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Going-private and the Role of Courts: A Comparison of Delaware and Japan

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Thank you for introducing me. It is a great honor to speak before such honorable guests from the US, UK and China.

My presentation is titled as a "going-private" transaction. In the broadest sense, this term means a 100% acquisition of a publicly-traded firm by a private firm.[1] This presentation, however, will focus on one category of going-private transactions: *management buyouts* (MBOs), that is, transactions in which top-managers of target companies participate as (one of) acquirers. They have appeared recently in Japan, and some of them have been disputed in courts. I will introduce two Japanese MBO cases (*Rex Holdings*[2] and *CYBIRD Holdings*[3]), and also discuss one Delaware case, *In re Emerging Communications, Inc.*,[4] which was decided by our honorable guest, Justice Jack Jacobs. *Emerging Communications* is a lower court decision and does not establish a new law. Still, this case is informative because it shows us how courts can do to scrutinize potentially abusive transactions.

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[1] *See, e.g.,* Robert P. Bartlett III, *Going Private but Staying Public: Reexamining the Effect of Sarbanes-Oxley on Firms' Going-private Decisions*, 76 U. CHI. L. REV. 7, 8 (2009).

[2] Rex Holdings Co. v. Anonym, 1326 KINYŪ SHŌJI 35 (Sup. Ct., May 29, 2009).

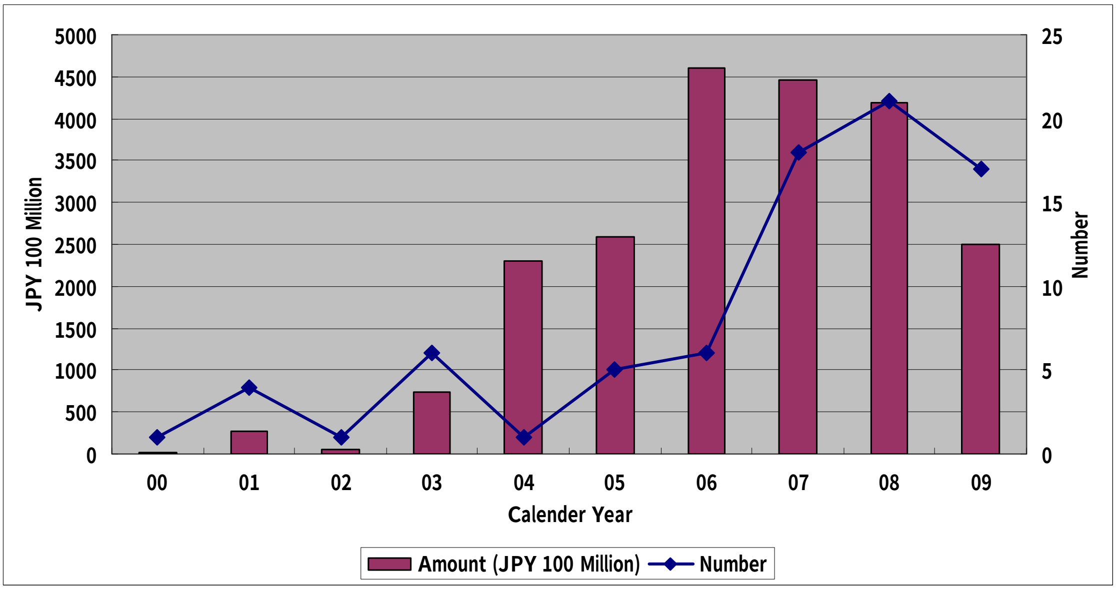
[3] Anonym v. CYBIRD Holdings Co., 1329 KINYŪ SHŌJI 45 (Tokyo Dist. Ct., Sep.18, 2009).

[4] *In re* Emerging Communications, Inc., S'holders Litig., 2004 Del. Ch. LEXIS 70 (Del. Ch., May 3, 2004), *judgment entered by* In re Emerging Communications, Inc., S'holders Litig., 2006 Del. Ch. LEXIS 25 (Del. Ch., Jan. 9, 2006).

