

Article

The Sale of All or a Substantial Part of the Business or Assets: In Conjunction with the Analysis of the Theory of Parity

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ABSTRACT

In Taiwan, the sale of all or a substantial part of a firm's assets or the business itself is regulated by both the Company Law and the Business Mergers and Acquisitions Law. When these two laws are cross referenced, the issue of consideration surfaces. The Company Law does not address the issue of consideration while the Business Mergers and Acquisitions Law emphasizes the role played by stock as one of the possible considerations in the acquisition of such assets or a business.

This paper draws on the differences among the sale of all or a substantial part of the assets/business, a merger and a division, as well as the general assumptions regarding the rights and obligations of the different parties involved. The remedies offered to dissenting shareholders, commonly known as appraisal rights, should be revisited simultaneously. The difficulties faced by the courts also include the validity of the resolution passed by the general meeting if the conditions for the requisite quorum or the method of resolution are not met. This problem also reveals the importance of the theory of parity, i.e., the demarcation of powers between the

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general meeting and the board of directors.

However, these issues are not attracting the attention of the legislature. The agenda of the general meeting is often loose, and shareholders are to a certain extent deprived of the right to information. The paper argues that when combined with the topic of the sale of the assets or the business, the theory of parity and the interests of shareholders should be simultaneously taken into account.

Keywords: *The Transfer of All or a Substantial Part of the Business or Assets, Merger, Appraisal Right, Shareholders' Proposal Rights, Theory of Parity*

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I. INTRODUCTION

“[The] transfer of the entire or a substantial part of the business or assets of a company” is one kind of acquisition behavior that does not receive a great deal of attention in the Business Mergers and Acquisitions Law. However, besides this kind of merger and acquisition activity having its own particular problems that deserve our careful attention, some of the other problems that arise involve different kinds of merger and acquisition activity, all of which need to be looked into.

The regulation with regard to “the transfer of all or a substantial part of the business or assets” appears in both the Company Law and the Business Mergers and Acquisitions Law. Article 185 of the Company Law refers to one type of basic change that occurs in the company’s organization. Paragraph 1, Subparagraphs 2 and 3 of that article respectively make mention of the following statements: “Transfer the whole or any essential part of its business or assets,” and “Accept the transfer of another’s whole business or assets, which has great bearing on the business operation of the company.” It is necessary for a special resolution proposed by the board of directors to be passed in the general meeting of shareholders by a special resolution for the proposal to take effect. The Business Mergers and Acquisitions Law in Article 27, Paragraph 1 stipulates that a notice of transfer can take the form of a publication thus reducing the obligation on the part of the debtors to provide notice. At the same time, Article 39 of the Business Mergers and Acquisitions Law focuses on the issue of “shares with voting rights” as being the consideration for “the transfer of all or a substantial part of the business or assets,” for which a tax credit is provided. In addition, both Article 186 of the Company Law and Article 12 of the Business Mergers and Acquisitions Law provide appraisal right safeguards to small numbers of dissenting shareholders, but in terms of their stipulations, they differ slightly.¹ The regulation described above provides the framework for the standards by which Taiwan deals with this kind of merger and acquisition behavior.

In relation to this regulation it is necessary to clarify a few points. First, Article 185, Subparagraphs 2 and 3 of the Company Law refer to the concept of the transfer of the business or assets of a company, and in regard to the real meaning of this provision (whether it means the general assumption of

1. Based on the Business Mergers and Acquisitions Law being a special law of the Company Act, the required condition of Article 12 of the Business Mergers and Acquisitions Law is that under these circumstances this article is given priority over Article 186 of the Company Act in terms of its application, and so there are scholars who point out that Article 12 of the Business Mergers and Acquisitions Law has already rendered Article 186 of the Company Act unfeasible. See Kuo-Chuan Lin, *Ku Tung Tzu Yu Chuan Jang Yuan Tse (The Principles of the Free Transfer of Shares)*, 71 TAIWAN PEN TU FA HSUEH TSA CHIH (TAIWAN L.J.) 161, 162 (Jun. 2005) (in Chinese).

assets and liabilities or the sale of assets), it is necessary to thoroughly examine Articles 27 and 39 of the Business Mergers and Acquisitions Law. Secondly, as for the transfer of a company's property or business in exchange for shares in another company, pursuant to both Article 39 of the Business Mergers and Acquisitions Law and Article 185, Paragraph 1, Subparagraph 2 of the Company Law, if such a transfer takes place, it needs to be asked on what basis the company can hand over the shares to the shareholders, how this in substance differs from a split-up, and whether or not some of the company's assets are being returned to the shareholders, which would require a reduction in capital.

