

him offer rebuttals including the proof of his alibi, on the hearing dates. Although a considerable period of time had elapsed after the ruling on protective measure, the court gave enough him an opportunity to defend, and thus there is no illegal defect in the hearing proceedings of the first instance.

Therefore, the original ruling in which, from the view of the same effect as this, the court decided that the case in question did not fall under the cases where the protective measure shall be rescinded pursuant to the said provision is in the right.

#### **Editorial Note:**

This is the first case of the Supreme Court in which the court has handed down an opinion on the question of whether to accept the rescindment of a protective measure when there is an error in a part of one fact of delinquency found in the ruling on a protective measure. In this Supreme Court's ruling, as noted above, the court made it clear that, when a Family Court cannot recognize the existence of a fact of delinquency on the date found in its ruling on a protective measure, but can find both the existence of the fact of delinquency on another date which consists of the same contents as the former fact and then the identity of these two facts, this court does not have to rescind the protective measure pursuant to the provision of the Juvenile Act, Article 27-2, Paragraph 2. We can see that the Supreme Court presented the legal principle that the protective measure does not need to be rescinded when the court can switch its finding from the fact of delinquency found in the ruling on protective measure to one which is incompatible and basically identical with the former fact and can be assessed as with this fact in terms of the constituent elements of a crime.

## **6. Commercial Law**

**X v. Y**

Supreme Court 3<sup>rd</sup> P.B., April 19, 2011

Case No. (kyo) 30 of 2011

65(3)MINSHU 1311; 2119 HANREI JIHO 18; 1351 HANREI TAIMUZU

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**Summary:**

In this case, a shareholder who opposes the company reorganization exercised a right of “the share purchase demand” to the company, and the “fair price” of the share on that right had been become an issue.

**Reference:**

Art.782 para.1 of the Company Law

**Facts:**

X(Rakuten. Appellant-petitioner) had acquired and owned Y(Tokyo Broadcasting System Holdings Co., Ltd., the other party) shares for the purpose of a business alliance with Y. On the other hand, Y decided to establish a certified broadcast holding company and planed that all the rights and obligations of the Y’s broadcasting license were to be succeeded to A(TBS TV), Y’s wholly owned subsidiary. Y held the general meeting of the shareholders on December 16, 2008, and the resolution was duly approved.

X opposed the Y’s resolution, and meanwhile demanded that Y purchase all of X’s holding shares of Y at the fair price pursuant to Art.782 para.1 of the Company Law. Y presented to X 1,294 yen per share which was the closing market price of the day the share purchase demand was made by X, but the price consultation was not settled among them. Because of this failure, the petitions for share price determination to the court were filed by each of X and Y.

The first trial recognized that “Y’s company value and/or shareholder value had not been damaged according to this absorption-type company split”, and the fair price of the shares is to be decided “at the discretion of the court, based on the effective date of the company split, the objective value of the share should be calculated as the share seems to be if there is no company split.” Accordingly, the first trial presented 1,255 yen as its objective price, which was calculated at the volume weighted average of the closing of the stock market price for 1 month before the effective date, then considering the asking price of Y for 1,294 yen, and finally decided

the purchase price at 1,294 yen. X appealed.

The high court dismissed X's claims as follows: "The fair price of shares should be based on the date the share purchase demand has expired." "In this case, the fair price is to be 1,294 yen which is Y's closing price of the expiration date (March 31, 2009)." X appealed against this holding.

**Opinion:**

"The purpose of granting the dissenting shareholders the right to request purchasing of their shares at a fair value is that it makes it possible for companies to reorganize their structure using the means of a merger, etc. such as a merger by shareholders majority vote, while giving the dissenting shareholders the right to exit at a fair value. Here, the fair value includes the expected synergies and values the reorganization will bring. By distributing these values to the dissenting shareholders properly, the certain gains of the opposed shareholders would be ensured. From these things considered, the fair price of the share to be decided by the court is not the price confirmation at a certain day, but the fair price formation which is compromised to a reasonable standard. And considering the Company Law does not stipulate the provisions for the criteria of price determination, the determination method is understood to have been left to the discretion of the court".