Economic and Legal Background

Before analyzing cases, let me explain some background. Management buyouts, or more generally, going-private transactions are rather recent phenomena in Japan. As Figure 1 shows, many of them took place as recently as late 2000s, after the company law reform prepared procedures for minority cash-out (freeze-out).[5]

Figure 1: Going-private of Public Corporations in Japan (2000-09)



Source: Nihon baiauto kenkyujo [Japan Buy-out Research Corporation], *Nihon baiauto shijo nenkan – 2009 nen shimo hanki ban* – [Japanese Buyout Market Yearbook: Second-half of 2009 Edition], 2010, p.15. "Going-private" transactions are defined as "buying out public corporations with a tender-offer bid by Special Purpose Companies [SPCs], followed by delisting of shares" (id. at 8).

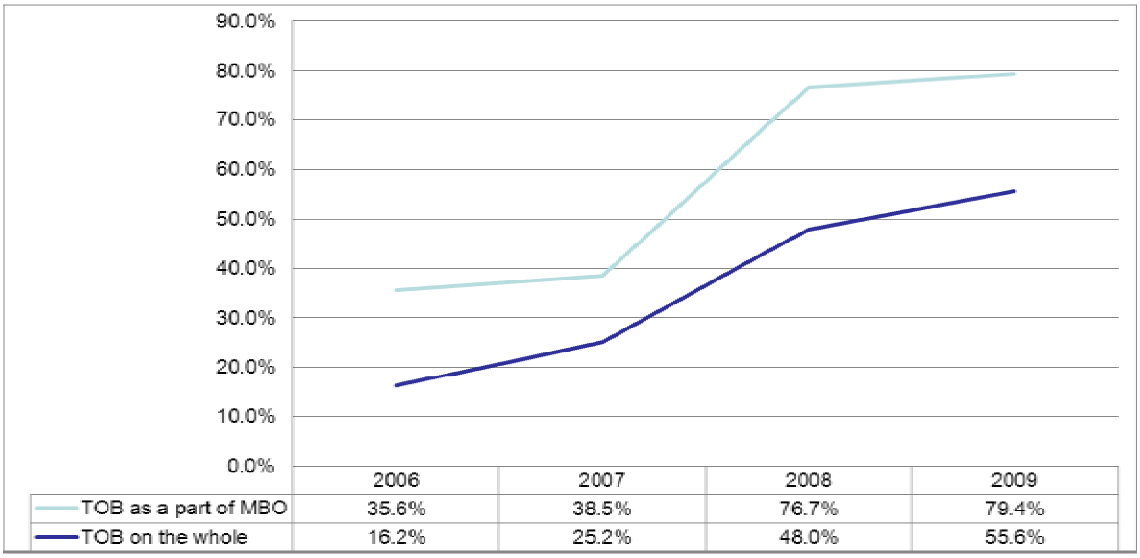
There are both positive and negative views of management buyouts. According to the positive view, MBOs can mitigate the problems of information asymmetry between shareholders and managers. Since share ownership is concentrated in the hands of managers and small number of investors who are familiar with businesses of their company, this view goes, managers can conduct bold restructuring without two much

[5] Companies Act of Japan (*kaisha ho*), Act No. 86, July 26, 2005, which took effect in May 2006, has legalized cash-out mergers and other types of reorganizations in which shareholders are paid cash or any other types of assets. *See* Companies Act Arts. 749(1)(ii) & 768(1)(ii). The act has also authorized a company to issue a special type of shares named "Wholly Callable Shares," which also can be used to cash out minority shareholders. *See infra* note 11.

concern of short-term profit, and sophisticated shareholders can monitor managers' behavior effectively. Those critical of MBOs, on the other hand, claim that mangers have strong incentives to buy shares at a low price and deprive current shareholders of future profit opportunities.[6]

In fact, shareholders of target companies of tender offer bids (TOBs) conducted as a part of MBOs have enjoyed on average *larger* profit (in terms of premiums over market prices) than the other TOBs, according to a recent survey (see Figure 2)[7]. This statistics is not a determinative proof that MBOs are generally beneficial to shareholders, since managers may have launched MBOs at the very time the stock market underestimated the value of target companies. Still, this result is consistent with the positive view of MBOs, and supports the policy that the law should take a selective approach – that is, the law should not categorically ban or discourage MBOs, but should regulate only abusive ones. Such a policy is now generally taken in Japan (as well as in the U.S.), and I basically agree with this approach.

