' Associates was attempting to acquire all the outstanding shares of Bull-Dog Sauce, but showed no management plan that would be enacted after a successful takeover, no policies regarding collecting invested capital, and did not intend to directly manage Bull-Dog Sauce. As none of the bases of the shareholders' decision can be considered defective, it should be treated as decisive as to whether harm would actually eventuate.

Due to the Condition of the Rights and the Acquiring Clause attached to the Rights, Steel Partners' Associates could neither exercise the Rights nor receive new shares as consideration for the acquisition of the rights, and Steel Partners' Associates' shareholding percentage would have decreased significantly. However, Steel Partners' Associates had an opportunity to express its opinion at the shareholders' meeting. After discussions took place at the shareholders' meeting, almost all of the shareholders, excluding Steel Partners' Associates, approved the Allotment of Rights without Consideration as a necessary defensive measure to prevent harm to the corporate value of Bull-Dog Sauce. Further, according to the Acquiring Clause, if the acquisition of Rights is carried out, then Steel Partners' Associates will receive cash as consideration. If, on the other hand, such an acquisition is not carried out, then Steel Partners' Associates will receive cash in exchange for offering to transfer the Rights that Steel Partners' Associates hold, as per the Decision on Payment made by the Bull-Dog Sauce board of directors.

The aforementioned consideration was decided on the basis of the purchasing price in the Takeover Bid that Steel Partners had itself decided, and therefore the consideration corresponds fairly to the value of the Rights. In light of this and considering the above compensation's effect of negating loss to Steel Partners' Associates, the Allotment of Rights without Consideration is not against the principle of balance, nor is it unreasonable. Moreover, when Bull-Dog Sauce acquires the Rights from Steel Partners Associates, in accordance with the Acquiring Clause Bull-Dog Sauce would provide a large amount of cash to Steel Partners' Associates. This payout could be considered to be damaging the corporate value of Bull-Dog Sauce, and contrary to the interests of the shareholders, but as noted earlier, almost all of the shareholders considered the monetary compensation an inevitable cost of avoiding the harm Bull-Dog Sauce would suffer if Steel Partners acquired control over it. Consequently, the decision of the shareholders should be appropriately respected.

Regardless of whether Steel Partners' Associates is an 'abusive takeover bidder' as the second original judgment asserted, the Allotment of Rights without Consideration is

not against the meaning of the principle of equality of shareholders, nor does it contravene any laws, regulations or articles of incorporation.

(2) On the question of whether the Allotment of Rights without Consideration was grossly unfair

The above judgment clearly shows that the Allotment of Rights without Consideration is not grossly unfair when looking through the lens of the principle of equality of shareholders. As a measure to retain the controlling power over management, Bull-Dog Sauce did not have an advance plan to enact the kind of defensive measures it ultimately employed in this case. From this perspective and also considering the purpose of taking defensive measures as Bull-Dog Sauce did, the Allotment of Rights without Consideration is not grossly unfair. The reasons for this are as follows.

The Allotment of Rights without Consideration was considered to be in response to the Takeover Bid. It was hastily carried out by changing Bull-Dog Sauce's articles of incorporation. Bull-Dog Sauce had not decided on how it would defend against an unwanted takeover bid in advance, and so there were no plans of its proposals to show beforehand. Certainly, the predictability will increase for those concerned such as shareholders, investors and takeover bidders, if a company decides in advance, before an emergency situation develops, whether it will employ defensive measures, and, if so, what form those defensive measures are likely to take. In fact, it seems that the number of companies who have made such a decision is increasing.

However, the mere fact that the defensive measures were relatively hastily drawn up without a prior plan is not a reason in and of itself to disallow them. Rather, consideration is given to the fact that the Takeover Bid was suddenly announced, with the result being that a real possibility of Steel Partners acquiring a controlling share of Bull-Dog Sauce arose, and also that at the shareholders' meeting it was overwhelmingly decided that the Allotment of Rights without Consideration, even allowing for the expenditure it would involve in paying to Steel Partners' Associates, was a necessary step to safeguard Bull-Dog Sauce's corporate value and the interests of the company and its shareholders in an urgent and dangerous situation. Finally, it is recognised that Steel Partners would be provided appropriate consideration for its inability to exercise the Rights, and this, together with the previous factors, leads to the conclusion that the Allotment of Rights without Consideration is not grossly unfair.

In general, if an allotment of rights to purchase new shares without consideration, which prima facie treats shareholders differently, is adopted not to maintain the corporate value and safeguard the interests of the shareholders, but primarily to maintain the controlling power of directors and other management or of specific shareholders, such an allotment would in principle be considered grossly unfair. However, the above judgment clearly lays out that the Allotment of Rights without Consideration does not belong to this category.

III. COMMENT

The Company Code includes the principle of equality of shareholders, which states that companies must treat shareholders equally in accordance with the nature and number of shares they have (Art. 109, Para. 1). In the present case, an allotment of rights to purchase new shares without consideration was enacted as a defensive measure to a hostile takeover. That defensive measure had clauses that treated the hostile takeover bidders and other shareholders differently. Further, the court held that the principle of equality would apply to the Allotment of Rights without Consideration.

