NUS Working Paper 2016/008
NUS Centre for Asian Legal Studies Working Paper 16/03
NUS Centre for Law & Business Working Paper 16/04

The Enigma of Hostile Takeovers in Japan Bidder Beware

Dan W. Puchniak
Masafumi Nakahigashi

lawdwp@nus.edu.sg
nakahigashi@law.nagoya-u.ac.jp

[August 2017]

This paper can be downloaded without charge at the National University of Singapore, Faculty of Law Working Paper Series index: http://law.nus.edu.sg/wps/

© Copyright is held by the author or authors of each working paper. No part of this paper may be republished, reprinted, or reproduced in any format without the permission of the paper's author or authors.

Note: The views expressed in each paper are those of the author or authors of the paper. They do not necessarily represent or reflect the views of the National University of Singapore.

Citations of this electronic publication should be made in the following manner: Author, "Title," NUS Law Working Paper Series, "Paper Number", Month & Year of publication, http://law.nus.edu.sg/wps. For instance, Chan, Bala, "A Legal History of Asia," NUS Law Working Paper 2014/001, January 2014, www.law.nus.edu.sg/wps/

The Enigma of Hostile Takeovers in Japan: Bidder Beware

Dan W. Puchniak[†]
Masafumi Nakahigashi[††*]

For over two decades, Japan has ostensibly had all the essential elements that leading academics and sophisticated investors have assumed to be sufficient for a country to develop an active market for hostile takeovers (i.e., dispersed shareholder ownership, depressed share values, and a United Kingdom or United States inspired regulatory framework). This has not gone unnoticed. For decades, leading academics and prestigious pundits have repeatedly predicted the imminent arrival of a wave of successful hostile takeovers in Japan. Based on the same prediction, but with much higher stakes, sophisticated investors have risked billions of dollars. History has consistently proven this prediction wrong—leaving a cadre of bewildered academics, embarrassed pundits, and bitter investors in its wake. How could so many leading academics, prestigious pundits, and sophisticated investors be so wrong (for decades) about Japan's market for hostile takeovers? This is the enigma of hostile takeovers in Japan, which we seek to explain in this Article.

We argue that, in applying abstract theories derived from the Anglo-American experience, most Western observers have neglected to properly account for local, idiosyncratic, Japanese factors that have stifled the market for corporate control in Japan. First, Japan transcends and complicates the conventional dispersed/concentrated shareholding dichotomy, as shown by the presence of dispersed stable-shareholders who have consistently rallied in support of incumbent management against hostile acquirers. Second, a corporate and shareholder culture that remains dominated by lifetime employee controlled corporate boards adds to the resilience of Japanese companies against hostile takeovers. Third, contrary to the belief of many Western scholars and pundits, Japan's law on defensive measures cannot be easily compared to the UK or US hostile takeover regimes, as it has developed important idiosyncratic features through judicial precedent and corporate practice that have a distinctively anti-takeover flavour. Ultimately, the story of the absence of hostile takeovers in Japan is a cautionary tale to comparative corporate scholars and foreign investors who underestimate the importance of context: apply Anglo-American generalizations, without adequate local knowledge, at your own peril.

[†] Director, National University of Singapore (NUS) Centre for Asian Legal Studies (CALS), Associate Professor, NUS Law.
[††] Professor, Faculty of Law, Nagoya University.
[*] A condensed version of this Article will be published as: Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, *in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES (Umakanth Varottil & Wan Wai Yee eds., Cambridge University Press, forthcoming). We would like to thank the NUS Centre for Asian Legal Studies (CALS) and EW Barker Centre for Law & Business (EWBCLB) for providing funding to support this research. We would also like to thank all the participants at the Berkeley-NUS-SMU Comparative Corporate Governance Conferences and the NUS-SMU Conference on Comparative Takeover Regulation for valuable feedback on earlier drafts. We are particularly grateful to Gen Goto, Manabu Matsunaka, Curtis Milhaupt, Zenichi Shishido, Holger Spamann, Andrew Tuch, Umakanth Varottil and Wan Wai Yee for their extremely helpful feedback on earlier versions of this Article. In addition, we would like to sincerely thank Alan K. Koh and Samantha Tang for their highly skilful and invaluable research assistance which went beyond our highest expectations. Some of the material in this Article is adapted from Dan W. Puchniak, *The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again Without Hostile Takeovers*, 5 BERKELEY BUS. L.J. 195 (2008) [hereinafter Puchniak, *Efficiency of Friendliness*]. We are grateful to the Berkeley Business Law Journal for permission to use this material and for their high quality editorial work on this Article. As usual, any errors remain our own.

PART I: INTRODUCTION

For over two decades, all of the essential elements that leading academics and sophisticated investors have assumed to be sufficient for a country to develop an active market for hostile takeovers have ostensibly existed in Japan.[1] Japan's listed corporations have stood out as having amongst the most dispersed stock ownership in the world.[2] Listed corporations in Japan have had depressed share values relative to their asset values, which has created a plethora of attractive takeover targets.[3] Japan's regulatory framework for hostile takeovers has ostensibly been modelled on the world's two most active markets for hostile takeovers: the United Kingdom in 1990 and Delaware in 2005.[4]

---

[1] Armour, Jacobs and Milhaupt strongly suggest that the combination of dispersed share ownership, depressed share values and an Anglo-American regulatory framework will bring about a vibrant market for hostile takeovers. John Armour et al., *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 221 (2011).

[2] In fact, according to the most common empirical measures for shareholder dispersion, only shareholders in the United Kingdom and United States are as dispersed as in Japan—with Japanese shareholders in large public companies appearing even more dispersed on some measures. Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999); Stijn Claessens et al., *The Separation of Ownership and Control in East Asian Corporations*, 58 J. FIN. ECON. 81 (2000); MASAHIKO AOKI, CORPORATIONS IN EVOLVING DIVERSITY: COGNITION, GOVERNANCE, AND INSTITUTIONS (Oxford University Press 2010); Julian Franks et al., *The Ownership of Japanese Corporations in the 20th Century*, 27 REV. FIN. STUD. 2580 (2014).

[3] It was well recognized that following the burst of Japan's stock market bubble in 1989, a significant percentage of large listed Japanese companies had a cumulative stock price that was considerably less than their bust-up value. This was especially the case when the stock market hit an all-time low in the early 2000s. In 2001, Milhaupt and West reported that thirteen percent of the TSE's non-financial companies traded at below their liquidation value. *See* Curtis J. Milhaupt & Mark D. West, *Institutional Change and M&A in Japan: Diversity Through Deals* 28 (Columbia Law School/Univ. Mich. Law School, Working Paper, 2001), *available at* http:// papers.ssrn.com/abstract=290744. In the same year, The Economist reported that 'there [were] pots of gold hidden everywhere' in Japan as about ten percent of its 3,500 listed companies had break-up values of more than twice their cumulative stock price. *See Ever So Polite*, ECONOMIST, Feb. 17, 2001 [hereinafter *Ever So Polite*]. In 2005, the Economist Intelligence Unit reported that about 25 percent of Japanese companies had bust-up values less than their cumulative stock price and that these companies were ripe for hostile takeovers as 'a faster way to make money [was] hard to find.' *See The Battle for Corporate Control: The Outlook for M&A in Japan*, ECONOMIST INTELLIGENCE UNIT at 20 (2005) [hereinafter EIU 2005].

[4] In 1990, Japan amended the Securities and Exchange Act. *See* Shōken Torihiki-hō no Ichibu wo Kaisei-suru Hōritsu 証券取引法の一部を改正する法律 [Act amending the Securities and Exchange Act] (Act No 43 of 1990) (Act Amending the Securities and Exchange Act 1990). This amendment to the Securities and Exchange Act required that an off-exchange offer, the acceptance of which would result in the acquisition of more than 33.3% of the target's shares, be made through a tender offer open to all shareholders. Milhaupt and West therefore suggest that the Japanese tender offer regime was 'patterned after (but more stringent than)' London's City Code. *See* Milhaupt & West, *supra* note 3, at 19-20. This conclusion, however, seems strained, given that Japan's regime did not have a UK-style mandatory bid rule because it only required a pro-rata purchase of shares from each shareholder that tendered shares in the offer and did not require the offeror to purchase all outstanding shares prior to obtaining control—which is at the core of the UK mandatory bid rule and London City Code regime (for more details concerning this argument see *infra* Part IV below). In 2005, the government issued the Takeover Guidelines which, according to many influential scholars, substantially incorporated Delaware takeover jurisprudence regarding defensive measures into Japanese law. *See* Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171, 2173 (2005) [hereinafter Milhaupt, *Shadow of Delaware*]. For an English translation of the Takeover Guidelines, *see* Ministry of Economy, Trade and Industry and Ministry of Finance, *Guidelines Regarding Takeover Defense for the Purposes of Protection and Enhancement of*

The fact that Japan purportedly has had a takeover environment with dispersed stock ownership, depressed share values, and a United Kingdom-United States inspired regulatory framework, sets it apart (with the United Kingdom and United States) as being ostensibly one of the most hostile takeover friendly jurisdictions in the world.[5]

This fact has not gone unnoticed. For over two decades, leading academics and prestigious pundits have repeatedly predicted the imminent arrival of a wave of successful hostile takeovers in Japan.[6] In a similar vein, but with much higher stakes, sophisticated investors have risked billions of dollars on the same prediction.[7] As we explain in this Article, however,

---

Corporate Value and Shareholders' Common Interests, May 27, 2005, *available at* www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/shishin_hontai.pdf (last accessed 14 July 2016) [hereinafter *Takeover Defense Guidelines*]. *See also* Puchniak, *Efficiency of Friendliness*, at 223-224. For an overview of the development of the law governing Japanese takeover bids, which takes a slightly different perspective, see Ken'ichi Osugi, *What is Converging? Rules on Hostile Takeovers in Japan and the Convergence Debate*, 9 ASIAN-PAC. L. & POL'Y J. 143, 149-56 (2007).

[5] Armour et al, *supra* note 1.

[6] In 1989, the CEO of a famous United States' merchant bank predicted that with the globalization of capital markets, "value-maximizing investors would use takeovers to replace underperforming managers, change corporate policies, and dramatically restructure companies with the aim of increasing equity value." W. CARL KESTER, JAPANESE TAKEOVERS 239 (Beard Books 1991). They theorized that Japan would be part of this market and therefore be part of a market for corporate control that looked like America in the 1980s. *Id.* In his 1991 book, Kester predicted, based on a few failed hostile takeover attempts at the time, that "while it is premature to forecast a convergence of the Japanese market with the West's, these examples make it evident that a newly active market for corporate control in Japan will fill the void left by receding capital market discipline." *Id.* at 239. In 2001, the Economist reported that, "analysts predicted that a new wave of similar [unfriendly] bids might follow. Some even forecast the imminent arrival of an 'Anglo-American' M&A (mergers and acquisitions) market, where investment banks, company bosses and investors would wrestle for control of companies." *Ever So Polite*, *supra* note 3. In a 2004 article, Gilson reported that, "[e]ach report of a reduction in the size of crossholdings among Japanese companies and in the size of Japanese bank stockholdings in their clients has given rise to an expectation that now, at last, hostile offers would emerge." Ronald J. Gilson, *The Poison Pill in Japan: The Missing Infrastructure*, 2004 COLUM. BUS. L. REV. 21 (2004) [hereinafter Gilson, *Missing Infrastructure*]. In the same article, Gilson states that, "A number of events now suggest that the long wait for hostile transactions in Japan may be approaching its end." *Id.* at 22. In his 2005 article, Milhaupt prognosticates that: "If, as now seems distinctly possible, the world's second largest economy is in the process of embracing hostile M&A (however reluctantly), and along with it the core of Delaware takeover jurisprudence, this development may represent an epochal moment for Japan and for the global standards movement in corporate governance." Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2171, 2173–2174. *See also*, *Say "Hostile Takeover" in Japanese*, ECONOMIST, Jul. 19, 1997 [hereinafter *Say "Hostile Takeover"*]; Robert Neff, *Japan: Land of the Hostile Takeover?*, BUS. WEEK, Mar. 13, 2000; *Hostile Takeover Taboo Will be Consigned to History*, FINANCIAL TIMES, Mar. 2, 2010 [hereinafter *Hostile Takeover Taboo*].

[7] Some of the more prominent failed hostile takeovers are as follows: in March 2005, Livedoor's hostile takeover bid for Nippon Broadcasting System; in July 2005, Yumeshin Holdings' hostile takeover bid for Japan Engineering Consultants. *See* Cristina Alger, *The Livedoor Looking Glass: Examining The Limits of Hostile Takeover Bids in Japan*, 3 N.Y.U. J. L. & BUS. 309, 319-20 (2006). In November 2005, Rakuten's hostile takeover bid for Tokyo Broadcasting System failed. In May 2006, MAC's hostile takeover attempt of Hanshin Electric Railway failed when Hanshin was acquired by Hankyu Holdings, a friendly shareholder. *See* Christopher T. Hines et al., *Doing Deals in Japan: An Analysis of Recent Trends and Developments for The U.S. Practitioner*, 2006 COLUM. BUS. L. REV. 355, 383-85 (2006). In February 2006, Don Quijote failed in its hostile takeover bid for Origin Toshu, when Origin Toshu's shares were acquired by a friendly shareholder, Aeon. *Id.* at 436 n.225. In August 2006, Oji Paper's hostile takeover bid for Hokuetsu Paper Mills was defeated. This bid was particularly noteworthy as the defensive measures used by Hokuetsu to defeat the bid appeared to clearly breach the existing hostile takeovers law—yet not a single legal proceeding was commenced even by the foreign shareholders who held a 25 percent stake in Hokuetsu. *See* Puchniak, *Efficiency of Friendliness*, at 246-50. In April 2008, Steel

history has consistently proven this prediction wrong—with a cadre of bewildered academics, embarrassed pundits, and bitter investors left in its wake.

Counterintuitively, rather than Japan's ostensibly friendly hostile takeover environment producing a wave of successful hostile takeovers, it has produced none.[8] As this Article reveals, what has made Japan exceptional over the last two decades has been the inability of hostile acquirers to succeed in what many have claimed to be a 'hostile takeovers utopia'.[9] Moreover, in an ironic twist, during this same period hostile acquirers have begun to succeed in jurisdictions which have traditionally been viewed as inhospitable to hostile takeovers.[10] This suggests that the criteria used to predict the emergence of an active market for hostile takeovers[11] must be re-evaluated. In a similar vein, it demonstrates that even if a jurisdiction develops an environment that is ostensibly friendly towards hostile takeovers (i.e., it has dispersed shareholder ownership, depressed share values, and a United Kingdom or United States inspired regulatory framework) successful hostile takeovers may *not* necessarily follow—the opposite of what leading comparative corporate law scholars appear to suggest.[12]

Rather than add to the history of incorrect predictions about the future of hostile takeovers in Japan, this Article seeks to understand them: Why have leading academics, prestigious pundits, and sophisticated investors perpetually misunderstood the evolution of hostile takeovers in Japan? We suggest that this misunderstanding emanates from a propensity of academics, pundits and investors to draw conclusions about the future of hostile takeovers in Japan based on abstract theories derived primarily from the United States[13] and/or United Kingdom experience. In a similar vein, we also suggest that this misunderstanding is the result of academics, pundits, and investors failing to appreciate fully the importance of local (often

---

Partners sold its stake in Bull-Dog Sauce after its unsuccessful takeover bid for the same in May 2007. *See* Kenji Hall, *Steel Partners Off the Sauce in Japan*, BLOOMBERG, Apr. 19, 2008; JOHN BUCHANAN ET AL., HEDGE FUND ACTIVISM IN JAPAN: THE LIMITS OF SHAREHOLDER PRIMACY 213-223 (Cambridge University Press 2012); Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 142-42 (2014).