Figure 2: TOB premiums over average market prices during the period of three months before the TOB announcement in 2006-2009



Source: Kunihiko Arai, "*2009 nen TOB no baishu puremiamu bunseki* [Analysis of TOB premiums in 2009]," 1241 JUNKAN KEIRI JOHO 58, fig.9 (2010)

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6 On pros and cons of MBOs, *see* RONALD J. GILSON & BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS, chap.11 (2nd ed., 1995 & 2003-04 Supp.).

7 For another survey suggesting sharehodlers of target companies in MBOs enjoy higher premiums than in other TOBs, *see* Yuko Yoshitomi, *MBO ni yoru hijojoka no doko (2)* [Real State of Going-private by MBOs, no.2], MARR Oct. 2010, at p.7, Fig.3 (2010).

Now let me turn to the legal structure. Perhaps the most prominent feature of Japanese law concerning going-private transactions is the lack of law -- at least if we compare it with American law. In Delaware and many other states, directors who decide to place their company on "sale" have the duty to seek the best value reasonably available to shareholders – so called *Revlon* duty.[8] In Japan, there is no clear statute or case-law recognizing directors have *Revlon*-like duty – or actually, *any* duty to shareholders. Companies Act provides that directors owe duty of care and loyalty to their *companies*,[9] but it does not say anything about what kind of duty (if any) they have to *shareholders*.[10]

Another relevant legal rule is a duty of controlling shareholders. A management buyout in Japan is usually conducted through a two-step acquisition – a tender offer bid (TOB) at the first stage and then minority cash-out[11] at the second stage – rather than through a one-step cash-out merger. (This is partly because of tax consideration.[12]) Thus, at the second stage of a management buyout there is always a transaction between a controlling shareholder and the company, so the duty of controlling shareholders is of concern. However, Japan has no statute or case-law clearly recognizing that a controlling shareholder owes fiduciary duty to the company or its minority shareholders. This does not mean controlling shareholders face no risk of liability. They may be liable for torts or based on some special statutory provisions.[13] Still, legal standard to

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8 *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985); Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 48 (Del. 1994).

9 Companies Act Art. 355.

10 Several lower court decisions have said, though in dicta, "directors are in a fiduciary relationship with shareholders who are owners of the company" (NIRECO Corp. v. SFP Value Realization Master Fund Ltd., 1735 SHŌJI HŌMU 48, 56 (Tokyo High Ct., June 15, 2005)), or "managers owe the shareholders a duty of care to promote their interests" (Anonym v. SUNSTAR Inc., 1326 KINYŪ SHŌJI 20, 25 (Osaka High Ct., Sep. 1, 2009)).

11 Minority cash-out in Japan is typically conducted by the charter amendment, for which a two-thirds majority vote is required, *see* Companies Act Arts. 466 & 309(2)(xi)), thereby turning the outstanding shares into a special type of shares named "Wholly Callable Shares(*zenbu shutoku jōkō tsuki shurui kabushiki*)," and immediately after that, calling these shares and distributing cash to minority shareholders. *See* Companies Act Arts. 108(1)(vii), 171-173, 234(1)(ii). *See infra* note 22 and the accompanying text.

12 One-step acquisition by a cash-out merger or share exchange (*kabushiki kōkan*) often suffers from disadvantageous tax treatment. In particular, the acquired company is required to reevaluate its assets and taxed on its built-in gain. *See* Corporation Tax Act Art. 62-9.

