located in the U.S. were to be examined in a court of Japan. The content of (1) corresponds "the nature of the case", (2) "the location of evidence", (3) concerns the predictability of parties, (4) the degree of burden of the side of plaintiff, and (5) means "the degree of burden that the defendant would have to bear in responding to action" (*see* Case Comment, 1424 Hanrei Taimuzu 110, 112 (2016)).

As seen above, the Supreme Court judges whether "special circumstances" can be found or not by considering a variety of circumstances and does not state a standard criterion. Therefore, it is assumed that "special circumstances" are decided according to each individual case.

5. Commercial Law

X et al. v. Y

Supreme Court 1st P.B., July 1, 2016

Case No. 4 (*kyo*), 5 (*kyo*), 6 (*kyo*), 7 (*kyo*), 8 (*kyo*), 9 (*kyo*), 10 (*kyo*), 11 (*kyo*), 12 (*kyo*), 13 (*kyo*), 14 (*kyo*), 15 (*kyo*), 16 (*kyo*), 17 (*kyo*), 18 (*kyo*), 19 (*kyo*), and 20 (*kyo*) of 2016

70 (6) Minshu 1445

Summary:

When majority shareholders squeeze out minority shareholders after a tender offer by using Class Shares subject to Wholly Call, fair compensations to the minority shareholders should be the same amount as the bidding price in the tender offer, as long as the majority shareholders had taken procedures which ensured that the bidding processes were fair, unless there are special circumstances.

Reference:

Companies Act (Act No. 86 of 2005, prior to the revision by Act No. 90 of 2014), Article 172, Paragraph 1.

Facts:

The majority shareholders of defendant Jupiter Telecommunication ("J:COM") who held or controlled over 70% of voting rights of J:COM in sum ("Majority Shareholders") decided to squeeze out minority shareholders. In February 26, 2013, they declared that they would start a tender offer ("the Bid") in February 27 till April 10, the bidding price was set for 123,000 yen per one share, and they would advance squeezing out processes in the terms that compensation would be the same amount as the bidding price of the Bid if there remained some minority shareholders after the Bid.

On the same day, J:COM expressed its opinion in favor of the Bid, in the same manner with opinions they received before which indicated the Bid was not unreasonable from non-interest-conflicted directors, a legal advisory law firm, a financial advisory stock brokerage firm, and a third-party committee.

There remained some minority shareholders ("Minority Shareholders") after the Bid, and the squeezing out process took place on June 28. The process were composed of 4 steps: (1) Amendment of Articles of Incorporation to enable to issue "Class A Shares", which were preferred shares, by shareholder meeting; (2) Changing all outstanding common shares into "Class Shares subject to Wholly Call" ("CSWC"), one type of class shares prescribed in the Companies Act that would be mandatorily bought up by the issuing company in the terms decided by the Resolution of that Class Share Meeting; (3) Purchase of CSWC by J:COM, in the term that all CSWC shareholders (i.e., ex- common shareholders) got 1/694,478 Class A Share in exchange for one CSWC in this case, noting that this ratio was set so that Majority Shareholders (who had had not less than 694,478 ex- common shares) got one or more Class A Shares and all Minority Shareholders (who had had less than 694,478 ex-common shares) got only fractional Class A Shares; (4) Squeezing out of all fractional Class A shareholders, say, all Minority Shareholders, according to the proceeding of the Companies Act, Article 234, in which fractional shareholders lose their fractional shares in exchange for money as compensation (that would be 123,000 yen per 1/694,478 Class A Share, i.e., per one ex- common share in this case).

Some Minority Shareholders, X et al., filed a petition before the court calling for a decision of the fair compensation, based on the Companies Act, Article 172, Paragraph 1. In this proceeding, which must be a non-contentious case, courts only decide the fair compensation to CSWC shareholders who rejected a tender offer, made against the vote in the above steps (1) and (2), and filed a petition, so the one who does not do ought to get the original compensation (123,000 yen per one CSWC in this case).

The 1st trial court decided 130,206 yen per one CSWC as fair compensation in consideration of market fluctuations after the announcement of the Bid. The 2nd trial court affirmed the 1st trial's decision, noting that even though the original compensation was fair at the time of announcement of the Bid, subsequent events allowed the court to revise the compensation.

