

4. On the premise of the findings explained above, it cannot be found that subsidence had occurred on the sand beach on the north side of the east jetty, near the site of the accident, before the accident occurred, and for this reason, it should be said that there are reasonable grounds for the determination that denied the foreseeability of the occurrence of the accident.

Editorial Note:

There is no discussion in theory and practice about the requirement of foreseeability for the crime of negligence. But when it comes to the degree of foreseeability, the majority of the theories require concrete foreseeability, while the Supreme Court's place is not established. Traditionally there was a sketch of a theory's objection to the Supreme Court's judgement, but in this case the Supreme Court took a different position; because there is no perfect agreement inside the Supreme Court, this decision will be important in the future.

7. Commercial Law

X v. Y

Supreme Court 3rd P. B., May 22, 2009

Case No. (ra) 80 of 2008

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Summary:

In this case, Y issued share classes with the provision to acquire all of its shares for the purpose of a management buyout (MBO) and resolved to acquire them at a shareholder meeting. X, who was Y's shareholder, vetoed the resolution and filed a decision about acquisition price of the share classes. The Tokyo High Court held that the acquisition price per share was 396,966 yen, which consisted of the average share price for six months by the day before November 10, 2006 and expected rising price by the MBO. Y appealed to the Supreme Court against the decision by the Tokyo High Court. The Supreme Court held that the decision by the

Tokyo High Court was legal and dismissed Y's appeal.

Reference:

Art. 172 para. 1 of the Corporation Law

Facts:

Y ("REX HOLDINGS", respondent, appellee, appellant at the court of the last resort) is a stock corporation in Japan (which merged with A (AP8) on September 1, 2007 for the purpose of the management buyout) and managed restaurants, convenience stores, supermarkets and so on by the franchise systems. Y had listed its shares at JASDAQ Security Exchange until they were delisted on April 29, 2007. Y resolved to acquire the share classes with the provision to acquire all of its shares ("the share classes") at a shareholder meeting held on March 28, 2007. X (pleader, appellant, appellee at the court of the last resort), who was Y's shareholder, vetoed the resolution at the meeting and filed a decision about the acquisition price of the share classes (Art. 172 para.1 of the Corporation Law).

Y acquired the share classes as part of the management buyout ("the MBO"). Y announced the takeover bid ("the TOB") on November 10, 2006. The TOB price was 230,000 yen per Y's common share. Y sent out the press release announcing that the TOB was part of the MBO, that Y's board of directors agreed to the TOB, that its price consisted of the simple average share price for a month by the day before November 10, 2006, when Y's common shares were taken over, as well as the premiums (13.9% of the share price), and that the acquisition price of the share classes would be assessed as a standard of the TOB price. Y could own 91.51% of its outstanding shares by the TOB. Then, Y forcibly acquired its shares in order to squeeze out the remaining shareholders, including X.

Y issued the press release on August 21, 2006, and lowered its earnings forecast. Y's share price was 304,000 yen per share on the same day and fell to 254,000 yen on the next day, and 144,000 yen on September 26, 2006. Y's share price rose to 219,000 yen on November 10, 2006 and since then has hovered around 220,000 yen. Furthermore, Y also lowered its earnings forecast on February 16, 2009.

Tokyo District Court held that the objective current value as of the acquisition of Y's shares did not exceed 202,000 yen per share. It also held

that the fair value of Y's share did not exceed 230,000 yen, even if the current value was added to the expected value deprived of by the forcible acquisition of the shares (the premiums). The acquisition price was decided to be 230,000 yen. X appealed to the Tokyo High Court against the decision.

The Tokyo High Court held that the acquisition price of the share stipulated in Art.172 para.1 of the Corporation Law should be interpreted to be a fair value as of the acquisition of the shares and that the court should also assess the expected rising share value. It decided that the simple average share value for certain periods close to the acquisition of the shares should be regarded an objective share value except for the unusual price formation.

The Tokyo High Court held that the periods should not be set shortly to assess the average market share price, considering the movement of share values and the situation of the share trading from the issuance of the press release on August 21, 2006, to the announcement of the TOB, and that the objective share price as of the acquisition should be an average share price for six months by the day before November 10, 2006. It concluded that the objective share price as of the acquisition was 280,805 yen, which was an average share price from May 10, 2006 to November 9, 2006.

Finally, the Tokyo High Court held that the acquisition price per share was 396,966 yen, which consisted of the objective share price as of the acquisition and expected rising price by the MBO (the premiums corresponding to 20% of the objective share price), considering that the average premiums were 27.05% of the TOB price in the MBOs (85 cases) implemented during certain periods close to the MBO in this case, and that Y neither especially showed the concrete basis for the assessment of the premiums nor put forward the business plans and evaluation documents to assess the share price. Y appealed to the Supreme Court against the decision by the Tokyo High Court.

Opinion:

Claim dismissed on the merit.