13 For example, controlling shareholders may be liable based on Company Act Art.120 [prohibiting companies from "giving benefits on exercise of shareholders' rights"].

scrutinize a conduct of controlling shareholders is generally underdeveloped.[14]

Also important is a procedural rule. Japan has no class action system. We do have a system of derivative suits, but a derivative suit can be used only to recover damage to the *company*,[15] and generally cannot be used as a remedy for minority shareholders who have been cashed out at unfairly low prices. This effectively means that remedies for dissenting shareholders in a going-private transaction are limited to statutory appraisal rights.[16] Even worse for dissenting shareholders, the appraisal proceeding lacks a procedure to force parties to submit any documentary evidence to courts.[17]

Our foreign guests may be surprised at how underdeveloped Japanese law is. What is more surprising is, in my opinion, that Japan has developed its capital market and its entire economy without paying much cost of legal intervention to protect shareholders' interests. Indeed, if financial economists had advocated "Law Matters" hypothesis before 1990,[18] we could have used Japan's success to rebut their argument and push for an alternative "Law Doesn't Matter," or "Less Is More," hypothesis. Unfortunately, such a claim now appears weaker considering stagnant Japanese economy these twenty years. Now we face a difficult policy question, however: Is it necessary to pay more cost of legal intervention to protect shareholders' interests for future development of our capital market? Will stronger intervention provide benefit overwhelming the cost? Today's topic I am now discussing is just one part of such a

[14] In particular, there is no statute or case-law recognizing the principle that, in a transaction between a company and its controlling shareholder, the controlling shareholder generally has the burden of proof to show the transaction is fair. *Compare* with Delaware law; Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); Kahn v. Lynch Communications Systems, Inc., 638 A.2d 1210 (Del. 1994).

[15] *See* Companies Act Art. 847.

[16] *See* Companies Act Arts. 172, 785-786, 806-807.

[17] Civil Procedure Act of Japan provides that a court may order a party to submit documents in general circumstances (Civil Procedure Act Art. 223), and in case the party does not comply with the order, the court may recognize that the opponent's allegations concerning the statements in the document are true (*id.* Art. 224). Peculiarly, however, those provisions are not applied in the appraisal proceeding, which is characterized as a "non-contentious case (*hishō jiken*)" in Japanese law. *See* Non-Contentious Cases Procedures Act Art. 10.

[18] *See, e.g.,* Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Rafael L Porta et al., *Law and Finance*. 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Investor Protection and Corporate Valuation*. 57 J. FIN. 1147 (2002). *Cf.* Holger Spamann, *The 'Antidirector Rights Index' Revisited*, 23 Rev. Fin. Stud. 467 (2010).

larger policy debate, and I will return to the general policy matter at the end of my presentation.

For now, let me turn to specific topics of management buyouts. When such transactions appeared and some criticism arose against them, there were regulatory and practical responses. The TOB rule was revised in 2006 to tighten the disclosure requirement in going-private transactions.[19] In 2007, the Corporate Value Study Group set up by Ministry of Economy, Trade and Industry published "MBO Report" to advocate best practices to assure management buyouts to be conducted in a way fair to shareholders.[20]

These responses, however, do not directly establish legal standards to examine directors' behavior in MBOs, nor do they solve the problem how the "fair price" should be determined in the appraisal proceeding. These matters must be decided by courts, so I now discuss how courts have tackled with these problems.

Rex Holdings

The first case is *Rex Holdings*, which occurred in 2006 and legal dispute continued up to the decision by the Supreme Court of Japan.[21] Rex Holdings (Rex) was a JASDAQ-listed company and was acquired by a Special Purpose Company (SPC) having been set up by Rex's president and representative director, Mr. Nishiyama, and a private equity fund named Advantage Partners. Like most MBOs in Japan, this transaction was a two-step acquisition. First the SPC launched a TOB to all the shareholders of Rex and acquired over 90% of the outstanding shares. Then the acquirer cashed out remaining minority shareholders by the procedure using "Wholly Callable Shares."[22] In short, this procedure enables the company to acquire all the shares of its minority shareholders by a special resolution (a two-thirds majority vote) of the shareholders' meeting.[23] Against this resolution, more than one hundred dissenting

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[19] *See* Cabinet Office Ordinance on Tender Offer for Share Certificates, etc. by Person Other Than Issuer, Form 2, notes (6)f & (25).