[8] Puchniak, *Efficiency of Friendliness*, at 200.

[9] David Turner, *Takeover Advisor to Target Japan*, FINANCIAL TIMES, Jun. 21, 2005; KESTER, *supra* note 6, at 239; Gilson, *Missing Infrastructure*, *supra* note 6, at 21-22; *Ever So Polite*, *supra* note 3; Puchniak, *Efficiency of Friendliness*, at 201.

[10] Until 1999, Germany was the only other major economy without a successful hostile takeover bid. This changed—spectacularly—when Vodaphone was victorious in its hostile takeover of Mannesmann. However, Germany has traditionally opposed hostile takeovers because it places emphasis on the protection of other constituencies—especially employee interests—to preserve social cohesion, which might be negatively affected by hostile takeovers. For more information on hostile takeovers in Germany, see REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 271 (2d ed., Oxford University Press 2009).

[11] Puchniak, *Efficiency of Friendliness*, at 224-225, 224 n.170.

[12] Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2215-16; Armour et al., *supra* note 1, at 284-85.

[13] Puchniak, *Efficiency of Friendliness*, at 224-225.

idiosyncratic) Japanese factors, which cause hostile takeovers in Japan to evolve in a way that the United Kingdom-United States experience and/or universal comparative corporate governance theories would not predict.[14] As such, one of the objectives of this Article is to explain the commonly overlooked local (and often idiosyncratic) factors which have resulted in hostile takeovers in Japan being so misunderstood.

In addition, by revealing the imperative role of local factors, this Article contributes to an emerging body of comparative corporate law scholarship which suggests that local factors—rather than universal theories of comparative corporate governance—are the key to properly understanding corporate law comparatively.[15] In addition, this Article further suggests that the imperative role of local factors in the unique evolution of hostile takeovers in Japan supports the conclusion that the global convergence of corporate law remains largely an academic proposition, with limited applicability in actual practice.[16]

The balance of this Article proceeds as follows. Part II chronicles the historical and economic context which gave rise to the history of incorrect predictions about the imminent arrival of successful hostile takeovers in Japan. Part III examines Japan's complex and often misunderstood shareholder ownership landscape and suggests how an understanding that goes beyond the traditional dispersed versus concentrated shareholder ownership dichotomy is required to make sense out of the failure of hostile takeovers in Japan. Moreover, Part III explains how ostensibly depressed share values create a mirage of attractive hostile takeover targets in Japan, which disappear when the 'true value' of shares in listed companies in Japan is properly understood. Part IV explains the legal framework governing hostile takeovers in Japan and highlights why, despite it being loosely inspired by the United Kingdom and then Delaware, it has important differences from both models, and has served (and still serves) as a formidable barrier to developing a vibrant market for hostile takeovers. Part V highlights how Japan's lifetime employee dominated corporate and shareholder culture may be as important, if not more important, than any other factor in explaining the failure of hostile takeovers in

[14] *Id*. at 205-209. However, leading corporate scholars have recently recognised that factors which might explain the differences between takeover regimes in the United States and the United Kingdom 'partially, but do not completely', explain the features of the Japanese approach', and adopted an analytical framework that seeks to acknowledge the presence of such idiosyncratic factors. *See* Armour et al., *supra* note 1, at 270-273.

[15] Dan W. Puchniak, *The Derivative Action in Asia: A Complex Reality*, 9 BERKELEY BUS. L.J. 1 (2012); INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., Cambridge University Press, *forthcoming*) [hereinafter INDEPENDENT DIRECTORS IN ASIA]; Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMP L. (forthcoming 2017).

[16] Dan W. Puchniak, *The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law*, 9 ASIAN-PAC. L. & POL'Y J. 7 (2007) [hereinafter Puchniak, *Japanization*].

Japan. Part VI concludes by summarizing the main findings of this Article, with the hope of preventing the history of incorrect predictions about hostile takeovers in Japan from repeating itself.

PART II: THE HISTORY OF INCORRECT PREDICTIONS IN CONTEXT

After almost three decades of tepid economic growth, it is easy to forget that in the late-1980s Japan was, by many measures, the richest country in the world.[17] It had the highest per capita Gross National Product, largest net holdings of foreign assets, and by far the largest stock market capitalization and highest property values in the world.[18] Japan's rise to the zenith of the world economy was even more extraordinary considering that merely a few decades earlier it had been reduced to the level of a poor developing country as a result of its devastating defeat in World War II.[19]

Many experts cite Japan's main bank corporate governance model as a key to its remarkable postwar economy.[20] Contrary to popular belief, Japan's main bank model was not marked by an absence of mergers and acquisitions (M&A). In fact, during the 1950s Japan had approximately 500 M&A transactions per year and, by 1985, the number had increased to approximately 2,000 per year.[21] Indeed, for most of the 1980s, when America was experiencing an M&A boom, the rate of combinations per 10,000 companies was higher in Japan than in the United States.[22]

The oddity of Japan's highly successful postwar main bank model—especially when compared with American corporate governance in the 1980s—was its lack of hostile takeovers. In the decades following the war, all of the large-scale mergers and acquisitions in Japan were either friendly or orchestrated by the government (something which still holds true today).[23] Indeed,

[17] Material in this section has been updated and condensed from portions of Puchniak, *Efficiency of Friendliness*.
[18] TAKATOSHI ITO, THE JAPANESE ECONOMY 3-4 (MIT Press 1992).
[19] MICHAEL SPENCE, THE NEXT CONVERGENCE: THE FUTURE OF ECONOMIC GROWTH IN A MULTISPEED WORLD 14 (Farrar, Straus and Giroux 2011).
[20] ITO, *supra* note 18, at 369; Michael E. Porter, *Capital Disadvantages: America's Failing Capital Investment System*, 70 HARV. BUS. REV. 65 (1992); Roberto Romano, *Corporate Law and Corporate Governance*, 5 INDUS. & CORP. CHANGE 277, 297-313 (1996).
[21] KESTER, *supra* note 6, at 8 n.1, 83.
[22] *Id*. at 83.
[23] According to Kester, in the postwar period until the burst of the bubble in 1990, the large-scale mergers that did occur were friendly deals that were sanctioned by the government and/or main banks and between related

in Japan's friendly postwar corporate governance environment, legislation governing takeover bids did not even exist until the 1971 Amendment to the Securities and Exchange Act.[24] Under this regime, only two friendly takeover bids were registered and concluded prior to its amendment in 1990.[25]

In stark contrast, in the 1980s, American corporate governance was widely seen as being driven by hostile takeovers. At that time, hostile bids were received by over half of all major American companies and viewed as the central mechanism for controlling agency costs and driving America's successful restructuring.[26] In 1988 alone, there were 27 successful hostile takeovers of large listed companies in the United States.[27] Thus, in the 1980s and early 1990s, the obvious question, especially for American academics, became: How did Japan engineer the world's most efficient economy without hostile takeovers?

Prior to the burst of Japan's economic bubble in 1989, the answer was simple: Japan did not have hostile takeovers because it did not need them.[28] As one of us has described in detail elsewhere, the main bank model provided an effective system for mitigating shareholder-manager agency costs and driving efficient restructuring—which have traditionally been seen as the two primary benefits of hostile takeovers.[29] As such, the main bank model was viewed widely as making hostile takeovers unnecessary in Japan because it performed the same functions as hostile takeovers, but in a manner that experts suggested was more efficient.[30]

---

companies. The purpose of the mergers was normally a 'deliberate attempt to alter the structure and performance of the industries in which the mergers occurred.' *Id*. at 94. In most cases, the government and main banks orchestrated the mergers to: (1) reduce excess capacity; (2) avoid destructive price competition; (3) build domestic firms to the scale that they can compete internationally; and/or (4) combine weaker firms with stronger ones. *Id.*

[24] Shōken-torihiki-hō no ichibu wo kaisei suru hōritsu 証券取引法の一部を改正する法律 [Act Amending the Securities and Exchange Act] (Act No 4 of 1971).

[25] The Securities and Exchange Act was subsequently amended in 1990. *See* KESTER, *supra* note 6, at 99.

[26] Bengt Holmstrom and Steven N. Kaplan, *Corporate Governance and Merger Activity in the United States: Making Sense of the 1980s and 1990s*, 15 J. ECON. PERSP. 121, 125 (2001).

[27] *See* John C. Coates IV, *Measuring the Domain of Mediating Hierarchy: How Contestable Are U.S. Public Corporations?*, 24 J. CORP. L. 837, 855-56 (1999) (reporting that 32% of the 85 hostile bids in 1988 were successful).

[28] According to Kester, the Japanese system of corporate governance 'largely obviated the necessity for a deeper and active market for corporate control at home and limited the activity of Japanese companies in the market abroad and yielded a paucity of attractive targets for foreign bidders.' *See* KESTER, *supra* note 6, at 5; Milhaupt & West, *supra* note 3.

[29] Puchniak, *Efficiency of Friendliness*.

[30] Masahiko Aoki & Hugh Patrick, *Introduction*, *in* THE JAPANESE MAIN BANK SYSTEM: ITS RELEVANCE FOR DEVELOPING AND TRANSFORMING ECONOMIES xxi-xxxii (Masahiko Aoki & Hugh Patrick eds., Oxford University Press 1994) [book hereinafter THE JAPANESE MAIN BANK SYSTEM]; Takeo Hoshi et al., *Lessons from the Japanese Main Bank System for Financial System Reform in Poland*, in THE JAPANESE MAIN BANK SYSTEM, *supra* note 30, at 593-94, 611. On relational investing, *see* generally Romano, *supra* note 20, at 297-313.

Moreover, some experts posited that introducing hostile takeovers into postwar Japan would have broken the web of 'friendly efficiency'[31] that allowed its economy to consistently outperform all others for over three consecutive decades following the war.[32]

In 1990, however, Japan's celebrated main bank model came crashing down with the burst of its economic bubble. On the last day of business in 1989, the Nikkei 225 stock price index reached its 38,915 peak and then collapsed. By October 1, 1990, the Nikkei hovered barely above 20,000, which was a decline of almost 50 percent in nine months. For the balance of the 1990s, which came to be known as the 'lost decade,' the Nikkei floated around 15,000. The Nikkei entered the new millennium with a brief climb up to 20,000 and then plummeted again to near its postwar low of 7,607 on April 28, 2003. Finally, the Nikkei hit its all-time postwar low of 7,054 following the Global Financial Crisis (GFC) on March 10, 2009—which was 81.9 percent below its peak twenty years earlier.[33] It nearly repeated this low again in 2011 after Japan's massive earthquake and tsunami, which brought about a nuclear meltdown with serious repercussions.[34] Most recently, spurred on by Abenomics, the Nikkei climbed to above 20,000,[35] but has again fallen to around 16,000 and still remains at far less than half of its bubble peak.[36]

The burst of the stock market bubble, coupled with a similar collapse of Japan's real estate market, had a devastating impact on the Japanese economy. During the lost decades that followed, the economy slipped into negative growth, and price deflation placed a strangle-hold on domestic investment and spending. As a result, the famed Japanese banking system amassed mountains of non-performing loans and had capital ratios that were on the verge of falling below the regulatory minimums required to keep their doors open.[37] The entire banking system would have likely fallen into complete chaos if not for the Japanese government's forced bank

[31] As coined in Puchniak, *Efficiency of Friendliness*.
[32] Masahiko Aoki, *Monitoring Characteristics of the Main Bank System: An Analytical and Developmental View*, *in* THE JAPANESE MAIN BANK SYSTEM, *supra* note 30, at 138.
[33] Michael Hutchison et al., *Empirical Determinants of Banking Crises: Japan's Experience in International Perspective, Why did Japan Stumble?*, *in* WHY DID JAPAN STUMBLE? CAUSES AND CURES 157, 157 (Craig Freedman ed., Edward Elgar 1999); *see also* Takeo Hoshi & Anil K. Kashyap, *Japan's Financial Crisis and Economic Stagnation*, 18 J. ECON. PERSP. 3, 5 (2004); *General Electric Japanese Property Investment May Reach 1 Trillion Yen*, FINANCIAL TIMES, Aug. 25, 2007; *Time to Arise from the Great Slump*, ECONOMIST, Jul. 22, 2006.
[34] *World Stock Markets Slide on Japan Panic*, GUARDIAN, Mar. 15, 2011.
[35] *Nikkei 225 Passes 20,000 after 15-Year Wait*, FINANCIAL TIMES, Apr. 22, 2015.
[36] *Asia Markets Post Weekly Gains as Investors Digest Chinese GDP Data*, CNBC, Jul. 15, 2016.
[37] *The Non-Performing Country*, ECONOMIST, Feb.16, 2002.

mergers and bailouts.[38] The government's role as the backstop for failing banks and its pump-priming spending resulted in massive deficits that were unmatched by any other developed country.[39] During the darkest days of the lost decades questions arose as to whether Japan's position as one of the world's leading economies might quickly slip away. Despite an underappreciated period of economic recovery in the mid-2000s (which was extinguished by the GFC) and a spark of economic hope more recently as a result of Abenomics, serious questions still linger about the future of the Japanese economy.[40]

In this context, it is understandable why starting in the 1990s so many experts wrote off the main bank model as a failed economic experiment that had outlived its usefulness by the post-bubble era.[41] Moreover, after the burst of the bubble, many M&A experts viewed Japan as strikingly similar to the United States during the 1980s in terms of its need for restructuring. Japan's conglomerate groups (*keiretsu*) were viewed as tantamount to the inefficient conglomerates, which were effectively dismantled by hostile takeovers in the United States during the 1980s.[42] Moreover, during the lost decades there were reportedly legions of inefficient industries and 'zombie firms' in Japan kept on life-support by their main banks.[43] As such, it appeared to many academics, pundits and investors that, similar to America in the 1980s, shareholders in Japan would stand to gain from hostile takeovers as they would force entrenched managers either to focus on shareholder value or be culled from the market.

