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