[20] KIGYO KACHI KENKYU KAI [The Corporate Value Study Group], KIGYO KACHI NO KOJO OYOBI KOSEI NA TETSUZUKI KAKUHO NO TAMENO KEIEISHA NIYORU KIGYO BAISHU (MBO) NI KANSURU HOKOKUSHO [Study Report on Management Buyouts (MBOs): To Enhance Corporate Value and Ensure Fair Dealing] (Aug. 2, 2007), *available at* http://www.meti.go.jp/press/20070802008/20070802008.htm [hereinafter MBO Report].

[21] Rex Holdings Co. Ltd. v. Anonym, 1326 KIN'YŪ SHŌJI 35 (Sup. Ct., May 29, 2009).

[22] *See supra* note 11.

[23] *See supra* note 11 and the accompanying text.

shareholders of Rex applied to the court for appraisal of their shares.[24]

Rex Holdings was among the earliest MBOs, having taken place before the Corporate Value Study Group published "MBO Report,"[25] so the company took few measures MBO Report recommended to avoid the problem of conflict of interests. The acquisition price was ¥230,000 per share, adding 13.9% premium to the average of market prices during one month before the date of TOB announcement. This premium was itself small (see Figure 2 on the average takeover premium), and even worse, Rex had revised its forecast of annual income downward about three months before the TOB announcement, having caused a sharp decline of its share prices. If we took an average of market prices during the period of six months (instead of one month) before the TOB announcement, it turned out to be ¥280,805, which was higher than the acquisition price.

Rex had no outside directors, nor did it set up a special committee to scrutinize the transaction, nor did it get a fairness opinion. Instead, it obtained a " share valuation report " from a third party consulting company, but in the appraisal proceeding, Rex only submitted to the court a " summary " of the report and refused to disclose its detailed analysis and the information of cash-flow projections based on the business plan of the Rex's management.[26]

Finally, the announcement of the TOB disclosed the plan of the second-stage cash-out transaction, and stated the price to be paid to minority shareholders "may be different from the TOB price."[27] In fact, such a representation is seen in many TOB announcements in Japan and today's participants on the floor coming from Japanese law firms would claim that it has no malicious intention and only has a purpose of dealing with very unusual circumstances – such as, a big earthquake may attack Tokyo and destroy all the assets of the target company. And, despite such a statement, it appears that Rex paid minority shareholders the same price as the TOB price (¥230,000) in the second-stage cash-out transaction.[28] Rex Holdings case, however, was among the earliest cases of management buyouts with minority cash-out using Wholly

[24] *See* Companies Act Art. 172(1)(giving dissenting shareholders appraisal rights).
[25] *See supra* note 20 and the accompanying text.
[26] There is no statutory provision authorizing the court to order the party to submit any documentary evidence in the appraisal proceeding. *See supra* note 17 and the accompanying text.
[27] *See* AP8 Co. Ltd., Tender Offer Notification, Chap.1, sec.3 (Nov. 13, 2006), *available at* EDINET: http://info.edinet-fsa.go.jp
[28] I know no MBO transaction in which the price paid to minority shareholders at the second-stage cash-out transaction is really set at the lower price than the first-stage TOB price.

Callable Shares, so public investors had had little experience of being cashed out by a two-step acquisition. In such a circumstance, Rex's shareholders who read the TOB announcement may well have really worried that, if they did not tender their shares, then they would be treated even worse after the acquirer took the control of Rex. In other words, the TOB arguably had some "coercive" nature.[29]

Let me explain in brief how courts decided this case. Tokyo District Court appraised the shares of dissenting shareholders at ¥230,000 per share.[30] In other words, the court recognized the actual acquisition price as a "fair" price of Rex's share. On appeal of shareholders, however, Tokyo High Court reappraised the share at ¥336,966.[31] In particular, the high court found problematic the way in which Rex had announced the revision of its annual income forecast just one month before the TOB announcement. Although the revision itself was in accord with the generally accepted accounting principle, Rex's management disclosed only negative information without disclosing positive one -- especially the information that the management was planning MBO and restructuring of Rex's businesses thereafter. Thus, according to the court, the stock market could have been reacted too pessimistically.[32] The court also criticized that Rex refused to submit the detailed analysis of the share valuation report and its cash-flow predictions, making it difficult for the court to appraise the fair value of Rex's share.[33]