In addition, the passing of a special resolution in a general meeting of shareholders is a legal prerequisite in regard to such kinds of merger and acquisition behavior. However, if the general meeting does not pass such a resolution, or even if such a resolution is passed in the general meeting resolution but the procedures for convening such a meeting or the way in which the resolution is handled have their defects, and in the meantime the company's managers on behalf of the company engage in "the transfer of all or a substantial part of the business or assets," whatever the legal outcome, this issue merits a detailed discussion.² The problems that arise concern not only the effectiveness of the resolutions passed in the general meeting, the issue of agency without authority, but also constitute a violation of Article 71 of the Civil Code that renders them void. When considered in more depth, this issue probably involves the basic concept of the theory of parity between the board of directors and the general meeting as well as how this relates to Taiwan's Company Law. How the boundaries of such a basic theory should be defined is in essence what this article seeks to examine.

II. THE RELATIONSHIP BETWEEN "THE TRANSFER OF ALL OR A SUBSTANTIAL PART OF THE BUSINESS OR ASSETS" AND OTHER MERGER AND ACQUISITION BEHAVIOR

A. *The Fundamental Difference from a Merger*

A merger is the most frequently referred type in M & A.³ Such a merger

2. Contradictory opinions exist, however, in Taiwan, such as Supreme Court Decision, case no. 1974 Tai-Shang Tzu 965 and Supreme Court Decision, case no. 1991 Tai-Shang Tzu 434. For a related analysis, see *infra*.

3. It is perhaps at this point worth mentioning a line of thought that differs from the U.S. view. The U.K.'s Companies Act 1985 is unlike its counterpart in the U.S. where the Corporation Acts for each state include a complete set of regulations for merger procedures. On the contrary, in the U.K. the relevant laws are scattered among its Companies Act 1985, §§ 425-427A (Eng.), and its Insolvency Act 1986, §§ 110-111 (Eng.). The key feature of these laws is whether or not they are approved by the courts, and the appraisal rights are also not essential. On this, see PAUL L. DAVIES, GOWER AND DAVIES' PRINCIPLE OF MODERN COMPANY LAW 793-803 (7th ed. 2003).

can either take the form of a newly-established merged entity or else a consolidation (whereby one or more entities absorb another entity or entities). Regardless of which approach is adopted, the natural outcome of the merger is that one or more companies cease to exist. What does result, however, is that the shareholders of the dissolved company become the shareholders of the surviving or newly-established company. Conceptually, for the shareholders of the dissolved company, that does not mean the end of their investments, but rather that there is substantial continuity of their ownership interest in the surviving company.⁴

On the contrary, “the transfer of all or a substantial part of the business or assets”⁵ in terms of the original concept refers to selling behavior. The acquired companies (in actual fact it is the companies whose assets have been acquired) are in most cases dissolved following the sale of the whole or a substantial part of the business or assets.⁶ The result is that the shareholders in the end entirely disinvest from their prior indirect claim on the assets and earnings of the acquired company).⁷ That is, when the company engages in the transfer of all or a substantial part of its business or assets, the consideration involved is concerned with the amount of cash to be received,⁸ and not with shares.