An important aspect of this case is the court's decision that where the acquisition of controlling power by a specific shareholder is found to be contrary to the interests of the company and its shareholders, measures are deemed to be congruent with the principle of shareholder equality if such measures conform to the principle of balance and are reasonable.[7] Another important note is that the Court stated that it would treat the decisions of shareholders' meetings with a high degree of respect.[8] Specifically, the final say in whether a takeover by a particular bidder would damage corporate value and be contrary to the interests of the company and its shareholders should be left to the shareholders themselves. Provided there is no reason to dismiss the shareholders' decision (such as false information), the shareholders' decision should not be overturned.

In this case the particular facts were that Steel Partners, while attempting to gain all the outstanding shares of Bull-Dog Sauce, did not produce management plans for running the company post-acquisition. Even though the defensive measures of Bull-Dog Sauce resulted in a substantial decrease in the relative shareholding of Steel Partners' Associates', it made an allowance to compensate Steel Partners' Associates for the loss of such relative share value. Therefore, a question as to whether the defensive measures taken by Bull-Dog Sauce are against the principle of equality of shareholders would arise in a case where the court found that a hostile takeover bidder had concrete plans for management and showed such plans to the target company and its shareholders.[9]

If the issuance of rights to purchase new shares is grossly unfair and likely to be detrimental to shareholders, such shareholders can demand the company suspend the issuance (Art. 247, Para. 2, Code). But in the case of allotting rights without consideration, there are no provisions clearly providing that shareholders are allowed to demand

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7 M. YANAGA, *Buru-doggu sôsu jiken no igi to nokosareta kadai* [The Decision of the Bull-Dog Sauce Case: Its Significance and the Remaining Problems] in: Bijinesu Hômu, December Issue (2007) 44.

8 M. YANAGA, *supra* note 7, 44. For discussion on the appropriateness of decisions made by shareholders' meetings as to whether to take defensive measures, see, W. TANAKA, *Buru-doggu sôsu jiken no hôteki kentô (ge)* [A Legal Analysis on the Bull-Dog Sauce Case (II)], in: Shôji Hômu 1810 (2007) 15; M. NAKAHIGASHI, *Buru-doggu sôsu jiken to kabunushi sôkai no handan no sonchô* [The Bull-Dog Sauce Case and the Value of Decisions of Shareholders' Meetings], in: Jurisuto 1346 (2007) 17.

9 M. YANAGA, *supra* note 7, 45.

the suspension of the issuance of the rights (see Art. 277 and subsequent Articles). However, it was held that Art. 247 of the Code can be applied using analogous interpretation. [10]

In this case, the court held that the Allotment of Rights without Consideration was not grossly unfair when looked at in terms of the equality of shareholders.

In the present case the Allotment of Rights without Consideration was carried out hastily, to prepare for Steel Partners' Takeover Bid. Bull-Dog Sauce had not decided in advance to institute the measures it did in the event of a hostile takeover. The court held that defensive measures generally could be adopted when a bidder announced its intent to acquire controlling power. The court recognised that the Allotment of Rights without Consideration was a measure for an emergency situation, and that Bull-Dog Sauce would provide Steel Partners with an equitable amount of monetary compensation in place of new shares. The court then held that even though the defensive measures in question were not decided in advance but hastily drawn up, they were not grossly unfair. Therefore, according to the court, these kinds of defensive measures are allowed in emergency situations. However where an allotment of rights without consideration is taken to maintain the power of directors engaged in management, or specific shareholders who support management, the allotment would generally be considered grossly unfair, and would not be allowed.

In sum, according to the court, whether allotments of Rights without consideration that prima facie treat shareholders differently should be allowed as defensive measures in emergency situations depends on whether they breach the principle of equality of shareholders. Such defensive measures will not necessarily breach the principle, as was shown in this case where the different treatment of shareholders was tolerated. However, according to the judgment, if a takeover bidder is found to genuinely intend to participate in management of the company post-acquisition, the issue of whether monetary compensation is allowed as part of a defensive measure will be raised. The court also considers that shareholders' decisions constitute an important source for use in judgments.

Defensive measures taken not for the interests of the company and the body of shareholders, but only for protecting the interests of the incumbent management will not be allowed. Looking at this through the lens of comparative law, this method of reasoning resembles the German legal concept of equal treatment of shareholders (§ 53 a Aktiengesetz). German law allows the different treatment of shareholders where the interests of the company (*Gesellschaftsinteresse*) justify both the purpose and method of the discriminatory treatment (*die Lehre vom sachlichen Grund*).[11]

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10 W. TANAKA, *Buru-doggu sôsu jiken no hôteki kentô (jô)* [A Legal Analysis on the Bull-Dog Sauce Case (I)], in : Shôji Hômu 1809 (2007) 7.