Taking above facts into consideration, Tokyo High Court appraised fair value of Rex's share by taking an average of market prices during six months before the TOB announcement (¥280,805) and adding 20% premium to it.[34] This calculative method was very rough, of course, but the court justified its approach by the fact Rex failed to submit enough information for the court to conduct more elaborate valuation.[35] Rex appealed, but the Supreme Court affirmed the decision of Tokyo High Court.[36]

Although the decisions of Tokyo High Court and the Supreme Court are sometimes criticized as discouraging even value-creating MBOs,[37] I basically agree with the

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29 One justice of the Supreme Court, Mutsuo Tahara, did say in his concurring opinion in *Rex Holdings* that the TOB announcement used some expressions potentially having "coercive effects," *Rex Holdings*, 1326 KIN'YŪ SHŌJI at 36 (J. Tahara), though the expressions he pointed out were somewhat different from what I mention in the text.

30 Anonym v. Rex Holdings Co., 1283 KIN'YŪ SHŌJI 22 (Tokyo Dist. Ct., Dec. 19, 2007).

31 Anonym v. Rex Holdings Co., 1301 KIN'YŪ SHŌJI 28 (Tokyo High Ct., Sep. 19, 2008).

32 *Id.* at 35-36.

33 *Id.* at 39.

34 The court determined 20% as an appropriate amount of premium based on past MBOs and other TOBs conducted in Japan. *Id.* at 39.

35 *Id.*

36 Rex Holdings Co. v. Anonym, 1326 KIN'YŪ SHŌJI 35 (Sup. Ct., May 29, 2009).

37 *See, e.g.,* Yo Ota, *Rekkusu hoorudingusu jiken tokyo kosai kettei no kento* [Examination of the Decision of Tokyo High Court in Rex Holdings Case], 1848 SHŌJI

opinion of both courts. They effectively sent a message to practitioners in the M&A market that a management buyout is a conflict-of-interests transaction, so it is the company (and its managers), not dissenting shareholders, who should have a burden of proof to show that the dealing and the actual acquisition price were fair to shareholders.

CYBIRD Holdings

Next case is *CYBIRD Holdings*, which occurred in 2007 and decided by Tokyo District Court in June 2009[38] – four months after the Supreme Court's decision of *Rex Holdings*. Facts of *CYBIRD Holdings* are somewhat similar to *Rex Holdings*. It was a buyout of a JASDAQ-listed company (CYBIRD) by a special purpose company (the acquiring company), in which the top manager of CYBIRD, Mr. Hori, and a private equity fund named Longreach Group would participate. It was a two-step acquisition, first the TOB and secondly minority cash-out using Wholly Callable Shares, and dissenting shareholders applied to the court for appraisal of their shares. Also like *Rex Holdings*, CYBIRD had revised downward the forecast of its annual income before the TOB announcement.[39]

Tokyo District Court again decided that the actual acquisition price, ¥60,000 per share, is a "fair" price of a CYBIRD's share.[40] But the opinion was much more carefully reasoned than the decision of Tokyo District Court in *Rex Holdings*. The court said that the "fair" price of the share should be determined taking the whole process of the dealing into account. More particularly, the court examined such matters as "whether the MBO was conducted in a way similar to the transaction between independent parties," and "whether it reached to an agreement through the negotiation with the reasonable ground based on the evaluation of third parties."[41]

The court found that CYBIRD had set up a "third-party committee" consisting of two outside directors and two outside experts in order to "discuss and negotiate" with the acquirer, and employed an independent financial adviser and a legal advisor.[42] In addition, the court emphasized that CYBIRD's top manager, Mr. Hori, who would participate in the acquiring company which would acquire the whole share of CYBIRD,

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HŌMU 4 (2008).

[38] Anonym v. CYBIRD Holdings Co., 1329 KIN'YŪ SHŌJI 45 (Tokyo Dist. Ct., Sep.18, 2009).

[39] *See id.* at 49.

[40] *See id.* at 63.

[41] *See id.* at 59.