Now let us consider the situation where the consideration involves shares. In the case where the acquired company is dissolved and the principal method adopted is to use shares to compensate for the investment, the original shareholders will be in a similar plight to the shareholders of the company that has been dissolved because of the merger, i.e., the shareholders of the acquired company will prolong their former investment but in the

4. ROBERT C. CLARK, *CORPORATE LAW* 407 (1986).

5. Although the transfer of the business or assets of a company is one type of merger or acquisition method, in the U.K. the vast majority of mergers and acquisitions take place through public takeovers, and very few are the result of the business or assets of the company in question being transferred. There are two principle reasons for this. The first is that such a transfer involves the rights and interests of third parties and creditors. As for the former, when the transfer takes place, legally there is the power to terminate the contract or stipulate different conditions, and the U.K. Companies Act does not proscribe or restrict the exercise of such powers. In relation to the latter, appeals to the court for compensation or to obtain more safeguards for the company can also be anticipated. For this reason, making the arrangements for the transfer of a business or its assets will entail many additional costs and inconveniences. A further reason is that if the company engaging in such activity involves a public company, many information disclosures and expert opinions will be bundled together to conform to the Third and Sixth Council Directive of the European Union concerned with corporate mergers and split-ups, something that companies are also not keen to see. See DAVIES, *supra* note 3, at 799-800.

6. Assets are interpreted here to include tangible assets and intangible assets. However, intangible assets refer to paperless assets that have independent economic value, as clearly stated in Article 19 of the Regulation on Business Entity Accounting Handling. See Ministry of Economic Affairs (MOEA) Letter No. 09302069760 (2004) (in Chinese).

7. CLARK, *supra* note 4, at 403.

8. See Arndt Stengel, *The New German Business Transformation Act*, 6(3) INT'L. COMPANY COM. L. REV. 86, 89 (1995).

form of another investment. This differs from the original concept which is based on trading taking place.

When looked at from the point of view of the acquiror, the consideration provided by the acquiring company in the event of the merger taking place consists primarily of the shares of the acquiring company itself or of another company. Strictly speaking, for this type of approach where shares form the basis of the consideration, the company in reality has not paid any assets. When looked at the other way round, if the same company wishes to use cash to acquire another company's business or assets, then that company needs to pay an appropriate price.

From the point of view of the taxation laws, the distinction between a merger and "the transfer of all or a substantial part of the business or assets" of a company is even more meaningful/significant. When discussed in terms of the economic reality, following the merger, the shareholders of the dissolved company have only changed the content of their investment, but have not terminated their investment. That is, the exchange of the originally-held shares cannot be seen as involving the realization of capital gains, and so the result will be that taxes are deferred.⁹ On the contrary, since "the transfer of all or a substantial part of the business or assets" by definition involves trading, the seller must first pay tax on the benefits generated by this transfer. Afterwards, following the dissolution of the company, because of the benefits received from the investment the shareholders will probably once again pay personal consolidated income tax, which will certainly not be advantageous for them. If we take the U.S. federal tax regulations as an example, if the company when it sells its principal assets plans to dissolve the company within the next 12 months, part of the profits obtained from the sale of such assets will be exempt from tax.¹⁰

From this we can learn that, if the consideration given in exchange for the transfer of a business or assets is in the form of shares, then the transfer of the acquired company (and its shareholders) in so far as it relates to the tax law should be closer to a merger and should not constitute a sale. This should be the reason for Article 39, Paragraph 1 of the Business Mergers and Acquisitions Law, which states: "If the shares with voting rights acquired by a company as a result of the transfer of its entire or substantial part of business or assets to another company is not less than 80% of the consideration of the entire transaction, and all the shares so acquired have been transferred to the shareholders, then any proceeds generated from the transfer of the business or assets are exempted from profit-seeking enterprise

9. See Internal Revenue Code (I.R.C.) § 368.

10. See *id.* § 337.

income tax; and any loss incurred is prevented from deduction from the income.” The income from the sale of the company’s business or assets that is directly allotted to the shareholders is an exchange in terms of the content of the shareholders’ investment and a reduction in the company’s capital, and so it is not appropriate to tax this as corporate income tax.

If we extend this argument and draw further inferences, in both the Company Law and the Business Mergers and Acquisitions Law, the consideration involved in “the transfer of all or a substantial part of the business or assets” obviously includes property and shares in addition to cash. As to whether any differences exist between a consideration that consists of cash or property apart from cash and that which exists where shares are used, an attempt will be made to explain this in the paragraphs that follow.