---

[38] GILLIAN TETT, SAVING THE SUN: A WALL STREET GAMBLE TO RESCUE JAPAN FROM ITS TRILLION-DOLLAR MELTDOWN xxiv-xxv (Harper Business 2003); *Chronic Sickness*, ECONOMIST, Jun. 2, 2001; *The Viagra Economy*, ECONOMIST, Sep. 24, 2005; Dan W. Puchniak, *Perverse Main Bank Rescue in the Lost Decade: Proof that Unique Institutional Incentives Drive Japanese Corporate Governance*, 16 PAC. RIM L. & POL'Y J. 13 (2007).

[39] Puchniak, *Efficiency of Friendliness*, at 210.

[40] STEVEN K. VOGEL, JAPAN REMODELED: HOW GOVERNMENT AND INDUSTRY ARE REFORMING JAPANESE CAPITALISM 27 (Cornell University Press 2007); Shingo Miyake, *New Corporate Law Caps Series of Business Reforms*, NIKKEI WEEKLY, May 8, 2006; *In Jeopardy*, ECONOMIST, Aug. 15, 2015; *Abenomics Is Losing Support with Economist and Voters Alike*, BLOOMBERG, Mar. 17, 2016; *Abenomics Failure Explained*, JAPAN TIMES, Apr. 4, 2016.

[41] JAMES C. ABEGGLEN, 21ST CENTURY JAPANESE MANAGEMENT 131 (Palgrave Macmillan 2006); VOGEL, *supra* note 40, at 1-2, 205; Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 331 (2001); Yoshiro Miwa & J. Mark Ramseyer, *The Myth of the Main Bank: Japan and Comparative Corporate Governance*, 27 L. & SOC. INQ. 401, 409 (2002) (reviewing MASAHIKO AOKI, INFORMATION, CORPORATE GOVERNANCE, AND INSTITUTIONAL DIVERSITY: COMPETITIVENESS IN JAPAN, THE USA, AND THE TRANSITIONAL ECONOMIES (Stacey Jehlik trans., Oxford University Press 2000) (1995)). *See also* Curtis J. Milhaupt, *On the (Fleeting) Existence of the Main Bank System and Other Japanese Economic Institutions*, 27 L. & SOC. INQ. 425, 428 (2002) (arguing that the main bank system was part of a team of institutions forged in the post-war era that needed to evolve to meet new challenges).

[42] Gilson, *Missing Infrastructure*, *supra* note 6, at 24-25; Donald Maclntyre, *Challenging Japan's Cozy Corporate Culture*', TIME ASIA, Feb. 7, 2000. *See* generally VOGEL, *supra* note 40, at 144-45; Holmstrom & Kaplan, *supra* note 26, at 130.

[43] Puchniak, *Efficiency of Friendliness*, at 215.

In addition, and perhaps most importantly, since the burst of the bubble the bust-up values of a substantial portion of Japan's large listed companies have reportedly been above their cumulative stock price[44]—a phenomenon that, in the late 1980s, drove a wave of hostile takeovers in the United States and which has been linked to the rise of hostile takeovers in the United Kingdom.[45] In 2001, Milhaupt and West reported that 13 percent of the Tokyo Stock Exchange's non-financial companies traded at below their liquidation value.[46] In the same year, The Economist reported that 'there [were] pots of gold hidden everywhere' in Japan as about 10 percent of its 3,500 listed companies had break-up values of more than twice their cumulative stock price.[47] In 2005, The Economist Intelligence Unit reported that about 25 percent of Japanese companies had bust-up values more than their cumulative stock price and that these companies were ripe for hostile takeovers as 'a faster way to make money [was] hard to find.'[48] In the words of one M&A commentator, '[i]f there are profits to be had, hostile takeovers will increase. . .this cannot be stopped, even if it doesn't suit Japan's culture.'[49] As such, it was assumed that the potential to make enormous profits in Japan's undervalued and dispersed stock market would axiomatically lead to a wave of American-style hostile takeovers during Japan's lost decades. This view was bolstered by the opinions of leading academics and pundits that the Japanese government's issuance of the Takeover Guidelines in 2005 substantially incorporated Delaware takeover jurisprudence into Japanese law—combining the legal framework from the world's leading jurisdiction for hostile takeovers with Japan's optimal market conditions for hostile takeovers.[50]

Ultimately, however, as noted above, there still has not been a single successful hostile takeover in Japan.[51] This extraordinary fact stands in the face of repeated predictions by leading

---

[44] *Low Price-to-book Ratios May Reveal Undervalued Japanese Stock*, NIKKEI ASIAN REVIEW, May 14, 2014; *Japan Inc Shopping Spree Just Beginning: Goldman*, CNBC, Apr. 8, 2015.

[45] Armour et al., *supra* note 1, at 233, 240.

[46] Milhaupt & West, *supra* note 3, at 28.

[47] *Ever So Polite*, *supra* note 3.

[48] EIU 2005, *supra* note 3, at 20.

[49] Michiyo Nakamoto, *A Takeover Battle Launched by the Upstart Livedoor is a Test of How Much Big Corporate Groups Can Protect Themselves Against Unwanted Attention*, FINANCIAL TIMES, Mar. 22, 2005.

[50] Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2173; *Takeover Defense Guidelines*, *supra* note 4.

[51] Puchniak, *Efficiency of Friendliness*, at 200; *Failed Takeover Bid by Oji Seen as Loss for Hokuetsu*, INTERNATIONAL HERALD TRIBUNE, Sep. 6, 2006. In addition to hostile takeover attempts failing to succeed, despite Japanese dispersed shareholder structure all form of hedge fund activism (which include but are much broader than hostile takeover attempts) have been largely unsuccessful. Gen Goto, in his review of hedge fund activism in Japan since the 2000s concluded that: 'Putting aside the possibility of future developments, hedge fund activism seems to have largely failed as a sustainable investment strategy thus far.' Goto, *supra* note 7, at 142. Observers have also noted that "[d]eeply ingrained biases linger, meaning non-Japanese buyers are still few and far between, and hostile takeovers remain mainly theoretical." *See* Sharon Kahn, *Why M&A Is Different in Japan*, COLUMBIA BUSINESS SCHOOL CHAZEN GLOBAL INSIGHTS, Jan. 5, 2015), *available at*

academics[52] and prestigious pundits[53] who have claimed for decades that a wave of successful hostile takeovers in Japan was imminent. Moreover, it belies the efforts of numerous sophisticated domestic and international activist investors who, over the last two decades, have made several valiant attempts to succeed in hostile takeover bids—but, who have all ultimately failed in their attempts.[54]

How could so many leading academics, prestigious pundits and sophisticated investors be so terribly wrong (for decades) about Japan's market for hostile takeovers? How has Japan Inc. managed to keep hostile takeovers from occurring despite Japan having an environment that is ostensibly a 'utopia for hostile takeovers'? This is the enigma of hostile takeovers in Japan. Our goal in the remainder of this Article, is to explain it.

PART III: JAPAN'S SHAREHOLDER LANDSCAPE: COMPLICATING THE DISPERSED VERSUS CONCENTRATED DICHOTOMY

In the comparative corporate law and governance literature, whether a jurisdiction has a dispersed or concentrated shareholder landscape is often viewed as the most important determinant of whether it will develop a vibrant market for hostile takeovers.[55] This makes sense: hostile takeovers are only possible in companies without a controlling block-shareholder. As such, in jurisdictions where most listed companies have a controlling block-shareholder, hostile takeovers will only be possible in a small fraction of such companies. In these jurisdictions, hostile takeovers are likely to be extremely rare and have a relatively limited impact on corporate governance.

---

http://beta.global.columbia.edu/global-news/why-ma-different-japan (last accessed Aug. 10, 2017). A Japanese proxy adviser at International Shareholder Services Inc also noted that 'Hostile takeovers in Japan are like plane crashes. They hardly ever happen … Yet Japanese corporations are afraid and want to protect themselves.' *See*, *Japanese Firms Cling onto Shareholding 'Poison Pills,' Snubbing Abe's Governance Push*, BLOOMBERG, Jul. 29, 2015.

[52] Gilson, *Missing Infrastructure*, *supra* note 6, at 21-22 ("The coming of hostile takeovers to Japan has been anticipated, and anticipated, and anticipated. Each report of a reduction in the size of crossholdings among Japanese companies and in the size of Japanese bank stockholdings in their clients has given rise to an expectation that now, at last, hostile offers would emerge. … A number of events now suggest that the long wait for hostile transactions in Japan may be approaching its end."); KESTER, *supra* note 6, at 239; Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2189 ("As we have seen, substantial market shifts and large-scale legal development occurred over the course of a decade, in a country commonly portrayed as slow to change, culminating in a series of hostile bids that would have seemed unthinkable a short time ago.").

[53] *Say "Hostile Takeover"*, *supra* note 6; *Ever So Polite*, *supra* note 3; *Hostile Takeover Taboo*, *supra* note 6.

[54] For a detailed list of failed hostile takeover bids, see *supra* note 7.

[55] Armour et al., *supra* note 1, at 221-222; *see also* David C. Donald, *Evolutionary Development in Hong Kong of Transplanted UK-Origin Takeover Rules*, *in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES (Umakanth Varottil & Wan Wai Yee eds., Cambridge University Press, forthcoming) [book hereinafter cited as COMPARATIVE TAKEOVER REGULATION].

When compared to most other countries, Japan stands out, with the United States and United Kingdom, for having a dispersed shareholder landscape.[56] On average, over the last several decades, only approximately 10 percent of Tokyo Stock Exchange (TSE) listed companies have had a controlling block shareholder.[57] As such, hostile takeovers have been technically possible in the vast majority of listed companies in Japan for decades—a market reality that distinguishes Japan, with the United States and United Kingdom, from almost every other jurisdiction in the world.[58]

While the dispersed versus concentrated shareholder dichotomy provides a useful starting point for explaining why the United States and United Kingdom have had the most active hostile takeovers markets in the world, this dichotomy has limited explanatory force for Japan. Ironically, it appears that grouping Japan together with the United States and United Kingdom on the basis of their dispersed shareholder landscape has resulted in at least three distinct, but interrelated, misunderstandings about Japan's hostile takeovers market.

First, classifying Japan in this manner appears to have led some observers and market players to assume that Japan would axiomatically develop a market for hostile takeovers.[59] As suggested above, this assumption is incorrect because the fact that a jurisdiction has a dispersed shareholder landscape merely means that hostile takeovers are *technically possible* in most of its listed companies—but provides no information about whether hostile takeovers will actually be attempted or ultimately succeed. Japan demonstrates that a dispersed shareholder landscape may be necessary for a jurisdiction to develop an active market for hostile takeovers, but is insufficient on its own.

Second, this classification unduly focuses on the shareholder landscape of the Japanese stock market as a whole, rather than on the specific identities of the various types of dispersed shareholders and the different types of companies that may be potential takeover targets. This narrow focus on the shareholder landscape of the Japanese stock market as a whole is misplaced

---

[56] La Porta et al., *supra* note 2; Claessens et al., *supra* note 2; AOKI, *supra* note 2; Franks et al., *supra* note 2.
[57] Franks et al., *supra* note 2, at 2592 tbl. 3.
[58] Armour et al., *supra* note 1.
[59] Neff, *supra* note 6; Gilson, *Missing Infrastructure*, *supra* note 6, at 21, 29; Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2171, 2173-74; *Say "Hostile Takeover"*, *supra* note 6; *Ever So Polite*, *supra* note 3; *Hostile Takeover Taboo*, *supra* note 6.

because hostile takeovers ultimately occur at the firm—and not market—level. This misunderstanding has resulted in a myopic understanding of Japan's hostile takeovers market, as there has been a pervasive failure to appreciate critical attributes of certain sub-categories of dispersed shareholders[60] and the diverse nature of potential target companies—both of which, as explained below, have had an important impact on the evolution of Japan's hostile takeovers market.

Third, the realization that Japan has a dispersed shareholder landscape has caused many observers to assume that the market for hostile takeovers in Japan will evolve in a similar fashion as in the United States and United Kingdom.[61] This has provided the theoretical underpinning for the persistent predictions that Japan would develop an active hostile takeovers market. As explained in detail below, a litany of complex shareholder-market, legal and cultural factors have caused Japan's hostile takeovers market to evolve in ways that have often been the opposite of the evolution of the hostile takeovers markets in the United States and United Kingdom. The fact that many of these complex factors appear to be unique to Japan and are continually evolving suggests that comparisons between the market for hostile takeovers in Japan and the United States-United Kingdom are problematic.

Parts IV and V of this Article will respectively examine the unique legal and cultural factors that have driven the idiosyncratic evolution of Japan's hostile takeovers market. As such, the remainder of this Part of the Article will examine three critically important, but often overlooked, aspects of Japan's dispersed shareholder landscape, which help explain why Japan has not developed a vibrant hostile takeovers market. These three unique aspects of Japan's dispersed shareholder landscape further illustrate why a blunt dispersed versus concentrated shareholder ownership dichotomy may mislead, and why the specific identities of different types of dispersed shareholders are important for accurately understanding hostile takeovers in Japan (and, we suspect, elsewhere).

First, Japanese corporate governance experts have consistently observed that most listed companies in Japan contain a distinct subset of dispersed shareholders, which are commonly

[60] Puchniak, *Japanization*, *supra* note 16, at 41-42.
[61] Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2175; Armour et al., *supra* note 1, at 284-285.

referred to as 'stable-shareholders'.[62] These stable-shareholders generally consist of banks, insurance companies, or other non-financial Japanese companies that are 'typically engaged in some sort of business transaction with the issuer corporation'.[63] Stable-shareholders normally hold a small percentage (usually less than 5 percent)[64] of the issuer corporation's shares for the purpose of maintaining a long-term business relationship with the issuer corporation. Contrary to the typical dispersed shareholder, stable-shareholders do not purchase shares in the issuer corporation for the purpose of receiving dividends and/or realizing capital gains.[65]

When faced with a hostile takeover bid with a significant premium, stable-shareholders have little incentive to sell their shares, given that they are not looking to reap capital gains through their shareholding. Conversely, they have a strong incentive to support incumbent management to maintain a solid business relationship with the issuer corporation, which is the primary reason that stable-shareholders hold stable-shares. An understanding of these incentives illuminates why a hostile takeover bid, which offers a significant premium to a typical dispersed-shareholder, may in fact be seen by a stable-shareholder as offering a negative premium—as the 'true value' of the shares for the stable-shareholder is not solely the market price, but the market price plus the value of maintaining the business relationship with the target company (which may be worth more to the stable-shareholder than the 'premium' offered). In such a case, it would be rational for a stable-shareholder to reject a hostile takeover bid with a substantial 'premium', while at the same time it would be rational for a typical (non-stable) dispersed shareholder to accept the bid.