[42] *See id.* at 60-61.

actually had already had about 10% of CYBIRD's share before the acquisition.[43] After the acquisition, his shareholding in the acquiring company (so indirectly in CYBIRD) would be slightly less than 8%, and most of the other shares would be held by Longreach Group.[44] Therefore, in the court's opinion, Mr. Hori stood more as a seller than as a buyer in this transaction. The court also found that he had indeed vigorously negotiated with Longreach Group in order to raise the acquisition price.[45]

Taking all these facts into consideration, the court approved the actual acquisition price as "fair."[46] Shareholders appealed and the case is now being reviewed at Tokyo High Court.

The decision of *CYBIRD Holdings* is carefully reasoned and I agree with the court's general opinion that we should examine the process of the MBO transaction and, if the process is fair, we can basically regard the actual acquisition price as a "fair" price. Still, several questionable points can be mentioned. First, although Mr. Hori's shareholding in CYBIRD would decrease after the acquisition, he would be given call options for the share of the acquiring company according to the MBO contract between Mr. Hori and Longreach group. These options would give Mr. Hori another 8% of share (including 5% of stock options) in CYBIRD at the maxim.[47] Thus, we might be able to say, in contrast to the court's opinion, Mr. Hori had more interest as a buyer than as a seller in this transaction. Anyway, since the manager and the private-equity fund can make various arrangements on the managers' remuneration after the MBO, it might be misleading just to compare the sizes of shareholdings by the manager before and after the acquisition.

Another questionable point is that, while the court finds the "third-party committee" was set up, it does not find any facts concerning how the committee really worked. The committee was set up on Oct 18, 2007, *after* Mr. Hori and Longreach Group had reached an agreement on the acquisition price (i.e., ¥60,000), and it approved the transaction on Oct 30.[48] I do not mean twelve days are necessarily short. If the committee discussed and negotiated eight hours every day, then twelve days would be more than enough. But the court does not find any facts about how many times the committee met, how long they discussed each session, and what kind of negotiation they did with the acquirer.

Finally, while the court finds CYBIRD employed a financial adviser (one auditing

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[43] *See id.* at 50.
[44] *See id.* at 61.
[45] *See id.* at 60.
[46] *See id.* at 63.
[47] *See id.* at 50.
[48] *See id.* at 60-61.

firm), it does not find any facts about how it worked. The firm was also employed on Oct 18, and we do not even know whether it made any written opinion. -- The court does not find any fact on that. On the other hand, the acquiring company employed its own financial adviser (one securities company) and obtained the share valuation report by it. Like *Rex Holdings* case, however, only the summary of the report is disclosed and CYBIRD refuses to submit to the court the projections of future cash-flows by the management, based on which the share valuation report was presumably written.[49]

My questions can be summarized as follows: how thoroughly should the court scrutinizes the transaction before it determines the dealing was "fair"? With this respect, I would like to introduce one Delaware case: *Emerging Communications*.[50]

Emerging Communications

This case was on a going private transaction of a publicly-traded corporation named Emerging Communications (EMC), which was totally acquired by Mr. Prosser, EMC' Chairman and Chief Executive Officer and also its controlling shareholder.[51] Market prices of EMC's share ranged from a high of $8.9375 to a low of $6.25 before the acquisition,[52] whereas the acquisition price was $10.25.[53] In the appraisal proceeding, however, the court decided that the fair price was $38.05.[54]

In this transaction, a committee consisting of three independent directors ("the Special Committee") was set up to negotiate with Mr. Prosser with the advice of its own financial adviser.[55] The Special Committee did achieve improvement of the condition of the acquisition. Through the negotiation between one member of the Committee and Prosser, acquisition price increased from $9.125 (which was Prosser's initial offer) to $10.25.[56]

According to the court, however, the dealing was seriously flawed. In March of 1998 (the year the acquisition took place), Mr. Prosser ordered EMC's Chief Financial Offier to make projections of future cash-flows (" March projections ") and disclosed them to the