B. *Appraisal Rights*

If we take the dissolution of a company as an example, when the company is dissolved, the Company Law only imposes certain requirements on the resolution passed by shareholders. Once the decision to dissolve the company is passed, based on the premise that the minority interests serve the majority interests in shaping a company’s intention (the majority rule), the dissenting shareholders are not given recourse to appraisal rights. Under such circumstances, following the dissolution, the company’s shareholders likewise receive a cash payment, and so the appraisal rights do not have any real significance.

On the contrary, when a merger takes place, it is unreasonable for the company to force shareholders to exchange the content of their original investment in line with principles based on majority decisions. Although the minority shareholders are unable to prevent the company from merging, the company cannot also decree that the minority shareholders accept shares in another company in order to continue their investment, and it is for this reason that there are appraisal rights.¹¹ If the principal consideration obtained for “the transfer of all or a substantial part of the business or assets” consists of shares, so that the principle is the same as in the case of a merger,

11. Because the shareholders of a company limited by shares are in most cases not limited to one individual, when deciding whether or not the merger or acquisition is effective, if the sole owner standard is adopted to explain this, it is necessary to provide an explanation to the company that does not just consist of one shareholder. Based on the principle of fairness, it is necessary to give the dissenting minority shareholders rights that provide certain safeguards. There are two different approaches used: the first is to give them the power of veto, and the second is to give them appraisal rights. From the point of view of economic efficiency, the latter is better than the former. See Yedidia Z. Stern, *A General Model for Corporate Acquisition Law*, 26 IOWA J. CORP. L. 675, 688 (Spring, 2001).

the minority shareholders should then have the right to request cash and to refuse shares.¹²

To sum up, in light of the theories regarding the dissolution and merger of companies, that Article 186 of the Company Law and Article 12 of the Business Mergers and Acquisitions Law give dissenting shareholders appraisal rights is problematical. When the consideration in regard to “the transfer of all or a substantial part of the business or assets” takes the form of cash, and the transfer takes place as planned, the company’s subsequent dissolution is an integral part of the overall buying and selling plan. Such a case is similar to a dissolution and is not a merger; and in theory there is no legitimacy to provide dissenting shareholders with appraisal rights.¹³ Although Article 186 of the Company Law stipulates that if the general meeting at the same time resolves to dissolve the company, the shareholders do not have appraisal rights, based on the stipulation of that article where it says “[the shareholders’ meeting] also adopts a resolution for dissolution. If the company only subsequently adopts a resolution for dissolution, then whether or not the shareholders lose their appraisal rights will not be without doubt. Secondly, even if the company at the same time adopts a resolution to dissolve itself, it is still not clear whether it can force the shareholders to accept shares in another company. In addition, Article 12 of the Business Mergers and Acquisitions Law is unlike the proviso of Article 186 of the Company Law, and in this regard the Business Mergers and Acquisitions Law should be viewed as a special regulation. It is for this reason that in this context Article 12 referred to above should be applied prior to the Company Law; or on the contrary, the Company Law is meant to make up the defects of the Business Mergers and Acquisitions Law.

C. *The Relationship between “the Transfer of All or a Substantial Part of the Business or Assets” and a Dissolution*

In the case of “the transfer of all or a substantial part of the business or assets” where the consideration is not limited to cash, a further issue is raised. In Taiwan it has already practically been pointed out that “the

12. Within the Delaware General Corporation Law, § 271 is concerned with the company’s transfer of a major part of the property. Regardless of the type of consideration used, the dissenting shareholders are not given appraisal rights. However, if pursuant to § 262(c) the articles of incorporation stipulate that the shareholders be given appraisal rights, then the related regulations regarding appraisal rights may then be used.