In 1985, the percentage of stable-shareholdings in TSE listed companies peaked at 66.1 percent of total market value and remained above 50 percent until 1999.[66] As such, it is clear why in

---

[62] A 'stable shareholder' has been described as '[a person who] holds the shares as a 'friendly' insider sympathetic to incumbent management: agrees not to sell the shares to third parties unsympathetic to incumbent management, particularly hostile takeover bidders or bidders trying to accumulate strategic parcels of shares: agrees, in the event that disposal of the shares is necessary, to consult the firm or at least give notice of its intention to sell.' *See* Ronald J. Gilson, *Reflections in a Distant Mirror: Japanese Corporate Governance Through American Eyes*, 1998 COLUM. BUS. L. REV. 203, 209 n.19 (1998), citing Paul Sheard, *Interlocking Shareholdings and Corporate Governance*, *in* THE JAPANESE FIRM: THE SOURCES OF COMPETITIVE STRENGTH at 314, 318 (Masahiko Aoki & Ronald Dore eds., Oxford University Press 1996).

[63] Goto, *supra* note 7, at 142. *See also* Puchniak, *Japanization*, *supra* note 16, at 42.

[64] La Porta et al., *supra* note 2, at 492, 496-497; Claessens et al., *supra* note 2, at 103; Puchniak, *Japanization*, *supra* note 16, at 42.

[65] Goto, *supra* note 7, at 142.

[66] Tokyo Stock Exchange, '2015 Share Ownership Survey', (March 2016), available at www.jpx.co.jp/english/markets/statistics-equities/examination/b5b4pj00000154dp-att/e-bunpu2015.pdf (last accessed 20 July 2016).

the build up to Japan's economic bubble in the late 1980s and in the decade after its burst in the 1990s, despite sporadic hostile takeover attempts, none of them succeeded. It is also clear why the significant decline in stable-shareholdings in the late 1990s and early 2000s (i.e., stable shareholdings went from 53.5 percent in 1997 to 32.9 percent in 2006 during this period)—which largely occurred as a result of financially distressed stable-shareholders being forced to sell stable-shares to raise capital—spurred leading academics and prestigious pundits to once again predict that Japan would develop a vibrant market for hostile takeovers.[67] In the early-to-mid 2000s, it appeared as if these predictions would finally become reality as there was an unprecedented number of hostile takeover bids.[68] This, coupled with the fact that stable-shareholdings consistently remained below 50 percent throughout the 2000s,[69] appeared to make Japan a 'utopia for hostile takeovers'.

The fact that all of the hostile takeover attempts failed in this ostensible utopia, once again belied the predictions of experts that Japan would likely become something akin to another Delaware.[70] Moreover, in the late 2000s, following several highly publicized failed hostile takeovers[71] and the GFC,[72] Japan's hostile takeover market went virtually silent.[73] Although stable-shareholdings in TSE listed companies reached a low in 2015 of 31.4 percent,[74] hostile takeovers attempts remained moribund and are currently in a state of slumber.[75] The failure of Japan's hostile takeovers market to develop, despite the significant reduction in stable-shareholdings, presents a conundrum.[76]

[67] Gilson, *Missing Infrastructure*, *supra* note 6, at 22; KESTER, *supra* note 6, at 239; Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2189.
[68] However, comparing hostile takeover bids in Japan with the United States is essentially comparing 'apples and oranges' in light of the substantive differences between the two. As such, many takeover bids in Japan were deemed to be 'hostile takeover bids' according to United States criteria, even though such bids should not have been deemed as such. Puchniak, *Efficiency of Friendliness*, at 251-254.
[69] Tokyo Stock Exchange, *supra* note 66.
[70] Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2215-2216.
[71] Puchniak, *Efficiency of Friendliness*, at 243-250; BUCHANAN ET AL., *supra* note 7, at 213-224.
[72] Goto, *supra* note 7, at 140.
[73] BUCHANAN ET AL., *supra* note 7, at 180. M&A practitioners in Japan have observed that '[they had] not seen much of either [shareholder activism or hostile takeovers] since the global financial crisis'. *See* Getting the Deal Through, *Japan: An Interview With Ryuji Sakai and Kayo Takigawa*, Dec. 2015, at https://gettingthedealthrough.com/intelligence/34/article/4577/mergers-acquisitions-japan (last accessed 21 July 2016) [hereinafter *An Interview with Ryuji Sakai and Kayo Takigawa*].
[74] Tokyo Stock Exchange, *supra* note 66.
[75] *An Interview with Ryuji Sakai and Kayo Takigawa*, *supra* note 73.
[76] A 2004 article by Gilson suggested that there would be a rise in hostile takeovers following reports of reductions in stable-shareholdings among Japanese companies, and Japanese bank stockholdings in their clients – but the increase did not materialise. *See* Gilson, *Missing Infrastructure*, *supra* note 6, at 21-22; Puchniak, *Efficiency of Friendliness*, at 224.

To begin to unravel this conundrum requires a more granular analysis of Japan's shareholder ownership landscape—which reveals the second unique aspect of Japan's dispersed shareholder market. Gen Goto, in his recent research on shareholder activism in Japan, insightfully notes that the reduction in stable-shareholdings has not occurred evenly among TSE listed companies.[77] As Goto explains, in the late-1990s, when banks were forced to sell their stable-shareholdings to meet regulatory capital requirements, they strategically sold shares in corporations with larger market capitalization and higher market valuation. This was done to refrain from selling shares of corporations that were dependent on the banks for borrowing whenever possible, with a view to preserving important main-bank relationships.[78]

As a result, much of the decrease in stable-shareholdings was concentrated in the largest TSE listed companies, meaning that stable-shareholdings still remained relatively high in small and medium sized listed companies.[79] As small and medium sized listed companies tend to be more vulnerable to hostile takeovers, this suggests that stable-shareholdings likely played a larger role in insulating Japanese listed companies from hostile takeovers than the general statistics reporting the decline of stable-shareholding for the TSE market as a whole suggest.

The third unique aspect of Japan's dispersed shareholder market, which is closely related to the decline in stable-shareholding, is the rapid rise of foreign shareholders[80]—which has been widely noted, but often misunderstood. At roughly the same time that stable-shareholdings decreased in Japan, foreign shareholdings rapidly increased. Foreign ownership accounted for approximately 4.2 percent of market capitalization for TSE listed companies in 1990; by 2004

---

[77] Goto, *supra* note 7, at 145-147.

[78] Goto, *supra* note 7, at 145-146; Miyajima Hideaki & Nitta Keisuke, *Kabushiki shoyū kōzō no tayōka to sono kiketsu - Kabushiki mochiai no kaishō / "fukkatsu" to kaigai tōshika no yakuwari* 株式所有構造の多様化とその帰結―株式持ち合いの解消・「復活」と海外投資家の役割 [*Diversification of Share-Ownership Structure and its Consequences / Unwinding and "Revival" of Cross-Shareholdings and the Role of Foreign Investors*], *in* NIHON NO KIGYŌ TŌCHI 日本の企業統治 [CORPORATE GOVERNANCE IN JAPAN] 120-21 (Miyajima Hideaki ed., Tōyōkeizai Shimpōsha 2011).

[79] Goto, *supra* note 7, at 146; Tanaka Wataru, *Kabushiki hoyū kōzō to kaisha-hō – "Bunsan hoyū no jōjō gaisha no JIRENMA" wo koete* 株式保有構造と会社法－「分散保有の上場会社のジレンマ」を越えて－ [*Share-Ownership Structure and Corporate Law - Beyond the 'Dilemma of Dispersedly-Held Listed Corporations'*], 2007 SHŌJI HŌMU 30, 31-32 (2013). For an in-depth case study of how stable-shareholdings influenced the outcome of the Bulldog Sauce case, see Xu Peng & Tanaka Wataru, *Baishū bōeisaku IN ZA SHADŌ OBU kabushiki mochiai - jirei kenkyū* 買収防衛策イン・ザ・シャドー・オブ株式持ち合い一事例研究 [*Takeover Defense in the Shadow of Cross-Shareholdings - A Case Study*], 1885 SHŌJI HŌMU 4, 10-13 (2009).

[80] Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2184

it had climbed to 22 percent; now, it stands at 28 percent.[81] Virtually all of these shares are held by foreign institutional investors, which have a history of actively engaging with management in their portfolio firms.[82] The rise in foreign institutional investors was noted by many experts as an important additional factor that would ensure the arrival of a vigorous hostile takeovers market in Japan.

Similar to the decline in stable-shareholdings, however, a more granular analysis of Japan's dispersed shareholder ownership landscape reveals a complex picture. Empirical evidence confirms that foreign investors have preferred to invest in 'larger corporations with higher ratios of overseas sales and higher return on assets'—which dovetailed with the propensity of Japanese banks to sell their stable-shareholdings in larger firms.[83] As such, the rise in foreign-shareholders appears to have accentuated the significant change in the type of dispersed shareholders in the *largest* listed companies in Japan (i.e., a movement away from dispersed stable-shareholders towards dispersed foreign-shareholders), while having a more limited impact on small and medium sized listed companies—which, as already highlighted above, tend to be the companies that are normally most vulnerable to hostile takeovers.

Obviously, the nature of Japan's shareholder landscape will continue to evolve. At present, however, there is no indication that the shareholder market is becoming less dispersed, but there is some indication that there has been a limited revival of stable-shareholdings—especially among cash-rich companies that may be the target of hostile takeovers.[84] There is also evidence that foreign institutional investors have changed their strategy for engaging with management of their portfolio firms in a way that better fits with Japan's unique lifetime employee-centred business culture[85] (which is explained in detail in Part V below). Both of these trends suggest that the types of dispersed shareholders in Japan will continue to be less receptive to hostile takeovers than academics and market players familiar with hostile takeover markets in the United States and/or United Kingdom might expect. However, the significant changes in the nature of Japan's shareholder landscape over the last several decades suggest that things can change quickly and predictions about the future identity and behaviour of Japan's dispersed shareholders—and how they will impact the evolution of Japan's market for

[81] Tokyo Stock Exchange, *supra* note 66.
[82] Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2184.
[83] Goto, *supra* note 7, at 145-146; Miyajima & Nitta, *supra* note 78, at 135.
[84] Goto, *supra* note 7, at 146; Miyajima & Nitta, *supra* note 78, at 117-18, 125-131.
[85] *See* BUCHANAN ET AL., *supra* note 7, at 282-293 (discussing the disappearance of confrontational activism).

hostile takeovers—should be made cautiously.

Finally, an important point that the evolution of Japan's shareholder landscape illuminates is that there are many 'varieties of shareholders', which complicates the oversimplified dispersed versus concentrated shareholder dichotomy.[86] Each variety can have a unique and important impact on the development of a jurisdiction's market for hostile takeovers. Recognizing that there are varieties of dispersed shareholders is distinct from an earlier trend in the literature which suggested that because a significant portion of TSE shares are held by stable-shareholders that Japan should be lumped into the monolithic category of jurisdictions with a concentrated shareholder landscape.[87] Such a blunt classification is incorrect as it is incontrovertible—regardless of the empirical method used to measure the extent of dispersion—that Japan's stable-shareholders are indeed widely dispersed.[88] Also, the fact that Japan's stable-shareholders have a common reason to support incumbent management does not eliminate their potential collective action problems or remove the empirical possibility of hostile takeovers—which are two features that distinguish stereotypical dispersed shareholders from controlling shareholders in terms of their impact on hostile takeovers.

The importance of recognizing Japan's stable-shareholders as a 'variety' of dispersed shareholders (rather than as stereotypical controlling-block shareholders) is further illustrated by the fact that, as explained above, many sophisticated investors have attempted to test the stability of Japan's stable-shareholders by launching hostile takeover bids—something that would obviously not happen if Japan's dispersed-stable-shareholders were stereotypical controlling-block-shareholders. This being said, as one of us has explained elsewhere, from another perspective it may be possible to view Japan's stable-shareholders as on one end of the continuum of 'varieties of controlling shareholders'—but this would only be correct if there is an understanding of the diverse varieties of controlling shareholders, which has been largely overlooked in the literature.[89]

Although incorrectly classifying Japan as a stereotypical concentrated shareholding market was

---

[86] Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1652-1659 (2006); Dan W. Puchniak, *Multiple Faces of Shareholder Power*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER at 523-524 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar 2015) [hereinafter Puchniak, *Multiple Faces*].
[87] Puchniak, *Japanization*, *supra* note 16, at 42.
[88] La Porta et al., *supra* note 2, at 471; Franks et al., *supra* note 2, at 2580.
[89] Puchniak, *Multiple Faces*, *supra* note 86, at 514.

done by leading academics in the past,[90] recent developments in comparative corporate law research suggest that the rationale for such a classification is becoming outdated. There is a growing recognition that there are 'varieties of shareholders', and that these varieties may have a significant impact on the market for hostile takeovers and corporate governance more generally.[91] In this vein, although the evolution of stable- and foreign-shareholding make Japan's hostile takeovers market unique, having varieties of dispersed/concentrated shareholders does not appear to be unique to Japan. In addition, it appears that the need to understand the distinct varieties of shareholders in order to properly understand a jurisdiction's hostile takeovers market is something that is probably necessary in all jurisdictions.

PART IV: THE MYOPIA OF THE ANGLO-AMERICAN LENS: UNDERSTANDING JAPAN'S REGULATORY FRAMEWORK ON ITS OWN TERMS

The regulatory framework for hostile takeovers in Japan is often understood through an Anglo-American lens.[92] Leading scholars and practitioners regularly highlight the fact that aspects of Japan's hostile takeovers regime were modelled on the United Kingdom's City Code in 1990[93] and Delaware law in 2005.[94] However, Japanese academics have, while acknowledging the historical origins of Japan's hostile takeover regime, tended to emphasise that Japan's regime differs substantially from its counterparts in the United Kingdom and United States.[95]

---

[90] Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 871, 875 (1993); Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan and the United States*, 102 YALE L.J. 1927, 1939 (1993); Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1436 (1994); Puchniak, *Japanization*, *supra* note 16, at 41-42.

[91] For example, it is now clear in the literature that institutional shareholders in the United States, which typically hold less than 5 percent of their portfolio companies, are normally rationally apathetic and support incumbent management. However, there is no suggestion that this feature of the dispersed shareholder market in the United States makes it a concentrated shareholder market. Conversely, there is an increasing realization that understanding the unique varieties of dispersed shareholders is critical for an understanding of how shareholder activism has evolved in the United States. Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013).

[92] *See e.g.*, Gilson, *Missing Infrastructure*, *supra* note 6; Milhaupt, *Shadow of Delaware*, *supra* note 4; Armour et al., *supra* note 1.

[93] Milhaupt & West, *supra* note 3, at 19-20; Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2205–2206; Armour et al., *supra* note 1, at 249–250. Even one of the authors was guilty of this; *see* Puchniak, *Efficiency of Friendliness*, at 229.

