



JAPAN LEGAL UPDATE

Corporate

Supreme Court Decision on Share Price in Minority Shareholder Cash Out Transactions

On July 1, 2016, the Supreme Court (first petty bench) issued a decision (the "Decision") that may have a material impact on Japanese M&A practice with respect to the determination of the price for callable shares (*zembu shutoku joko tsuki shurui kabushiki*) redeemed by a target company to cash out minority shareholders after a tender offer by an acquirer.

In this case, minority shareholders who did not tender their shares in a tender offer and were forcibly cashed out by the redemption of callable shares subsequently complained about the redemption price for the shares, which was equal to the tender offer price, and then filed a petition with the Tokyo District Court to determine a "fair" redemption price. (Before the enactment of the amended Companies Act in May 2015, a method whereby the target company converts its common shares into callable shares and forcibly redeems the callable shares was frequently used to cash out minority shareholders.)

In the decision issued by the Tokyo High Court on October 14, 2015, the court held that the redemption price should be determined by taking into account share price movements in the overall market following the announcement of the tender offer up until the redemption date. Accordingly, the Tokyo High Court rejected adopting a price equal to the tender offer price as the redemption price and determined the redemption price by using a method of share price regression analysis. However, detractors criticized the original decision on the grounds that, if the price may be adjusted retroactively due to an increase in share prices in the overall market, then (i) shareholders may selectively enjoy the benefits of the share price increase without being exposed to the risk of a share price decrease after the announcement of a tender offer and thus the High Court's decision incentivizes shareholders to take speculative actions and (ii) it would be difficult for an acquirer to accurately calculate the amount necessary for the acquisition of a target company and thus the High Court's decision harms the predictability of such transactions.

In the Decision, however, the Supreme Court determined that if a tender offer is conducted through generally accepted fair processes, such as through seeking opinions from an independent committee and professionals, and the target company thereafter redeems the callable shares at a price equal to the tender offer price, such redemption price will generally be deemed appropriate unless there are special circumstances where fundamental facts regarding the transaction have unexpectedly changed. Based on the framework of the Decision, as long as procedural fairness in a tender offer is ensured, the courts, in principle, would determine the redemption price for callable shares as the tender offer price. Therefore, the Decision dispels the concerns about speculation and predictability, and should increase procedural stability in cash out transactions.

After the enactment of the amended Companies Act in May 2015, rather than using callable shares, the primary methods used for cash out transactions have been: (i) demands for the sale of shares (in cases where an acquirer holds 90 percent or more of the total voting rights of the target company) and (ii) reverse share splits (in cases where an acquirer holds less than 90 percent of the voting rights). The framework of the Decision will most likely apply also to the determination of the share price in cash out transactions using the two methods above, and thus we believe that the resulting increase in predictability and procedural stability in cash out transactions will have a material impact on the M&A practice in Japan.

Signature Certificates of Foreigners Attached to Commercial Registration Application (July 1, 2016)

The Ministry of Justice announced that, starting June 28, 2016, the signature certificates of foreigners attached to commercial registration applications may be those prepared by the authorities of the country of nationality" (e.g. consul) of the relevant foreigner, located in the country where such foreigner has residence; whereas, before the announcement, only signature certificates prepared by "authorities of the country of nationality" of the foreigner located in the country of nationality of such foreigner or located in Japan could be used. As of June 28, 2016, the Ministry of Justice has issued a circular notice addressed to the Directors of the Legal Affairs Bureau and Local Legal Affairs Bureau outlining this change.

Tax

Amendment of Administrative Guidelines for Transfer Pricing, etc. (June 28, 2016)

The National Tax Agency amended the administrative guidelines for transfer pricing concerning, among other things, its audit policy, in association with the development of transfer pricing documentation pursuant to the 2016 Tax reform. Simultaneously, new guidelines concerning administrative matters such as audits and APAs (advance pricing agreements) relating to the taxation of foreign corporation income attributable to its permanent establishment were introduced.

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