13. In the U.S.’s Model Business Corporation Act, revised through 2002, § 13.02(b)(3) has a similar regulation. In addition, appraisal rights provide dissenting shareholders with a way of escape. For related theories, please refer to Shu-Ching Chiu, *Hsien Chin He Ping Tui Ku Tung Chuan Yi Pao Chang Chih Yen Tao(Shang) (A Study on How Cash-out Mergers Safeguard Shareholders’ Rights (Part I))*, 127 CHI PAO YUEH KAN (TAIWAN SECURITIES CENTRAL DEPOSITORY M.) 3, 13-18 (Jun. 2004) (in Chinese).

so-called transfer of the essential part of the company's business or assets as per Paragraph 1, Subparagraph 2 of Article 185 of the Company Law refers to the transfer of that part of the business or assets that is sufficient to prevent the company's business operations from being successful."¹⁴ Accordingly, once the company pursuant to law disposes of the principal business or assets, which in reality constitutes the statutory cause of dissolution, at such a juncture, it is only by amending the articles of incorporation that the company is spared the fate of dissolution. When compared with the original explanation of the "transfer of the whole or a substantial part of the company's business or assets," this practical understanding will in most cases continue to give meaning to the company's dissolution. It will also conform to the explanation of the major differences between a merger and "the transfer of all or a substantial part of the business or assets" given above.

In practical cases, there is also a relatively more relaxed view. That is, it is not what prevents the company's business operations from being successful that is important, but that, within the company's inventory of essential property that has been acknowledged in the general meeting, there is property that has been transferred which constitutes the property referred to in this article.¹⁵ However, after the Company Law was amended in 2001, the inventory of essential property was no longer the property recognized in the general meeting, and thus it would appear that such property is unsuitable for meeting these criteria. In addition, there are also scholars who, in referring to Article 6, Paragraph 1, Subparagraph 3 of the Fair Trade Law, propose both qualitative and quantitative criteria.¹⁶ What is worth attaching importance to, however, is the application of this law in the case involving the dispute between Taiwan SOGO and Breeze Development Co., Ltd. over the sale of shares in Pacific SOGO Department Store, Ltd.¹⁷

In the Business Mergers and Acquisitions Law, the consideration in relation to "the transfer of all or a substantial part of the business or assets" appears to take various different forms, and the concept of selling property changes its form accordingly. If the company is not willing to dissolve, it is admissible. In particular, Article 39, Paragraph 2 of the Business Mergers and Acquisitions Law provides a definition for "the substantial part of the business or assets," and stipulates that "the income of the latest three years

14. Supreme Court Decision, case no. 1992 Tai-Shang Tzu 2696.

15. Supreme Court Decision, case no. 1998 Tai-Shang Tzu 1998.

16. See LEN-YU LIU, KUNG SSU FA LI LUN YU PAN CHUEH YEN CHIU(SAN) (STUDIES ON COMPANY LAW THEORIES AND JUDGMENTS (III)) 213-15 (May 2002) (in Chinese); Chih-Cheng Wang, *Chi Yeh Ping Kou Fa Chih Chih Chi Chu Kou Tsao* (*The Basic Structure of the Business Mergers and Acquisitions Legal System*), 4 CHUNG CHENG TA HSUEH FA HSUEH CHI KAN (NAT'L CHUNG CHENG U. L.J.) 91, 98-99 (Apr. 2001) (in Chinese).

17. Taipei District Court Decision, case no. 2002 Chung-Su Tzu 2465.

of the transferor business is at an amount not less than 50% of the total operating income for each respective fiscal year; and the substantial part of assets refers to the assets to be transferred as having a value of not less than 50% of the total assets at the time the transfer takes place ...” Similarly, the Supreme Court’s early practical understanding appears to have already lost its basis. By regarding the Business Mergers and Acquisitions Law as a special law compared to the Company Law, an appropriate interpretation should be as follows: when the transfer of all or a substantial part of the business or assets is already likely to affect the company’s continued operation, at such a time, the outcome of selling the business or assets will as a consequence in most cases follow the dissolution of the company. If the consideration takes the form of cash or other property, this will constitute a type of trading behavior. On the contrary, if the company is still likely to continue to operate, its operations can then be continued. Unless shares account for a considerable proportion of the consideration and these are assigned to shareholders, such trading will come within the scope of the company’s enterprise income tax calculations. In other words, the inevitable link between “the transfer of all or a substantial part of the business or assets” and the company’s dissolution will no more exist.¹⁸

D. *The Fundamental Difference from the Assumption (and Transfer) of Assets and Liabilities*

Generally speaking, except as otherwise specified in the contract, “the transfer of all or a substantial part of the business or assets” does not mean that the acquiring company will because of this be responsible for or assume the acquired company’s liabilities.¹⁹ This is also one of the main differences between the merger referred to above and “the transfer of all or a substantial part of the company’s business or assets.”