[94] Armour et al., *supra* note 1, at 250-253; Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2205-2206; Masatsugu Suzuki, *Japan: Takeover Guide*, at 2, *available at* www.ibanet.org (last accessed 4 August 2016).

[95] Eiji Takahashi, *Japanese Corporate Groups under the New Legislation*, 3 EUR. CO. & FIN. L. REV. 287, 298 (2006); Tomotaka Fujita, *The Takeover Regulation in Japan: Peculiar Developments in the Mandatory Offer Rule*, 3 U. TOKYO SOFT L. REV. 24 (2011). While leading corporate law academics such as Aronson, Jacobs, Milhaupt and West have provided a fairly nuanced description of Japanese law, such descriptions are often made through an Anglo-American lens. One of the authors, for example, even previously analysed Japan's hostile

In this Part of the Article, we suggest that viewing Japan's hostile takeovers regime through an Anglo-American lens often results in myopia. Such an approach over-emphasizes the role played in Japan by features which have played a predominant role in the United States or United Kingdom (e.g., the poison pill, independent directors, directors' duties, and the mandatory bid rule). In a similar vein, explaining features of Japan's regulatory regime using terminology originally created to describe important features in the United States or United Kingdom (e.g., the 'Japanese poison pill', 'Japanese independent directors', and 'Japanese mandatory bid rule') often results in Japan's regulatory regime being misunderstood.[96]

Ultimately, by highlighting how Japan's hostile takeovers regime must be understood on its own terms, this Part of the Article reveals that Japan's regulatory regime has charted its own course—but in a way that has been slow to develop and left many critical questions unanswered.[97] For example, it is still unclear under Japanese law what types of defensive measures are legally permissible;[98] how directors' duties apply in hostile takeover cases;[99] and, whether independent directors have any role to play in hostile takeovers.[100]

We posit that such critical questions have remained unanswered in Japan because other non-legal factors described in this Article (i.e., stable-shareholdings and Japanese corporate culture) have served as an effective shielding from hostile takeovers for the vast majority of listed companies. As a consequence, Japan's regulatory regime has not had a consistent flow of

---

takeover regime using Anglo-American devices (*e.g.* 'poison pill') as a basis for comparison; *see* Puchniak, *Efficiency of Friendliness*.

[96] *See e.g.*, *Corporate Japan Looks for Outside Advice*, WALL STREET JOURNAL, Jun. 8, 2015; *Poison Pills Linger as Japan Firms Snub Abe Governance Push*, BLOOMBERG, Jul. 28, 2015.

[97] Armour et al., *supra* note 1, at 258, 272; Stephen Givens, *Looking Through the Wrong End of the Telescope: The Japanese Judicial Response to Steel Partners, Murakami, and Horie*, 88 WASH. U. L. REV. 1571, 1572 (2011); Hideki Kanda, *Corporate Governance in Japanese Law: Recent Issues and Trends*, 11 HASTINGS BUS. L.J. 68, 71 (2015).

[98] Armour et al., *supra* note 1, at 255; Tomotaka Fujita, *Case No. 29 – Corporate Law*, *in* BUSINESS LAW IN JAPAN – CASES AND COMMENTS at 313-322 (Moritz Bälz et al. eds., Wolters Kluwer 2012) [hereinafter Fujita, *Case No. 29*] [book hereinafter cited as BUSINESS LAW IN JAPAN]; Hiroshi Oda, *Case No. 30 – Corporate Law*, *in* BUSINESS LAW IN JAPAN, *supra* note 98, at 327-330 [hereinafter Oda, *Case No. 30*].

[99] J. MARK RAMSEYER & MASAKAZU IWAKURA, CASEBOOK M&A – HARVARD LAW SCHOOL DE NO KŌGI WO MOTO NI ケースブック M&A　ハーバード・ロースクールでの講義を基に [CASEBOOK ON M&A—BASED ON LECTURES AT HARVARD LAW SCHOOL] 87-93 (Shōji Hōmu 2015).

[100] Hiroyuki Watanabe, *Designing a New Takeover Regime for Japan: Suggestions from the European Takeover Rules*, No. 30 J. JAPAN. L. 89, 90-91 (2010).

hostile takeover cases,[101] which has prevented it from developing a similar level of detail and clarity as in the United States.[102] We suggest that this lack of detail and clarity has spawned uncertainty in the market, which in turn has created an additional barrier for the development of a vibrant hostile takeovers market in Japan.[103]

Japan's foundational hostile takeovers regime—not the UK model

In 1990, Japan's Securities and Exchange Act underwent a major revision which aimed to provide a more detailed regulatory framework for hostile takeovers.[104] Japanese legislators drew on the United Kingdom's City Code for aspects of this revision.[105] As such, it is understandable why leading comparative corporate law experts sometimes claim that Japan's post-1990 hostile takeovers regime adopted facets of the City Code model.[106] For at least three reasons, this suggestion is incorrect and has resulted in a number of fundamental misunderstandings about the core features of Japan's post-1990 hostile takeovers regime.

First, contrary to the views of leading experts, Japan's post-1990 regulatory regime did not impose a mandatory bid rule—as it is understood in the United Kingdom—on acquirers seeking to purchase more than one-third of the shares in a listed company.[107] Japanese acquirers were—and still are—required to make an offer to all shareholders if they intend to acquire

[101] Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2192–2193 (observing that 'sparse litigation' meant that Japan did not have 'a particularly complete or instructive body of takeover jurisprudence' in the mid-2000s); Armour et al., *supra* note 1, at 250.
[102] Armour et al., *supra* note 1, at 263.
[103] Even if the law was clarified so that management could 'just say no' to a takeover bid (similar to under Delaware law) this may allow potential bidders and shareholder activists to develop strategies to have management remove defensive measures—which is what happened in the United States with the poison pill and staggered boards. In Japan, however, it seems that the law is generally pro-management, but the fact that it is uncertain makes it difficult for bidders and/or shareholder activists to lobby to change the pro-management law because it is uncertain exactly what the law is—other than that it is generally pro-management.
[104] Act Amending the Securities and Exchange Act 1990; Fujita, *supra* note 95, at 25.
[105] Naitō Jun'ichi, *Kabushiki kōkai kaitsuke seido no kaisei* 株式公開買付制度の改正 [*Reform of the Takeover-bids Regime*], 1208 SHŌJI HŌMU 2 (1990).
[106] Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2205; Milhaupt & West, *supra* note 3, at 19-20.
[107] Milhaupt & West, *supra* note 3, at 19-20; Armour et al., *supra* note 1, at 249.

more than one-third of a listed company's shares[108] through an off-market purchase.[109] Acquirers, however, can cap the total percentage of shares they want to purchase for such offers as long as the cap is set below two-thirds of the target's shares.[110] If, however, an offer for less than two-thirds of the target's shares is over-subscribed (i.e., the percentage of shares offered exceeds the acquirer's prescribed cap) then the acquirer must purchase the shares offered on a *pro-rata basis* up to the level of the cap—but, importantly, is not required to purchase any shares beyond the cap.[111]

This is precisely the opposite of a United Kingdom-style mandatory bid rule, which prohibits setting a cap on the amount of shares the acquirer must purchase if the acquirer seeks to purchase more than 30 percent of the target's shares.[112] The inability of an acquirer, after crossing a certain ownership threshold, to cap the percentage of shares purchased goes to the core of the United Kingdom's mandatory bid rule. Critically, this core feature is missing from Japan's one-third 'mandatory bid rule'.[113]

Japan's Securities and Exchange Act was amended in 2006 to implement another rule (which is still in effect) that requires an acquirer who aims to purchase more than two-thirds of a target company's shares, to make an offer to all remaining shareholders, without allowing a cap on the percentage of shares to be acquired.[114] This rule comports with the understanding of what a mandatory bid rule means in the United Kingdom (and most other jurisdictions). However, the policy rationale underlying Japan's two-thirds mandatory bid rule and its functional effect on the market for hostile takeovers are fundamentally different than under the United Kingdom's 30 percent mandatory bid rule (and, mandatory bid rules in most other

[108] Kin'yū Shōhin Torihiki-hō 金融商品取引法 [Financial Instruments and Exchange Act] (Act No 25 of 1948) [hereinafter FIEA 2006], art. 27-2 (1) (ii). It should be noted that an acquirer is also required to make an offer where he ends up holding 5 percent or more of the company's shares through an off-market purchase ('the 5 percent rule'), unless he has purchased his shares from 10 or fewer shareholders within 61 days (60 days plus the day of the purchase), and his resulting shareholding is one-third or less. FIEA 2006, art. 27-2 (1)(i) read with Kin'yū Shōhin Torihiki-hō Shikō-rei 金融商品取引法施行令 [Financial Instruments and Exchange Act Enforcement Order] (Cabinet Order No 321 of 1965) [hereinafter FIEA Enforcement Order], art. 6-2 (3). This '5 percent rule' is modelled after the United States Securities and Exchange Act of 1934. *See* Takahashi, *supra* note 95, at 298.

[109] It is unlikely that on-market purchases will trigger the mandatory bid requirements in the Securities and Exchange Act or the FIEA; *see* FIEA 2006, art. 27-2 (1) (i) and (ii).

[110] FIEA 2006, art. 27-13 (4), read with FIEA Enforcement Order, art. 14-2-2.

[111] FIEA 2006, art. 27-13 (5).

[112] City Code on Takeovers and Mergers (U.K.) [hereinafter City Code], r. 9.1.

[113] Japan allows acquirers to set a cap on the number of shares to be acquired; see FIEA 2006, art. 27-13 (4) and (5), read with FIEA Enforcement Order, art. 14-2-2.

[114] FIEA 2006, art. 27-2 (5), read with FIEA Enforcement Order, art. 8(5)(iii).

jurisdictions).[115]

In the United Kingdom, the 30 percent mandatory bid rule is designed to prevent an acquirer, who obtains control of a target company, from using her control to extract private benefits of control from the target company.[116] This is achieved by requiring a bidder who wants to gain control of a company (which in the United Kingdom is assumed to occur when a shareholder owns more than 30 percent of a company's shares)[117] to offer to purchase all of the shares in the target company without setting a cap. In contrast, Japan's two-thirds 'mandatory bid rule' explicitly allows an acquirer to gain *de facto* control (and, even actual majority voting control) of a target company without making a United Kingdom-style mandatory bid.

This difference is critical because it allows an acquirer to succeed in taking control of a target company through a hostile takeover bid without having to incur the cost of making a United Kingdom-style mandatory bid.[118] In this limited respect, Japan's post-1990 regulatory regime is more similar to the regime in United States than in the United Kingdom because in both jurisdictions a hostile acquirer can gain control of a company through a hostile takeover bid without being required to make a United Kingdom-style mandatory bid. However, as suggested above, the Japanese and American regimes are distinct in that an acquirer in Japan must make a United Kingdom-style mandatory bid if they want to acquire more than two-thirds of the target company's shares—which is not required in the United States.[119]

In addition, the fundamental logic which underlies Japan's two-thirds mandatory bid rule and the United Kingdom's 30 percent mandatory bid rule are clearly distinct. The justification for

---

[115] KRAAKMAN ET AL., *supra* note 10, at 252-255. For examples from other jurisdictions, *see* Umakanth Varottil, *The Nature of the Market for Corporate Control in India*, *in* COMPARATIVE TAKEOVER REGULATION, *supra* note 55; Claire Te-Fang Chu, *Takeover Laws and Practices in Taiwan: Recent Developments and Future Prospects*, *in* COMPARATIVE TAKEOVER REGULATION, *supra* note 55; Donald, *supra* note 55.

[116] Private benefits of control have been defined as 'the disproportionate returns … that dominant shareholder receive, often at the expense of minority shareholders. These benefits are impounded in the control premia charged for controlling blocks and in the price differentials that obtain between publicly traded high- and low-vote shares in the same companies.' *See* KRAAKMAN ET AL., *supra* note 10, at 89-90.

[117] The City Code defines 'control' as 'an interest, or interests, in shares carrying in aggregate 30% or more of the voting rights (as defined below) of a company, irrespective of whether such interest or interests give *de facto* control.' *See* City Code, 'Definitions'. For further information on the City Code regime for takeovers in comparative perspective, *see* Harald Baum, *Takeover Law in the EU and Germany: Comparative Analysis of a Regulatory Model*, 3 U. TOKYO J. L. & POL'Y 60 (2006).

[118] A shareholder with a simple majority (50% + 1) of the company's shares can generally control the election and removal of directors – and therefore the management of the company. *See* Goto, *supra* note 7, at131-133; Kaisha-hō 会社法 [Companies Act] (Act No. 86 of 2005), arts. 339(1) and 341.

[119] KRAAKMAN ET AL., *supra* note 10, at 253-255.

setting the trigger for the mandatory bid rule at 30 percent in the United Kingdom is rooted in a market-based approach: in the United Kingdom's dispersed shareholding environment 30 percent ownership of a listed company is assumed to normally provide an acquirer with *de facto* control of the company.[120] Conversely, the justification for setting the trigger for the mandatory bid rule at two-thirds in Japan is rooted in a law-based approach: according to Japanese company law a two-thirds shareholder vote is required to make fundamental corporate decisions.[121] In contrast to both the United Kingdom and Japan, in the United States the rationale for having no mandatory bid rule at all is that by allowing the target company's board to use defensive measures to negotiate on behalf of the shareholders, there is no need to force the acquirer to purchase any shares at all.[122]

The second feature of Japan's post-1990 regulatory regime, which makes it incorrect to suggest that it generally followed the United Kingdom's City Code, is that Japanese courts were—and still are—at the centre of the regime.[123] In fact, the central role of courts in regulating hostile takeovers in Japan preceded the 1990 revision to the Securities and Exchange Act.[124] This is diametrically opposed to the approach taken in the City Code, which intentionally side-lines the courts and places The Panel on Takeovers and Mergers (the 'Panel') at the centre of the regulation of hostile takeovers in the United Kingdom.[125]

Although courts were (and still are) at the centre of Japan's post-1990 regulatory regime, as suggested above, the relatively sparse nature of Japanese jurisprudence on hostile takeovers has left many critically important questions unanswered.[126] Even though Japanese courts have sporadically rendered decisions on disputes involving hostile takeover attempts since the 1980s, the depth, detail and clarity of Japan's hostile takeovers jurisprudence pales in comparison to the jurisprudence in Delaware over the same period.[127] In this respect, the role of Japanese courts in the post-1990 regulatory regime is distinct from the role of courts in both

---

[120] John Armour & David A. Skeel, *Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1737 (2007).

[121] KANZAKI KATSURŌ ET AL., KINYŪ SHŌHIN TORIHIKI HŌ 金融商品取引法 [FINANCIAL INSTRUMENTS AND EXCHANGE ACT] 502, 503 n.2 (Seirinshoin 2012).

[122] KRAAKMAN ET AL., *supra* note 10, at 253-255.

[123] Armour et al., *supra* note 1, at 263-265.