Opinion:

Quashing and Decision by Final Appellate Court (Final Order)

"In a dealing where [majority] shareholders...make a tender offer and subsequently [squeeze out minority shareholders], there is a conflict of interest between majority shareholders or the company and minority shareholders. However, the bidding price in the offer is supposed to be decided in consideration of [that] conflict properly, if the bidding was implemented in the way that ensured the bidding was fair in general, such as that some measures to prevent decision making process being arbitrary had been taken, like independent third-party committee's or advisory's opinions were taken into consideration, or [compensation to remaining minority shareholders after the offer who would be squeezed out] is declared that it is set equal to the bidding price in the bidding, and so forth. Having done that, the bidding price is assumed to be set in consideration of market general fluctuations that would arise [from the announcement of the bidding to] the acquisition of [CSWC] by the issuing company. In that case, [courts are not allowed to revise the compensation by rejecting the original one in consideration of market fluctuations that had arisen after the announcement of the bidding]. It will be generally an abuse of their discretionary powers by disregarding necessary elements and taking account of improper ones."

"Consequently, in a dealing where majority shareholders squeeze out minority shareholders [by using CSWC], if a tender offer is done based on proceedings that would be accepted as fair in general [as described above], and the issuing company buys [CSWC] at the same price as the bidding price, courts should fix [the compensation to the petitioners in the proceeding of the Companies Act, Article 172, paragraph 1] at the same amount as the bidding price, unless there are special circumstances."

"In this case, [there is no special circumstance, so the fair compensation to the petitioners should be 123,000 yen per one CSWC, the same amount as the bidding price]."

Editorial Note:

In similar cases, lower courts have tended to revise compensation in consideration of market fluctuations from the day of announcement of a tender offer to the day of purchase of CSWC by a company. The remote cause of this tendency is one concurring opinion by Supreme Court Judge Mutsuo Tahara to a judgment by Supreme Court (X v. Y; May 29, 2009, 1326 KINYU SHOJI HANREI 35) which argued that the "fair value" compensation to CSWC shareholders should be calculated basically as the value of the share on the day of purchase, in consideration of synergy distribution, market fluctuations and so forth, if necessary. In this framework, a revision by courts may seem to be permitted to reflect these elements.

Academics have criticized those lower courts' decisions, arguing that revisions can cause opportunistic behaviors of minority shareholders; they may reject a tender offer and make against voting in the squeezing out process detailed above, only hoping that courts allow them more valuable compensation than the bidding price in a bull market, but this may cause the failure of a bid as a whole, regardless of whether or not it is desirable one.

In this case, the Supreme Court indicated that revisions are not allowed as long as bidding processes are deemed to be generally fair, stating that necessary elements, including market fluctuations, are expected to be incorporated already in original bidding prices in a proper way.

This conclusion is by and large supported by academics, though the reasoning is sometimes criticized that it does not exclude a possibility to

justify revisions based on actual fluctuations. Related to this, it is not clear what the special circumstances are in which a revision by courts is allowed. The same is true of the scope of measures which suffice to ensure that the bidding processes were fair.

6. Labor/Social Security Law

X et. al., v. Yamanashi Kenmin Shin-yo Kumiai
Supreme Court 2nd P.B., February 19, 2016
Case No. (*jyu*) 2595 of 2013
70 Minshu 123

Summary:

In the case contested concerning the validity of an unfavorable change of working conditions based on the consent of employees to the modification of the work rules, careful determination should be made as to whether or not a worker has consented to the changes from the perspective of whether reasonable grounds exist objectively for finding that the worker has given consent by his/her own free will, though it is possible to change working conditions by individual agreement (Article 8 and 9 of the Labor Contract Act (LCA)).

Reference:

Article 8 and 9 of LCA

Facts:

1. The appellants (plaintiffs of the first instance, and appellants of the second instance) were employees of A (Credit Union; non-party to the litigation). However, A was merged into the appellee (a defendant of the first instance, and an appellee of the second instance), in 2002, to avoid a bankruptcy. At the merger (hereinafter the first merger), their employment contracts were succeeded to the appellee.

2. On December 19, 2002, the committee on the merger, constituted by