11 D. VERSE, Der Gleichbehandlungsgrundsatz im Recht der Kapitalgesellschaften [The Principle of Equal Treatment in Corporate Law] (2006) 252 et seq; H. WIEDEMANN, Minder-

IV. CONCLUSION

Hostile takeovers are already considered day-to-day business in Japan. To date, there have been many attempts at hostile takeovers by foreign investment funds.[12] In Japan, companies have begun to take defensive measures that treat hostile takeover bidders and normal shareholders differently.[13] However, many listed companies have taken defensive measures before an actual takeover bidder emerges. These defensive measures give prior warning that various rights to purchase new shares or the allotment of such rights without consideration will be carried out in the event of a takeover attempt that does not conform to the rules set out by target companies.[14]

Whether defensive measures are allowed, as per the Bull-Dog Sauce case, should be decided based on protecting the interests of the company and its shareholders as a whole. Defensive measures that merely seek to maintain the controlling power of the incumbent management should not be allowed. In the present case, the hostile takeover bidder was a foreign investment fund, and the court allowed the defensive measures taken. Rational defensive measures should be allowed. However, Japanese shareholders and companies should not overreact to takeovers of Japanese companies by foreign investors, and irrational defensive policies should not be adopted. Japanese shareholders and companies should not shut foreign investors out of the Japanese takeover market.

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heitsrechte ernstgenommen [Rights of the Minority Taken Seriously] in: ZGR 28(6) (1999) 857 et seq.; BGHZ 71, 44 (*Kali und Salz*).

12 For example, as of 12 June 2007, Steel Partners have acquired large blocks of shares in; Sapporo Holdings, 17.96 percent; Nisshin Food Products, 13.67 percent; Citizen Holdings, 11.57 percent; Yushiro Chemical Industry, 13.69 percent; Aderans, 24.69 percent. Nihon Keizai Shimbun, 13 June 2007.

13 W. TANAKA, *supra* note 10, 7. See, K. TAKEI et al, *Nihon ni okeru heiji dônyû-gata baishû bôei-saku no hyôjun-kei: "Jôken-gata wakuchin puran" no sekkei-sho* – [A Model of Defensive Measures adopted in Time of Peace in Japan: "A Design of the Conditional Vaccine Plan"], in: K. Takei / R. Nakayama, *Kigyô Baishû Bôei Senryaku II* [Defense Strategy For Corporate Takeovers II] (Shôji Hômu, 2006) 45.

14 W. TANAKA, *supra* note 10, 7.

ZUSAMMENFASSUNG

Die Entscheidungen in dem Fall „Bull-Dog Sauce“ *vom Juni 2007 stellen einen wichtigen Schritt in der Entwicklung des Übernahmerechts in Japan dar. Das Distriktgericht Tokyo hatte über die Rechtmäßigkeit von Abwehrmaßnahmen einer börsennotierten japanischen Gesellschaft* (Bull-Dog Sauce) *gegen einen feindlichen Übernahmeversuch durch einen US-amerikanischen Investmentfond zu entscheiden. Die Entscheidung wurde später vom Obersten Gerichtshof bestätigt. Die Zielgesellschaft hatte sich zur Einleitung von Verteidigungsstrategien entschieden, nachdem der Bieter nicht zu erkennen gegeben hatte, was seine künftigen Pläne für die Gesellschaft waren und insbesondere wie er deren geschäftliche Aktivitäten verbessern wollte. Die Verteidigungsmaßnahmen bestanden im wesentlichen in der Ausgabe von Bezugsrechten, die die Inhaber einer Aktie berechtigten, drei weitere zu beziehen, ohne daß sie dafür eine Gegenleistung erbringen mußten. Das Angebot galt für alle Aktionäre mit Ausnahme des feindlichen Bieters. Die Gesellschaft verpflichtete sich statt dessen, an diesen einen finanziellen Ausgleich zu zahlen, um ihn für den Bezugsrechtsausschluß zu entschädigen.*

Das Distriktgericht stellte zunächst fest, daß derartige Maßnahmen nur dann gerechtfertigt seien, wenn sie weder den Gleichbehandlungsgrundsatz der Aktionäre verletzten noch in anderer Weise grob mißbräuchlich seien. Das Gericht stellte sodann fest, daß immer dann, wenn ein feindlicher Übernahmeversuch die Interessen der Aktionäre gefährde, Verteidigungsmaßnahmen, die ausgeglichen und vernünftig konzipiert seien, keine Verletzung des Gleichbehandlungsgrundsatzes der Aktionäre darstellten. Besondere Bedeutung maß das Gericht der Tatsache zu, daß die Hauptversammlung mit überwiegender Mehrheit eine Gefährdung der Interessen der Gesellschaft angenommen hatte und deshalb den Verteidigungsmaßnahmen zugestimmt hatte. Mit Blick auf die finanzielle Entschädigung des Bieters hielt das Gericht die Maßnahme auch für angemessen. Grundsätzlich betonte das Gericht ferner, daß in Notsituationen Verteidigungsmaßnahmen in aller Regel dann nicht grob unangemessen seien, wenn sie zum Schutze der Interessen der Gesellschaft und nicht lediglich zum Schutz der amtierenden Verwaltung in die Wege geleitet würden. Entsprechend hielt es die Maßnahmen für rechtmäßig und wies sämtliche Ansprüche des Bieters ab.

(dt. Übersetzung durch die Red.)