[124] Notably, the Chujitsuya and Inageya case: Tōkyō Chihō Saibansho [Tokyo Dist. Ct.], Jul. 25, 1989, 704 HANREI TAIMUZU 84.

[125] Armour & Skeel, *supra* note 120, at 1744-1745; Armour et al., *supra* note 1, at 262-263.

[126] Armour et al., *supra* note 1, at 258, 272; Givens, *supra* note 97, at 1571-1572; Kanda, *supra* note 97, at 71.

[127] Givens, *supra* note 97, at 1581.

the United Kingdom and United States.

The third feature of Japan's post-1990 regulatory regime, which makes it incorrect to suggest that it generally followed the City Code, is the (informal) role that target management was permitted to play in 'frustrating' hostile takeover attempts from the late-1980s until changes in Japan's hostile takeover regime took place in the mid-2000s.[128] During this period, a handful of hostile takeover cases reached Japanese courts. Generally, in these cases, the target company's lifetime employee dominated board would respond to a hostile takeover attempt by issuing the target company's shares to a friendly stable-shareholder[129]—which under Japanese company law could be done without shareholder approval.[130] In several of these cases, the hostile bidder responded to this defensive measure by seeking an interim injunction under the Commercial Code on the basis that such an issuance of shares was 'extremely unfair'.[131] Through these cases, the Japanese courts developed a judicial doctrine—the 'primary purpose rule'—to determine whether such an issuance of shares was 'extremely unfair'.[132] According to the 'primary purpose rule', the issuance of shares would not be 'extremely unfair' if the primary purpose of the issuance was to raise capital rather than to maintain control of the target company.[133]

---

[128] It should be noted that although Japan's postwar history of unsuccessful hostile takeover attempts can be traced back to the 1970s. As noted by one of us elsewhere, 'every year from the late 1970s until the burst of the bubble in the late 1980s, there were several major share acquisitions of large listed Japanese companies by maverick Japanese investors with hostile intents.' Every hostile share acquisition in this period ultimately failed to remove control from incumbent management, but many ended 'successfully' for the acquirers as they 'greenmailed' management of the target companies into have the target companies repurchase the shares they acquired at a premium in order to maintain their control. The defensive tactic to payoff greenmailers went almost entirely unchallenged by general shareholders likely because it would have been contrary to the interest of stable shareholders to act and directors' duties and derivative actions remained grossly underdeveloped at that time. *See* Puchniak, *Efficiency of Friendliness*, at 234.

[129] *See e.g.*, Tokyo Dist. Ct., Jul. 25, 1989, 704 HANREI TAIMUZU 84.

[130] Prior to the 2005 revision, the Commercial Code permitted the board of directors to issue shares or share options, unless the conditions of such issuance were 'particularly favourable' to its subscribers. SHŌHŌ 商法 [COMM. C.] (Act No 48 of 1899), arts. 280-2(1), (2), 280-20(2) and 280-21(1) (repealed).

[131] COMM. C., arts. 280-10, 280-39(4) (repealed).

[132] For an exhaustive treatment of the jurisprudence in Japanese see Matsunaka Manabu, *Shuyō Mokuteki RUURU no Kentō (ichi)* 主要目的ルールの検討（一） [*The Primary Purpose Rule (Part 1)*], 57 HANDAI HŌGAKU 1011 (2008).

[133] The jurisprudence is legion, but an early and influential case is the Chujitsuya and Inageya case, Tokyo Dist. Ct., Jul. 25, 1989, 704 HANREI TAIMUZU 84. *See* generally Mitsuhiro Kamiya & Tokutaka Ito, *Corporate Governance at the Coalface: Comparing Japan's Complex Case Law on Hostile Takeovers and Defensive Measures*, *in* CORPORATE GOVERNANCE IN THE 21ST CENTURY: JAPAN'S GRADUAL TRANSFORMATION at 183 (Luke Nottage et al. eds., Edward Elgar 2008); HIROSHI ODA, JAPANESE LAW 265 (3d ed., Oxford University Press 2009); Givens, *supra* note 97, 1574-1575; Fujita, *Case No. 29*, *supra* note 98, at 313-322; Oda, *Case No. 30*, *supra* note 98, at 323-330.

Some leading comparative corporate law scholars have noted that Japan's 'primary purpose rule' appears to be doctrinally similar to the common law directors' duty in the United Kingdom which requires directors to exercise their power to issue shares only when it is for the 'proper purpose' of raising capital (and not defeating a hostile takeover bid).[134] In addition, on its face, Japan's 'primary purpose rule' appears to dovetail with the United Kingdom's 'no frustration rule' which prohibits the target's board from taking any action to frustrate a takeover offer without shareholder approval.[135] However, in its application from the 1980s until 2005, Japan's 'primary purpose rule' could hardly be any different than the United Kingdom's 'no frustration rule' and 'proper purpose' duty for at least two reasons.[136]

First, it is widely recognized that Japanese courts were inclined to uphold the target board's decision to issue shares to a friendly stable-shareholder in the context of an ongoing takeover bid as long as the target board referred to some need to raise capital—which was normally easy to do.[137] Although never explicitly stated by the court, the general consensus among leading authorities was that courts were inclined to set an extremely low bar for finding that there was a capital raising purpose of issuing shares in cases where the court had a reason to believe that the hostile acquirer was a greenmailer.[138] Therefore, in practice, Japanese case law, as sparse as it was, appeared to allow management to effectively frustrate hostile takeover bids, without shareholder approval, when it appeared that management was acting in the best interests of the company. This approach is diametrically opposed to the United Kingdom's 'no frustration rule'

---

[134] Armour et al., *supra* note 1, at 250 n.147. The leading case in the United Kingdom on the 'proper purposes' duty prior to its codification in section 171 of the Companies Act 2006 (U.K.) was *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] A.C. 821 (P.C. (N.S.W.)). For the present post-codification position, *see Eclairs Group Ltd v. JKX Oil & Gas plc* [2015] Bus. L.R. 1395 (Supt. Ct. U.K.).

[135] The 'no frustration rule' provides that 'during the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, without the approval of the shareholders in general meeting, take any action which may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits …'. *See* City Code, r. 21.1.

[136] *See* generally Yamanaka Toshiaki, *Seitō Mokuteki RUURU ni yoru Torishimariyaku ni taisuru Kiritsu: Eikoku 2006 Kaisha-hō wo Fumaete* 正当目的ルールによる取締役に対する規律―― 英国 2006 年会社法を踏まえて [*Monitoring Directors with the Proper Purpose Test: Lessons from the UK Companies Act 2006*] (Kinyū shōjihō [Financial and Commercial Law] Working Paper 2014), *available at* http://www.securities.j.u-tokyo.ac.jp/w-papers/2014-9_Yamanaka.pdf (last accessed 19 August 2016).

[137] A leading Japanese academic has observed that 'the courts have recognized 'finance' as being the principal purpose very easily in the past. Some courts, when finding the principle to be 'finance' rather than 'control', relied on the simple fact that there was a need for external funds. Others referred to the reason why equity finance was desirable compared with other methods of finance or why public offering does not achieve the purpose in the case' (footnotes omitted). *See* Fujita, *Case No. 29*, *supra* note 98, at 317-18.

[138] Oda, *Case No. 30*, *supra* note 98, at 327.

and 'directors' duty to act for a proper purpose' in the context of a hostile takeover.[139]

Second, the 'primary purpose rule' applies to the issuance of shares, but it is unclear if it has any applicability to other defensive measures.[140] As such, from the 1980s until 2005, substantial uncertainty on the legality of many other defensive measures that target boards may take to frustrate a takeover bid significantly distinguished Japan's hostile takeovers regime from the United Kingdom's regime, which provides a general 'no frustration rule'.[141] In addition, Japan's 'primary purpose rule' was also distinct from Delaware's general position on the ability of a target board to frustrate a hostile takeover attempt—which provides clear guidelines for target management to 'just say no' when proper procedures are followed (which, as explained above, did not exist in Japan).[142]

In sum, it is incorrect to suggest that Japan's post-1990 to 2005 regulatory regime even loosely followed the United Kingdom's City Code model. As shown, in many respects, Japan's approach for regulating hostile takeovers was the polar opposite of the United Kingdom's approach. Moreover, during this period, as we have shown, Japan's approach was also significantly different from Delaware's approach.

Japan's post-2005 hostile takeovers regime—not the next Delaware[143]

There were great expectations among academics, pundits and investors that 2005 would be the year of watershed change for the success of hostile takeovers in Japan. These expectations were brought to life by Livedoor's audacious hostile takeover bid for Nippon Broadcasting System (NBS).[144] Livedoor's founder and president, Takafumi Horie, was a brash, 32-year-old, Tokyo University dropout, who made his mark as a dotcom billionaire-cum-corporate raider. With his

[139] The United Kingdom Supreme Court recently confirmed that a director cannot rely on the company's best interests to defend herself against alleged breaches of the 'proper purpose' duty. *See Eclairs Group Ltd v. JKX Oil & Gas plc* [2015] Bus. L.R. 1395 (Supt. Ct. U.K.); Hans Tjio, *The Proper Purpose Rule*, [2016] LLOYD'S MAR. & COMM. L.Q. 176, 185 (2016).
[140] Oda, *Case No. 30*, *supra* note 98, at 327.
[141] Armour et al., *supra* note 1, at 255.
[142] KRAAKMAN ET AL., *supra* note 10, at 238-239. Further, given that the poison pill in Japan was generally viewed as being technically impossible and illegal under Japanese law until an amendment to the Commercial Code in 2001 (and even after this, as explained below, its legality is still uncertain), management's ability to frustrate hostile bids in Japan differs significantly from the United States.
[143] Some material in this section has been reproduced from Puchniak, *Efficiency of Friendliness*. The authors are grateful to the Berkeley Business Law Journal for permission to do so.
[144] Armour et al., *supra* note 1, at 250.

spiky-hair, 'Cheshire cat' grin, t-shirt and jeans business attire, and penchant for bikini-clad girls and Ferraris, Horie became a cultural icon for his attempt to change Japan's traditional, lifetime employee centred, corporate culture.[145]

In early-February 2005, using a loophole in the Securities and Exchange Act, Livedoor surreptitiously acquired 29.6 percent of NBS' shares in after-hours trading (bringing its stake up to thirty-eight percent) and shocked the market by announcing its intention to make a takeover bid for NBS.[146] NBS responded quickly by announcing that it would issue warrants to a friendly stable-shareholder as a defensive measure—which, if exercised, would dramatically increase NBS' share capital by 140 percent and dilute Livedoor's stake in NBS to less than 20 percent.[147]

In response to NBS' defensive measure, Livedoor sought an injunction from the Tokyo District Court to stop the issuance of the NBS warrants. The fact that the warrants, if exercised, would have more than doubled NBS' capital made it practically impossible for NBS to argue that the 'primary purpose' of the issuance was to raise capital and not to entrench management.[148] As such, NBS 'never denied that the new share issue was intended to dilute the shares of Livedoor'.[149] Therefore, unsurprisingly, in light of the well-established 'primary purpose rule,' the Tokyo District Court granted the injunction preventing NBS from issuing the warrants, which was affirmed on appeal by the Tokyo High Court.[150]

Horie's aggressive takeover bid and successes in court led many experts to suggest that this signified a watershed change for hostile takeovers in Japan. Leading academics posited that the day Horie launched Livedoor's bid for NBS marked the 'advent of an era of hostile takeovers' in Japan.[151] Noted pundits claimed that Livedoor's takeover attempt sparked 'a revolution in [Japan's market for] corporate control.'[152] Influential policymakers even erroneously credited Horie with pulling off Japan's first-ever successful hostile takeover before the Livedoor bid

---

[145] Puchniak, *Efficiency of Friendliness*, at 243-244.
[146] Fujita, *Case No. 29*, *supra* note 98, at 314.
[147] Puchniak, *Efficiency of Friendliness*, at 245.
[148] *Id*.
[149] Oda, *Case No. 30*, *supra* note 98, at 327.
[150] Tōkyō Kōtō Saibansho [Tokyo High Ct.] Mar. 23, 2005, 1173 HANREI TAIMUZU 125 (hereinafter *Livedoor*); Puchniak, *Efficiency of Friendliness*, at 245; Fujita, *Case No. 29*, *supra* note 98, at 314.
[151] Puchniak, *Efficiency of Friendliness*, at 238.
[152] EIU 2005, *supra* note 3, at 7.

was even complete.[153]

In the end, however, all such predictions were proven wrong. In response to Livedoor's court victories, NBS' largest friendly-stable shareholder increased its NBS holdings and another friendly shareholder 'borrowed' a large portion of shares that NBS held in Fuji TV—which was the 'crown jewel' of NBS and the primary reason that Horie wanted to take it over. In addition, NBS' management received crucial support from its lifetime employees, as 90 percent of them signed a public statement supporting NBS' incumbent management over Horie and Livedoor.[154]

In April 2005, in an act that was tantamount to admitting defeat, Livedoor sold its significant block of NBS shares to NBS' largest stable-shareholder at a marginal profit, which was just enough to allow Horie to 'save face.'[155] In the end, Livedoor was defeated because, in traditional fashion, friendly stable-shareholders rallied around incumbent management, 'demonstrating that the era of a truly free stock market [was] still a long way off' in Japan.[156]

There were some experts, who even in the wake of Livedoor's failure, continued to view Horie's failed hostile takeover attempt as a major shift in the nature of Japan's market for corporate control.[157] In 2006, however, such views faded when Horie was arrested and indicted on allegations of accounting fraud and stock market manipulation.[158] The scandal spurred a massive two-day sell-off on the TSE. The volume of selling was so great that the TSE was forced to close early, a move that was seen as 'a blow to the nation's pride'.[159] This caused markets around the world to fall and was dubbed by the news media as the 'Livedoor shock.' Horie was disgraced, as Livedoor's share price plummeted in a month from 696 yen to 61 yen and in April, the stock was delisted from the TSE.

---

[153] Japan's highly regarded Corporate Value Study Group, which drafted a report that was foundational in establishing Japan's Takeover Guidelines, erroneously suggests in its report that Livedoor's hostile bid was successful. *See* Corporate Value Study Group, *Corporate Value Report*, at 14 (2005), *available at* www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/houkokusyo_hontai_eng.pdf (last accessed 29 July 2016).

[154] Puchniak, *Efficiency of Friendliness*, at 245-246.

[155] EIU 2005, *supra* note 3, at 11-13.

[156] *Id.*

[157] Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2203.

[158] *Keidanren rues Livedoor entry*, JAPAN TIMES, Jan. 19, 2006; Puchniak, *Efficiency of Friendliness*, at 259.

[159] *After Panic, Tokyo Market Rebounds*, NEW YORK TIMES, Jan. 19, 2006.