The Supreme Court held that the decision by the Tokyo High Court was legal. The judge Mutsuo Tahara expressed his supporting opinion as

follows, because this was the first case that the decision about the acquisition price of the share was filed under the Art. 172 para. 1 of the Corporation Law.

The corporation law sets no provision as to what the acquisition price is.

The corporation law stipulates that, when shareholders execute their appraisal right, the acquisition price of the shares is a fair value (Art. 469 para. 1, Art. 785 para. 1, Art. 797 para. 1, Art. 806 para. 1 of the Corporation Law) and the court shall decide the price on the basis of the petition of the parties, if they could not reach an agreement among them (Art. 470 para. 2, Art. 786 para. 2, Art. 798 para. 2, Art. 807 para. 2 of the Corporation Law). These prices decided by the court are generally interpreted as a fair value. The acquisition price (Art. 172 para. 1 of the Corporation Law) also should be considered to be a fair value, because the court shall decide it.

When shareholders file the decision about the acquisition price under each paragraph of Art. 172 of the Corporation Law, the court shall decide a fair price of the shares on the date of the acquisition (Art. 173 para. 1 of the Corporation Law).

The court should decide the acquisition price within a reasonable discretion, considering the purpose of the system to decide the acquisition price. Because this system is to compensate the economic values to the shareholders who object that their shares are forcibly acquired by MBO, the acquisition price should be assessed, combining (1) the values which shareholders could enjoy if the MBO had not been implemented, with (2) the part of the expected rising share value by the MBO which shareholders could naturally enjoy.

Editorial Note:

The corporation law in Japan allows stock corporations to issue the share classes with the provision to acquire all their shares (Art. 108 para. 1 no. 7 of the Corporation Law). This is the first case that, when the stock corporation (Y) squeezed out its shareholders, using the share classes, they filed the decision about the acquisition price under each paragraph of Art. 172 of the Corporation Law. At first, Y took over its shares and then implemented the management buyout in order to squeeze out the remaining shareholders. When Stock corporations in Japan implement the MBO,

they often issue the share classes with the provision to acquire their all of the shares.

If the shareholders oppose the forcible acquisition of the shares, they should file a decision about the acquisition price under each paragraph of Art. 172 of the Corporation Law. It is problematic how the price should be assessed. The Tokyo High Court held that the acquisition price was a fair share value on the date of the acquisition, which consisted of (1) the objective share value on the same day and (2) the values which were calculated by assessing the expected rising price. In addition, it decided that the simple average share value for certain periods close to the acquisition of the shares should be regarded an objective share value except for the unusual price formation. The Supreme Court absolutely supported the opinion of the Tokyo High Court and the Tokyo District Court basically showed a similar standard to that of the Tokyo High Court.

However, the acquisition price assessed by the Tokyo High Court (396,966 yen per share) was significantly different from that of the Tokyo District Court (230,000 yen per share), because the Tokyo High Court could not deny that Y had issued the press release on August 21, 2006 for the purpose of lowering its earnings forecast, while the Tokyo District Court considered that Y did not have an intent to make the market feel Y's corporate value to be lower than the reality. In short, the lower the TOB price becomes, the more cheaply the management can implement the MBO.

In this case, however, it remains undecided, what the directors should pay attention to when they implement the MBO.

In terms of the premium by the MBO, both the Supreme Court and the Tokyo High Court held that the value realized by the MBO included the value which could not be realized if the MBO had not been implemented and should be distributed to shareholders and directors. However, it is problematic that they did not clarify the standard to assess the value realized by the MBO.

When courts assess the value realized by the MBO, they should originally find whether the TOB is at arm's length before the corporation forcibly acquires its shares. If so, the value realized by the MBO seems to converge with the TOB price. If the TOB price is unfair because the TOB as the first step is coercive and threatens shareholders, the price of the

acquisition of all the remaining shares as the second step may be unfair. I think that, if the management cannot show that the MBO is transparent and reasonable, the court should decide a fair acquisition price, because there is an asymmetry of information between the management and shareholders.

8. Labor Law

Z v. State & Central Labor Relations Commission (on INAX Maintenance)

Tokyo High Court, September 16, 2009

Case No. (gyo-ko) 192 of 2009

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Summary:

This is an appeal court decision in a case concerning whether a person who worked under contract falls into the category of a worker defined in the Trade Union Law. The first court ruled for the plaintiff. The appeal court, however, did not decide that the said employed persons fell into the category of a worker defined in the Trade Union Law, and that the outsourcer's refusal of their offer to negotiate over working conditions and others fell under the category of unfair labor acts as defined in the Trade Union Law.

Reference:

Articles 1, 3 and 7, paragraph 2 of the Trade Union Law

Facts:

X (plaintiff, koso-appellant) is a company doing business in repairing housing equipment. Originally, it was its own employees who were engaged in the repairing. In 1985, the company primarily adopted a system under which persons called "Customer Engineers" (hereinafter referred to as CE) who entered into a subcontract with the company took on the task of repairing, and in order to keep the brand image of X, the