"In light of this purpose, in such a case that the company reorganization does not increase the fair value of the corporation, there is no room to consider the appropriate distribution of corporate value, and so the court should calculate the share price that would have obtained if there was no resolution at the shareholders' meeting (hereafter the price referred to as "Nakariseba price") and this price should be established as the "fair price". And if the opposing shareholder would have requested the share purchase demand, the same kind of legal relationship as a sales contract would be established between the opposing shareholder and the absorbed company without obtaining the consent of the absorbed company. Then, the obligation to buy the opposing shareholder's shares at the fair value would be raised on side of the absorbed company, on the other hand, the opposed shareholder would not be able to withdraw the share purchase demand without the consent of the absorbed company

(Art.785 para.6 of the Company Law). Considering these things, it is reasonable that the fair price of the share should be decided based on the date the share purchase demand was placed by the opposed shareholder, which is the date the legal relationship similar to a sales contract arises, and the opposed shareholder showed the intention of leaving the company. If the criteria date for the fair price of the share were settled on the date after the opposed shareholder had made the share purchase demand, the opposed shareholder has to bear the risk of changes in share prices caused by factors other than the reorganization, even though the opposed shareholder cannot withdraw the share purchase demand himself. It is not reasonable. It is also unreasonable that if the criteria date were set on the date of the shareholder's resolution, the opposing shareholder would not have to shoulder the burden of the risk of changes in share prices that would be expected from the date of resolution to the date of the share purchase demand".

"If the increase in corporate value does not occur due to the reorganization act under the Article 782 para 1 of the Companies Act, the fair value in this paragraph which will be applied in the share purchase demand by the opposing shareholder should be generally understood as the Nakariseba Price at the date on which the share purchase demand was made."

"Specific methods of calculating the Nakariseba Price are left to the reasonable discretion of the court, and as in this case where the corporate value has not been damaged or increased, the judgment of the original decision which articulated that the fair price of Y's share should be 1,294 yen which was the closing market price of the date the share purchase was exercised could be admitted in conclusion".

### **Editorial Note:**

Our Company Law has admitted to the opposing shareholders in the company reorganization the right to request share purchase at "fair value" to that company. As to the significance of the "fair price" on the right, there is no consensus among theories and precedents at which point the price is to be adopted. More specifically, theories and precedents on the fair price are divided into several approaches: ①when the reorganization was published, ②when approval of the reorganization was resolved at the

general meeting of shareholders, ③when the right of share purchase demand was exercised by the opposing shareholder, ④when the right of share purchase demand expired, ⑤when the effect of the reorganization occurred.

In this judgment, it was confirmed that if the increase in corporate value were not confirmed by the reorganization, the “Nakariseba price” should be the “fair price” of the share purchase demand, and as for the reference date for calculation of the “Nakariseba price”, the Supreme Court made it clear that No.③“when the right of share purchase demand was exercised by the opposing shareholder” should be employed. In this regard, the judgment of the first instance had adopted No.⑤“when the effect of the reorganization has occurred”, and the original decision had adopted No.④“when the right of share purchase demand expired”.

There are some opinions as to the theory adopted in this judgment (No.③the exercised date of the share purchase demand). First, it is pointed out that if there were more than one dissenting shareholder, there would be more than one reference price for each exercise date, and that would involve a complexity of procedure. Further, it might be a problem among the shareholders in terms of shareholder equality. On the contrary, it is pointed out that changing the purchase price by the exercised date would be more equitable in terms of shareholder equality, and there are no institutional guarantees under the current law that dissenting shareholders get their shares bought at same price. Further, this approach seems reasonable in this case in which the corporate value has not been damaged, but if it would involve any damage, the share price seems to be considered to fall after the publication and the approval of reorganization. Then, it might be contrary to the purpose of the system if the risk of changes in the share price from the time of publication until the date of exercise was borne by the dissenting shareholders.

## 7. Labor Law

**ZI v New National Theatre, Tokyo**  
Supreme Court, 3rd P.B., April 12, 2011