The picture of Horie solemnly bowing before a judge in a Tokyo courtroom, with his trademark spiky-hair cropped and wearing a conservative 'salary man' black suit, was a stark contrast to the once renegade shareholder activist who was famous for flamboyantly challenging Japan's conservative business culture. In March 2007, Horie was sentenced to two and a half years in prison. Given that Japanese courts rarely impose jail terms for securities violations, many viewed this sentence as extremely harsh.[160]

In retrospect, the Livedoor bid clearly did not mark a watershed change for hostile takeovers in Japan. A decade after the Livedoor bid, it is now clear that predictions that Japan would be quickly transformed into something akin to Delaware as a result of the Livedoor bid have clearly not come to pass. However, the manner in which the Tokyo High Court applied the 'primary purpose rule' in upholding the District Court's injunction to prevent NBS' issuance of warrants did create a noteworthy development in Japan's hostile takeovers jurisprudence—but, again, these developments can only be properly understood when viewed through a Japanese lens.

As explained above, prior to the *Livedoor* case, according to the 'primary purpose rule', the issuance of shares by the target's board could only be justified if it was proven that the 'primary purpose' of the issuance was to raise capital, rather than to maintain control of the target company. Although in practice Japanese courts were often quick to accept explanations offered by the target as to why raising capital was required (which in many cases was tantamount to allowing the target board to issue shares as a defensive measure) formally a target board could not claim that the 'primary purpose' of a share issuance was to maintain corporate control—even if doing so was in the company's best interest. In short, prior to *Livedoor*, Japanese courts had not *formally* recognized any circumstances in which a target board could, without shareholder approval, take defensive measures.[161]

However, the Tokyo High Court in the *Livedoor* case explicitly recognized that in four limited circumstances a target's board can issue shares or warrants for the 'primary purpose' of maintaining control. These four circumstances occur when the hostile bidder is: [162]

(1) acquiring the target's shares with the intent of requiring the corporation to buy them back at a

[160] Puchniak, *Efficiency of Friendliness*, 259.
[161] Oda, *Case No. 30*, *supra* note 98, at 328-29.
[162] Fujita, *Case No. 29*, *supra* note 98, at 319.

higher price ('greenmail');

(2) temporarily taking control of the corporation and running the corporation in the interests of the acquirer at the expense of the corporation, such as acquiring the corporation's important assets at low prices;

(3) pledging assets of the company as collateral for debts of the acquirer or its group companies or using the company's funds to repay such debts; or

(4) temporarily taking control of the management of the company and selling valuable assets that are currently not related to the company's business and temporarily declaring high dividends with profits from the disposition, or selling the shares at a higher price after the share price rose, due to temporarily high dividends.

It seems clear that the High Court crafted these four circumstances with a view to creating a filter that would allow wealth-enhancing hostile takeovers to proceed without interference from target boards, but permit target boards to block wealth-reducing hostile takeovers. The High Court's judgment generated considerable academic attention, especially from the US, given its similarity to the *Unocal* rule "with its implicit threat analysis and proportionality requirement".[163] On the domestic front, concerns have been expressed by leading Japanese academics, that the four circumstances may in fact provide a formal justification for management to block wealth-enhancing hostile takeovers—particularly as the third circumstance (see, above) could be interpreted as allowing management to issue shares to prevent wealth-enhancing leveraged buyouts from succeeding.[164]

Although a decade has passed since the *Livedoor* court decisions, no jurisprudence has developed to clarify the scope or application of the four circumstances. This has created uncertainty about precisely when a target board can issue shares or warrants for the 'primary purpose' of maintaining control without shareholder approval. We suggest that this lack of clarity has contributed to a vibrant market for hostile takeovers not developing in Japan.

Another significant development that occurred in 2005, in the midst of the *Livedoor* case, was the release by the Legislative Council of the Ministry of Justice of the Final Report on the new Companies Act.[165] The Final Report included proposed amendments to facilitate M&A, which sparked fear in corporate Japan of an increase in hostile takeover activity—especially by

---

[163] Milhaupt, *Shadow of Delaware*, *supra* note 4, at 2194. Milhaupt argues that these similarities "may not be coincidental", given that the High Court had apparently been briefed on the prevailing approach under Delaware law, and the existence of a substantial body of academic commentary on the applicability of a *Revlon* or *Unocal* rule in the Japanese context.

[164] Fujita, *Case No. 29*, *supra* note 98, at 319.

[165] Legislative Council of the Ministry of Justice, *Kaisha hōsei no gendai-ka ni kansuru yōkō*, 会社法制の現代化に関する要綱 [*Report on the Modernization of the Corporate Law Regime*], Feb. 9, 2005.

foreign hostile acquirers.[166] To alleviate this fear, the Japanese government released the Takeover Guidelines, which was a *non-binding* guide for companies that outlined the proper procedures for adopting defensive measures. The Takeover Guidelines made it clear that *pre-bid* defensive measures could be adopted by potential target companies, but that such measures should be endorsed in advance by shareholders.[167]

The legal relevance of the non-binding Takeover Guidelines has been significantly diminished[168] by the fact that they are non-binding and have been largely superseded by two subsequent court decisions (discussed below) and subsequent revisions to the TSE listing rules that substantially incorporate the Takeover Guidelines.[169] This being said, at the time the Takeover Guidelines were released, they appeared to inspire a handful of listed Japanese companies to adopt 'Pre-warning Rights Plans' (PRPs) as a uniquely Japanese type of pre-bid defensive measure.[170] After the TSE Revised Rules were implemented in January 2006, the number of Japanese listed companies that adopted PRPs increased at a more significant, but moderate, rate—peaking at 20.3 percent of TSE listed companies in 2011.[171]

PRPs have often been described as the Japanese 'poison pill'—suggesting that the defensive measure commonly referred to in the United States as the 'poison pill' has been transplanted to Japan.[172] Describing PRPs as poison pills or suggesting that PRPs are modelled on the typical US-style poison pill[173] is misleading for at least three reasons. First, the typical PRP merely involves a company's board issuing a press release—it does not involve amending the corporate constitution and is not a legally binding document like a typical US-style poison pill.[174] The press release normally states that if a takeover bid is commenced, which may result

[166] Fujita, *Case No. 29*, *supra* note 98, at 322.
[167] *Takeover Defense Guidelines*, *supra* note 4, at 5-6.
[168] Oda, *Case No. 30*, *supra* note 98, at 329.
[169] Tokyo Stock Exchange, *Baishū bōeisaku no dōnyū ni kakaru jōjō seido no seibi tō ni tsuite* 買収防衛策の導入に係る上場制度の整備等について [*Listing Rule Revision with Regards to the Adoption of Takeover Defensive Measures*]' (released on Jan. 24, 2006), *available at* http://www.jpx.co.jp/files/tse/rules-participants/public-comment/data/060124jojo.pdf (last accessed 19 August 2016).
[170] By 2006, less than 2 percent of Japan's listed companies had adopted such measures. Puchniak, *Efficiency of Friendliness*, at 260 n.395.
[171] Tokyo Stock Exchange, *TSE-Listed Companies White Paper on Corporate Governance 2011* at 78 (2011), *available at* www.jpx.co.jp/equities/listing/cg/tvdivq0000008jb0-att/b7gje60000037hvl.pdf (last accessed 3 August 2016).
[172] ENTERPRISE LAW: CONTRACTS, MARKETS AND LAWS IN THE US AND JAPAN at 33 (Zenichi Shishido ed., Edward Elgar 2014) [hereinafter ENTERPRISE LAW]; BUCHANAN ET AL., *supra* note 7, at 250.
[173] *Id.*
[174] Armour et al., *supra* note 1, at 254.

in the bidder holding more than a certain amount of the target's shares (typically, 20 percent), then the target company will establish a special committee. Then, the special committee will determine whether it would be in the target company's best interest to issue warrants as a defensive measure to shareholders other than the bidder.[175] Unlike the typical US-style poison pill, the non-legal and contingent nature of PRPs make it unclear what will occur if the acquirer 'triggers' the PRP, and exactly how PRPs will operate in practice.

Second, it is uncertain whether a PRP that has not been approved by shareholders is legally valid—which is contrary to a US-style poison pill which can be approved in advance of a takeover bid solely by the board.[176] The *Nireco* case, which took place in 2005 two months after *Livedoor*, is surprisingly the only case which has considered the legality of a PRP.[177] In *Nireco*, the Tokyo High Court upheld the District Court's decision to grant an injunction brought by an institutional investor to prevent a TSE listed company from putting a PRP in place.[178]

The decision in *Nireco* suggests that the standard applied by the High Court in the Livedoor decision—which allowed the board, *without shareholder approval*, to use a defensive measure *during* a takeover bid in the four circumstances described above—does not apply to *pre-bid* defensive measures.[179] If this is the case, then possibly all PRPs must be approved by shareholders to be valid, which would make them fundamentally different than the typical US-style poison pill. However, some leading Japanese law professors are of the view that the Nireco case has little precedential value, because the PRP in *Nireco* was not a typical PRP as it was constructed so that if triggered it would not only discriminate against the acquirer, but

[175] Tokyo Stock Exchange, *M&A wo torimaku genjō ni kansuru tōshika iken no gaiyō: baishū bōeisaku wo chūshin ni* M&A をとりまく現状に関する投資家意見の概要ー 買収防衛策を中心に ー [*Outline of Investor Opinions Concerning the Current Situation Surrounding M&A: With Focus on Takeover Defensive Measures*] at 7 (Aug. 26, 2008) *at* http://www.jpx.co.jp/equities/improvements/general/tvdivq0000004iib-att/2008ma.pdf (last accessed 19 August 2016); Armour et al., *supra* note 1, at 254 n.175.

[176] Moran v. Household International, Inc, 500 A.2d 1346, 1351-1353 (Del. 1985). US scholars have opined that pursuant to the general principles of shareholder ratification of interested transactions between the corporation and its managers, prior approval of the pill by a fully informed, disinterested majority would 'cleanse the "specter" of interested action in the takeover context": Neil Lieberman, *Justice Jackson in the Boardroom: A Proposal for Judicial Treatment of Shareholder-Approved Poison Pills*, 2008 COLUM. BUS. L. REV. 360, 371-372 (2008).

[177] Tokyo Dist. Ct., Jun. 1, 2005, 1186 HANREI TAIMUZU 274; Tokyo Dist. Ct., Jun. 9, 2005, 1186 HANREI TAIMUZU 265; Tokyo High Ct., Jun. 15, 2005, 1186 HANREI TAIMUZU 254 (hereinafter *Nireco*).

[178] Fujita, *Case No. 29*, *supra* note 98, at 320.

[179] Fujita, *Case No. 29*, *supra* note 98, at 320.

also against another sub-group of 'innocent' shareholders.[180] Therefore, it remains an open question whether PRPs must be approved by shareholders to be valid, creating a large amount of uncertainty and distinguishing PRPs from a typical US-style poison pill.

Third, PRPs are distinct from US-style poison pills in that they were adopted (and still exist) in a corporate governance environment which has no history of successful hostile takeovers. When the poison pill was recognized as valid by courts in the United States it arguably shifted the balance of power from hostile acquirers to target boards, making the impact of the poison pill a significant event and causing acquirers and shareholder activists to search for ways to challenge and remove poison pills. As mentioned above, the fact that a decade after the adoption of PRPs by TSE listed companies there has only been a single challenge in court to a PRP suggests that rather than a rebalancing of power, PRPs merely reinforced the existing Japanese postwar corporate governance norm: that stable shareholding and Japanese corporate culture place corporate control firmly in the hands of Japan's lifetime employee dominated boards—which has quelled the development of an active hostile takeovers market.

Finally, in 2007, for the first (and only) time the Supreme Court of Japan considered the validity of a defensive measure in the *Bulldog Sauce* case.[181] This case involved a takeover bid by a US private equity fund for an iconic Japanese condiment producer named Bulldog Sauce. In response to the bid, Bulldog Sauce's board proposed to take the defensive measure of issuing three warrants per share to all existing shareholders, which were exercisable for shares by all shareholders except the bidders. However, if the warrants were exercised the bidders would be entitled to receive cash in lieu of shares, which at the time amounted to a $18.7 million payment—essentially providing compensation to the bidders for the discriminatory issuance of shares to the other shareholders.

Most importantly, as the bid was made shortly before the Bulldog Sauce's annual general shareholders meeting, the board decided to put its proposed defensive measure before the shareholders for approval.[182] Astoundingly, the proposed defensive measure was approved by

---

[180] Such 'innocent' shareholders were defined as shareholders other than the acquirer. The Tokyo High Court further opined that had the pills been more carefully designed such that they would have avoided harming such shareholders, the outcome of the *Nireco* case might have turned out differently. *See* Fujita, *Case No. 29*, *supra* note 98, at 320.

[181] Saikō Saibansho [Supt. Ct.] Aug. 7, 2007, 61 MINSHŪ 2215; 1252 HANREI TAIMUZU 125 (*Bulldog Sauce*); Oda, *Case No. 30*, *supra* note 98, at 323-330.

[182] Oda, *Case No. 30*, *supra* note 98, at 324.

88.7 percent of a qualified majority of shareholders—which was almost all the shareholders aside from the bidder. Nevertheless, the bidder sought an interim injunction to prevent the warrant issuance—a strange turn of events considering that none of the shareholders appeared to be willing to sell their shares to the hostile acquirer.[183]

The Tokyo District Court denied the injunction and its decision was upheld by the Tokyo High Court and the Supreme Court of Japan. The Supreme Court reasoned that shareholders have the right to determine whether potential damage to the company would warrant taking defensive measures. Moreover, it held that the discriminatory treatment to the bidder as a shareholder was justifiable because 'fair and adequate measures' had been made to compensate the bidder for not being able to exercise its warrants for shares.[184]

Similar to the *Nireco* case, leading Japanese academics view *Bulldog Sauce* as having limited precedential value because it too involved unusual circumstances which make it easily distinguishable from the typical hostile takeover case.[185] The fact that almost all of the target's shareholders supported the defensive measure begs the question of why the defensive measure was required in the first place. In addition, the generous payment made to the bidder as compensation for the defensive measure makes the support of the target board's defensive measure by the shareholders curious—which we suggest below can only be explained by understanding the combined effect of stable shareholders and Japanese business culture.

