



In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan

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Backdrop

- **“There is no market for corporate control in Japan, and there is not likely to be one.” (Fligstein 2001)**
- **Today, Japan is riveted by hostile M&A.**
- **Delaware’s shadow looms large.**

Extraordinary

- **Corporate Value Study Group Report and METI/MOJ Takeover Guidelines embrace Delaware takeover jurisprudence.**

Significance

- **For Japan: Reflects ongoing institutional transformation in corporate governance.**
- **For Comparative Corporate Governance Scholarship: Provides insights into major issues in the literature today.**

My Approach

- **Follows commentators who examined the formation of Delaware takeover jurisprudence as a product of strategic/adaptive responses to market change, and interest group bargaining (e.g., Kahan & Rock 2002; Macey & Miller 1987).**

The Deals

- **UFJ-Sumitomo**
- **Livedoor-Fuji TV**
- **Steel Partners**
- **Others**

Why all the Commotion?

- **Players: New vs. Old Japan**
- **Tactics: “Western” vs. “Japanese”**
- **Nationalist/Protectionist Impulses**
- **An Emerging Market for Corporate Control**

Why Now?

- **Shareholders and shareholding patterns are changing**
- **More flexible corporate law**
- **New board governance and incentive structures**
- **Clearer legal duties to shareholders**
- **Not much attention (until now) to defensive measures**
- **Backdrop for all of the above is economic distress**

What Happened to Japan?

- In broad terms, the same thing that happened to the United States in the 1980s:
- Market change exposed problems in corporate law and corporate governance.
- Actors responded: legal strategies, adaptation, opting out, pushing the envelope.
- These responses eventually led to the creation of a new institutional environment for corporate governance.

Transplanting Delaware Law

- **METI/MOJ Takeover Guidelines**
- **Purpose:** “Develop a framework for fair and reasonable hostile takeover defensive measures that would enhance corporate and shareholder value based on Anglo-American measures that are accepted as a global standard.”
- **Approach:** Virtually wholesale adoption of Delaware doctrine: *Unocal*, *Unitrin*, *Revlon**, *Toll Bros*.

Why Delaware?

- **“Global Standard”**
- **Familiarity (int’l network effects)**
- **City Code too shareholder friendly**
- **Interest group dynamics**
 - US lawyers/financial advisors
 - Japanese lawyers
 - METI

Implications for Japan

- **Scenario One: Strong-Form Convergence with U.S.**
- **Scenario Two: Cryonic Suspension**
- **Scenario Three: Unpredictable Institution Telescoping and Stacking--A *Unocal* rule with Japanese characteristics?**

Is the Pill Good for Japan?

Grounds for Pessimism

- **Legal transplants are unpredictable, and Del. law is highly indeterminate**
- **Surrounding infrastructure in Japan is weaker than in U.S.**
- **Possible political intervention**

Is the Pill Good for Japan?

Grounds for Optimism

- **Guidelines can shape consensus**
- **Concepts in Report and Guidelines may take on a life of their own (e.g., “corporate value,” “independent directors”)**
- **New player in Japanese corporate governance: Courts!**

Comparative Corporate Governance Debate

- **Convergence or stacking?**
- **The intellectual appeal of Delaware: Ambiguous signal about shareholder protection**
- **Corporate law as focal point for institutional transformation**