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49 *See id.* at 60.
50 *In re* Emerging Communications, Inc., S'holders Litig., 2004 Del. Ch. LEXIS 70 (Del. Ch., May 3, 2004), *judgment entered by* In re Emerging Communications, Inc., S'holders Litig., 2006 Del. Ch. LEXIS 25 (Del. Ch., Jan. 9, 2006).
51 *Emmerging Communications*, 2004 Del. Ch. LEXIS 70, at *2-*6.
52 *See id.* at *18 n.7.
53 *See id.* at *2.
54 *See id.* at *155.
55 *See id.* at *22-*24.
56 See id. at *27-*31.

financial adviser of the Special Committee.[57] In June, Prosser prepared another, more optimistic projections (" June projections "), but disclosed them only to his own legal adviser, his financial adviser, and his lender (a financial institution providing him the fund for acquisition), not to the Special Committee, its financial adviser, or the ECM board.[58] Prosser's lender assessed EMC's share at $28 based on June predictions,[59] while the Special Committee's financial adviser, based on March projections, wrote its opinion that $10.25 was fair.[60] The court decided that June projections were more reliable,[61] and based on them, it appraised EMC's share at $38.05.[62] The court also found the dealing as well as the actual acquisition price was unfair to ECM's minority shareholders,[63] and held Prosser and some of other directors liable for breach of fiducially duty.[64]

Emerging Communications is arguably a very unusual, even egregious case. For example, since members of the Special Committee communicated with one another through Prosser's secretary, Prosser got an access to the discussion of the Committee.[65] So it may not be easily compared with other, more "normal" management buyout cases. Still, *Emerging Communications* informs us how thoroughly the Delaware court scrutinizes the transaction before it determines whether or not the dealing is "fair." It also brings me a doubt whether the court in *CYBIRD Holdings* made sufficient scrutiny. If – hypothetically – CYBIRD's MBO had problems similar to *Emerging Communications*, could Tokyo District Court find them without scrutinizing the negotiation process between the committee and the acquirer and without reading (let alone examining) the report of financial advisers?

I like to raise one more related question. Practitioners in Japan often show a concern that requirement to submit to the court the projections of future cash-flows based on the management's business plan would have negative effects, such as a leakage of a secret business plan and/or giving managers an incentive to make too conservative projections in the first place. Such a concern is reasonable on its face. My

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[57] See id. at *25.
[58] *See id.* at *25-*27.
[59] *See id.* at *25.
[60] *See id.* at *32.
[61] *See id.* at *45.
[62] *See id.* at *81. The court accorded no weight on the market prices of EMC's share because of the small public float, the fact that the stock was not followed by Wall Street analysts, *see id.* at *84, and the fact "the market never had the benefit of any disclosed earnings or projections of future results, including the June Projections." *Id.* at *85.
[63] *See id.* at *137.
[64] *See id.* at *139-*147.
[65] *See id.* at *31 n.27 & *131.

reading of several Delaware cases, however, gives me an impression that Delaware courts require the parties to submit the projections of future cash-flows almost as a matter of course.[66] They don't seem to find any difficulty in doing so. Perhaps the concern of Japanese practitioners may be overstated. But I am not sure on this matter, and would like to discuss with our guests and participants on the floor later in the question/discussion session.

Conclusion

Legal intervention is costly. We must carefully examine whether additional intervention can be expected to produce benefits overwhelming costs. So I never mean to say that Japanese courts are wrong just because Delaware courts do more. Still, now that the company law has been deregulated and the method of minority freeze-out is widely available, we must expect abusive transactions sometimes occur. And the courts' intervention, if properly done, can be helpful to prevent such abuses. Anyway, since going-private transactions have taken place only for ten years in Japan, we are still on the earliest stage of the debate how to regulate them. And I believe we can learn a lot of things from comparative-laws analysis. Thank you very much.

[66] DCF (discounted-cash-flow) method, which is routinely used by Delaware courts in the appraisal proceedings, inevitably needs cash-flow projections. Courts use very detailed, division by division cash-flow projections to appraise shares. *See, e.g.,* Cede & Co. and Cinerama v. Technicolor, Inc., 2003 Del. Ch. LECIS 146, C.A. No.7129, 2003 WL 23104613 (Del. Ch. Dec. 31, 2003), *reversed on other grounds*, CEDE & Co. and Cinerama, Inc. v. Technicolor, 884 A.2d 26 (Del. 2005).