Ultimately, the idiosyncratic aspects of *Bulldog Sauce* left at least three important legal questions unanswered. First, it did not clarify whether the board has the power to implement defensive measures without shareholder approval because the shareholder approval for the defensive measure was so overwhelming in this case.[186] Second, the decision does not clarify the legality of PRPs because this case involved a post-bid—not a pre-bid—defensive measure. Third, the decision raises the question of whether it is necessary to compensate the bidder for discriminatory treatment caused by the defensive measure for it to be considered 'fair and reasonable'—even if it is approved by shareholders.[187]

[183] Oda, *Case No. 30*, *supra* note 98, at 324.
[184] Armour et al., *supra* note 1, at 256; Oda, *Case No. 30*, *supra* note 98, at 326.
[185] Oda, *Case No. 30*, *supra* note 98, at 329-330.
[186] Oda, *Case No. 30*, *supra* note 98, at 329.
[187] It is worth noting that after *Bulldog Sauce* the Corporate Value Study Group issued a non-binding Report that took the position that compensation of the bidder is unnecessary when the bidder does not follow the procedure stated in the company's PRP. See, *See* Corporate Value Study Group, *Takeover Defense Measures in Light of*

From a legal perspective, what has occurred in the decade following Livedoor's hostile takeover bid, has been the opposite of the predictions that Japan would become something akin to Delaware. In the past decade, Japan's market for hostile takeovers has withered and legal developments have ossified. As described above, many of the most basic legal questions, which were quickly made relatively clear in the United Kingdom and United States, have been left impermissibly vague in Japan for over a decade.

Although we posit that this legal uncertainty has created a further barrier to the development of a vibrant market for hostile takeovers in Japan, it also appears that in general law has played a secondary role to stable shareholding and Japanese corporate culture in driving the evolution of Japan's hostile takeovers market. Ironically, even in Japan's two leading hostile takeover cases—*Livedoor* and *Bulldog Sauce*—the extra-legal factors were far more important than the court decisions.

Specifically, despite the fact that the court enjoined the defensive measure in *Livedoor*, management ultimately prevailed as friendly stable-shareholders came to the rescue of the target company. In *Bulldog Sauce*, the almost unanimous support that management received from friendly and stable-shareholders ensured the entrenchment of management regardless of the law. Indeed, whether *Bulldog Sauce* took place in Japan, the United States or the United Kingdom, with almost all shareholders supporting management, the result would have been the same. [188] As such, as much as some corporate law professors like to believe that law matters most, as explained in the next section, it appears that Japan's unique business culture, combined with the impact of stable shareholding, may be more important in limiting a vibrant market for hostile takeovers in Japan than the law.

PART V: THE IMPORTANCE OF JAPAN'S UNIQUE CORPORATE CULTURE: A FORMIDABLE BARRIER TO HOSTILE TAKEOVERS

Japanese culture has long been considered to be a significant barrier to hostile

---

Recent Environmental Changes at 12 (2008), *available at* http://www.meti.go.jp/english/report/data/080630TakeoverDefenseMeasures.pdf (last accessed 5 September 2016). However, as this Report is non-binding, there is some uncertainty about how it will impact the future development of the law.

[188] The defensive measure was approved by around 88.7 percent of the votes present and 83.4 percent of all votes. *See* Oda, *Case No. 30*, *supra* note 98, at 325.

takeovers.[189]Almost every analysis of hostile takeovers in Japan mentions the 'cultural distaste' that the Japanese have for the sale of a company and the 'taboo' associated with hostile takeovers.[190] Japanese managers have often been seen to have a sense of 'corporate paternalism' toward employees, which made it shameful to allow their 'family' to be the victim of a hostile takeover.[191] The concept that Japanese corporations are viewed more like families than profit machines, provides an additional rationale for stable-shareholders to protect each other from hostile takeovers and reinforces the rationale provided above that stable-shareholders often reject bids with substantial premiums to maintaining long-term business relationships.

The foundation of Japan's postwar corporate culture has been linked to the fact that almost all large listed companies recruit their core employees from top Japanese universities and provide them an implicit promise of a job until retirement.[192] This norm of lifetime employment for core employees, which was reinforced formally in the decades following the war by Japanese employment law, has resulted in an illiquid labour market for core employees in listed companies.[193] The lack of an external labour market inextricably ties the economic fate of Japanese lifetime employee managers to the economic future of their company—creating an important sense of group identity among core lifetime employees and loyalty to their company. This sense of group identity, or corporate culture, is further strengthened by the deep-rooted personal relationships that result from the lengthy tenure of career employees, relatively equal pay and promotion from within the company. The development of a strong corporate culture, which promotes the success of the company, is also reinforced by the emphasis in Japanese culture on commitment to the group.[194]

Most importantly, in the context of hostile takeovers, the most skilled lifetime employees in

---

[189] Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2090-2091 (2001) [hereinafter Milhaupt, *Creative Norm Destruction*]; Puchniak, *Efficiency of Friendliness*, at 226-228.

[190] Milhaupt, *Creative Norm Destruction*, *supra* note 189, at 2090-2091; Milhaupt & West, *supra* note 3, at 22; Puchniak, *Efficiency of Friendliness*, at 227.

[191] *See supra* note 190.

[192] Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189, 203 (2000); Puchniak, *Efficiency of Friendliness*, at 208-209.

[193] Shishido, *supra* note 192, at 203-204; Puchniak, *Efficiency of Friendliness*, at 209.

[194] Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508, 527, 531 (1999); John O. Haley, *Career Employment, Corporate Governance and Japanese Exceptionalism* 3-4, 6 (Wash. U. Faculty Working Papers Series, Paper No. 04-04-01, 2004); Puchniak, *Efficiency of Friendliness*, at 208-209, 226-227; ENTERPRISE LAW, *supra* note 172, at 14-15, 93.

listed companies are rewarded late in their careers by being 'promoted' to the board of directors, while still preserving their group identity as lifetime employees. As a result, boards of listed companies are dominated by lifetime employees—who have a clear cultural bias towards resisting hostile takeovers.[195] This culture is shared by most shareholders as all of Japan's major shareholders (i.e., Japanese banks, insurance companies, listed corporations) are governed by lifetime employees and even a large segment of individual Japanese shareholders are themselves lifetime employees. Moreover, the judges and government regulators are also lifetime employees and thus are well-attuned to this cultural norm in shaping the evolution of Japan's hostile takeovers regime.[196] From this perspective, although the exact impact of culture is difficult to measure, it seems clear that Japan's lifetime employment system is the foundation of a cultural bias against hostile takeovers and the glue that binds together stable shareholders.

During the lost decade, there were numerous reports that Japan's unique corporate culture, which sought to preserve the lifetime employee company community[197] over short-term profits, had significantly eroded. The widely publicized takeover attempts by Horie (and to a lesser extent Murakami) were cited as evidence that Japanese corporate culture was becoming tolerant towards, if not accepting, of hostile takeovers.[198] Many experts suggested that maximizing shareholder profits became the most important incentive for Japanese managers as it was 'no longer considered acceptable' for management of stable shareholder companies to block hostile takeover bids 'regardless of the financial consequences to their own shareholders'.[199]

However, it appears that Japan's corporate and shareholder culture is more resilient than many predicted. Within the limits of the Article we offer three pieces of evidence that demonstrate this point. First, the support for incumbent management by stable shareholders has consistently

---

[195] Bruce E. Aronson, *The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground Between the Board Monitoring Model and Management Model?*, 30 UCLA PAC. BASIN L.J. 93, 115 (2012); ENTERPRISE LAW, *supra* note 172, at 14-15.

[196] Haley, *supra* note 194, at 3-4, 9; Curtis J. Milhaupt, *Bull-Dog Sauce for the Japanese Soul? Courts, Corporations and Communities – A Comment on Haley's View of Japanese Law*, 8 WASH. U. GLOBAL STUD. L. REV 345, 359 (2009) (observing that the Tokyo High Court's decision in *Bulldog Sauce* "an example par excellence of this judicial tendency to protect the intermediate community (here, the corporation and its employees) against threats posed by the pursuit of individual interests").

[197] Shishido, *supra* note 192, at 203-204.

[198] Milhaupt, *Shadow of Delaware*, supra note 4, at 2192; Puchniak, *Efficiency of Friendliness*, at 228.

[199] Milhaupt, *Shadow of Delaware*, supra note 4, at 2186; Puchniak, *Efficiency of Friendliness*, at 228.

defeated takeover bids—even many bids offering significant premiums—over the last several decades. This has not changed in recent times.[200] As noted by Gen Goto, the support for incumbent management even appears to extend beyond formal stable shareholders (i.e., those with a business relationship with the target company) to Japanese shareholders more generally[201] and perhaps even to foreign investors who have come to realize that it does not pay to be the proverbial 'nail that sticks up' in Japan's lifetime employee-dominated corporate culture.[202]

Second, even at the height of the wave of hostile takeover bids in 2006, an often cited survey of Japanese management reported that 77 percent of Japanese executives said that they would not even consider attempting a hostile takeover.[203] Since then, Japan's perception of hostile takeovers has only worsened, as the prosecution and humiliation of Japan's two most prominent corporate raiders had a chilling effect on the market and hostile takeover attempts have virtually evaporated.[204]

Third, despite more than two 'lost decades' of tepid economic performance, Japan's lifetime employment system for core employees and lifetime employee dominate boards have been largely maintained.[205] This is surprising considering repeated predictions that Japan's lifetime employee system would disappear[206] and several legislative efforts to make boards of Japanese companies more independent.[207]

---

[200] For example, Murakami's attempted hostile takeover of Shoei Corporation through his takeover Boutique, M&A Consulting in 2000. Despite offering a 40 percent premium over the 1999 market price, Murakami's bid failed miserably, accumulating only 6.5 percent of Shoei's shares, as stable and friendly shareholders gave their unconditional support to existing management and refused to tender their shares to Murakami. *See* Puchniak, *Efficiency of Friendliness*, at 242-243. Steel Partners' attempted hostile takeover of Bulldog Sauce also failed due to support from stable shareholders, who overwhelmingly approved the defensive measures proposed by existing management. *See* Oda, *Case No. 30*, *supra* note 98, at 325.

[201] Goto, *supra* note 7, at 142-143.

[202] BUCHANAN ET AL., *supra* note 7, at 213-224; *Foreign Investors Fear Holding Japan Inc to Account*, FINANCIAL TIMES, Jan. 16, 2016; Puchniak, *Efficiency of Friendliness*, at 245-250.

[203] *Top Execs Split on Approval for Oji's Run at Hokuetsu*, NIKKEI WEEKLY, Sep. 11, 2006; Puchniak, *Efficiency of Friendliness*, at 250.

[204] Puchniak, *Efficiency of Friendliness*, at 260.

[205] Although the lifetime employment system has experienced some degree of erosion, it has generally been maintained for 'core' Japanese employees. *See* ENTERPRISE LAW, *supra* note 172, at 93; Sayuri A. Shimoda, *Time to Retire: Is Lifetime Employment in Japan Still Viable?*, 39 FORDHAM INT'L L.J. 753, 773-774 (2016).

[206] Shimoda, *supra* note 205, 771-773 (citing multiple quantitative studies observing and predicting the decline of lifetime employment in Japan); Japan Institute for Labor Policy and Training, *Labor Situation in Japan and Its Analysis: General Overview 2015-2016*, at 75 (Mar. 2016), *available at* http://www.jil.go.jp/english/lsj/general/2015-2016/3-1.pdf (last accessed 18 August 2016).

[207] Gen Goto et al., *Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis*, *in* INDEPENDENT DIRECTORS IN ASIA, *supra* note 15 (explaining the legislative history and development of independent directors in Japan).

It is noteworthy that corporate culture in Japan can change quickly. We should not forget that lifetime employment is a postwar phenomenon and that Japan in fact had a liquid labour market before World War II.[208] As such, we are not suggesting that because Japan's corporate culture has been a major hurdle to hostile takeovers in the past that it will not change in the future. However, it does seem that Japan's unique lifetime employee centred corporate culture has been an important force which has caused the Japanese market for hostile takeovers to evolve differently than in the United States or United Kingdom. While it is difficult to measure precisely, Japan's unique corporate culture provides a strong rationale for the durability of stable shareholding and the seemingly irrational behaviour of 'friendly' shareholders who have no business connection to a target company but nevertheless support management to fend off a hostile takeover attempt. Moreover, it provides an explanation for the general trend among government regulators and judges to support lifetime employee dominated boards in defeating hostile bids.[209]

PART VI: AVOIDING HISTORY FROM REPEATING ITSELF

In light of the history of incorrect predictions about the development of a vibrant market for hostile takeovers in Japan, we conclude with an important caveat: this Article makes no prediction about the future of hostile takeovers in Japan. Rather, it claims that Japan is an interesting example of an important jurisdiction, which for over two decades had a dispersed shareholding landscape, undervalued companies and a hostile takeovers regime that was ostensibly inspired by the United Kingdom and United States, but yet did not develop a market for hostile takeovers.

One way of interpreting this claim is that the three general criteria for predicting whether a hostile takeovers regime will develop (i.e., dispersed stock ownership, depressed share values, and a United Kingdom-United States inspired regulatory framework) are too broadly defined and limited to have much predictive value. The case of Japan highlights the fact that empirically

---

[208] Gilson & Roe, *supra* note 194, at 518-520.

[209] The Japanese government has taken various steps to promote the use of poison pills: in 2001, the Commercial Code was amended to permit use of poison pills; the Ministry of Economy, Trade and Industry and the Ministry of Justice 'officially sanctioned' the use of poison pills in 2005 following uncertainty about the 2001 amendments; and the Companies Act increased the varieties of poison pills available through amendments in 2006. *See* Puchniak, *Efficiency of Friendliness*, at 223-224.

dispersed shareholders come in different varieties, and that these varieties can have a distinct impact on the evolution of a jurisdiction's market for corporate control. In addition, the influence of Japanese corporate culture on the evolution of hostile takeovers in Japan is a poignant reminder of how unique factors may arise in different jurisdictions that cause hostile takeovers (and, we suspect almost all corporate governance mechanisms) to evolve in unanticipated jurisdiction-specific ways.

Another way of interpreting our claim is that a proper understanding of Japan demonstrates that in reality it had neither a stereotypical dispersed shareholding environment nor a regulatory system closely (or even loosely) modelled on the United Kingdom or United States regulatory regimes. From this perspective, perhaps Japan does not debunk the general theory that a jurisdiction with stereotypical Berle-Means-type dispersed shareholding, undervalued companies and a United Kingdom and/or United States inspired regulatory system will inevitably develop a vibrant market for hostile takeovers. We can accept this interpretation from a purely theoretical perspective, but suggest that it is arguably of little practical use.

As illustrated in this Article, it is likely that most (if not all) jurisdictions—including the United States and United Kingdom—have varieties of shareholders that do not neatly conform to the blunt dispersed versus concentrated dichotomy. In this sense, this general theory does not even accurately describe the United Kingdom and/or United States—the jurisdictions from which it was purportedly derived. Further, although it is inaccurate to claim that Japan's pre-2005 law closely, or even loosely, took up the core features of the UK City Code or that Japan's post-2005 law closely, or even loosely, resembles Delaware law, we suspect that this is true of most systems. The fact is that most regulatory systems end up with their own unique and important aspects—and, in this respect, Japan is not likely uniquely unique. In the end, this Article reminds us that to understand hostile takeovers in any given jurisdiction, it is best to understand that jurisdiction on its own terms.