However, in practice different opinions have been expressed. For example, company A claimed that company B should be responsible for the commission fee owe to A by company C on the basis that B has assumed the

18. The U.S.’s Model Business Corporation Act §12.01 U.S.C. (2000) is of the opinion that if the transfer or disposition of all or a substantial part of the corporation’s assets occurs in the usual and regular course of business, then this is within the authority vested in the board of directors. However, § 12.02 of the same Act states that if the above situation does not apply, and that, following the transfer or disposition, the corporation will be left without a significant continuing business activity, then the approval of the shareholders in a general meeting is required. This so-called significant continuing business activity refers to the business activity retained that accounts for 25% of total assets at the end of the most recently completed fiscal year, as well as more than 25% of either total income from continuing operations before tax or revenues from continuing operations in that same fiscal year. For this reason, only something less than this standard will constitute a threshold requiring the approval of the general meeting.

19. WILLIAM J. CARNEY, *MERGERS AND ACQUISITIONS* 20 (2000).

liabilities of C by way of “the transfer of all or a substantial part of the business or assets.” B argued that C does not in accordance with Article 185, Paragraph 1 of the Company Law transfer the whole or a substantial part of the business or assets, and so the problem of assuming the assets and liabilities does not arise. The court opined: “Based on the Company Law being a special law within the Civil Law, Article 305, Paragraph 1 of the Civil Law stipulates that the assumption of the assets or liabilities from the property or enterprise of a person falls within the same category as the transfer of all or a substantial part of the business or assets of a company limited by shares referred to in Article 185, Paragraph 1, Subparagraph 2 of the Company Law. For this reason, the assumption and disposition or transfer of the business or assets of a company limited by shares should first be based on the application of the Company Law.”²⁰ Since the two fall within the same category, “the transfer of all or a substantial part of the business or assets” has the same legal effectiveness as the assumption of assets and liabilities. However, in this paper we hold a contrary opinion.²¹

First of all, the focal point of “the transfer of all or a substantial part of the business or assets” concept is on buying and selling. Although it is one kind of acquisition technique, the acquiring company need not take responsibility for the acquired company’s liabilities, which is without doubt one of its special features, and is also one of the advantages of such a decision. This view does not rule out that the acquiring company may resort to a special contract to assume the assets and liabilities, but it is not an inherent characteristic.²² Secondly, in Article 27 of the Business Mergers and Acquisitions Law, “general assumption or transfer” and “transfer or acquisition of business or assets” are provided separately, and thus should be interpreted as two different things.

For these reasons, the assumption or transfer of assets and liabilities closely resembles a merger. However, the transfer of all or a substantial part

20. Supreme Court Decision, case no. 1990 Tai-Shang Tzu 2247. Scholars have adopted similar opinions, for example, Yi-Chou Wu, *Kung Ssu Fen Ke Yu Ying Yeh Jang Yu Erh Chih Chih Fen His Pi Chiao (A Comparative Analysis of a Split-up and the Transfer of a Business)*, 54(1) FA LING YUEH KAN (THE LAW M.) 4, 5 (Jan. 2003) (in Chinese).

21. In interpreting the issue of acquiring the company’s business liabilities through a transfer, Ministry of Economic Affairs (MOEA) Letter No. 16276 (1979) (in Chinese) refers to “the transfer of the entire or a substantial part of the business or assets (not including liabilities) of the company is already clearly stipulated in Article 185, Paragraph 1, Sub-paragraph 2 of the Company Act . . .,” and for this reason the Ministry of Economic Affairs does not believe that Article 185 is fundamentally concerned with the assumption or transfer of assets and liabilities.

22. The loan contracts or bonds between the company and the financial institution should at times be stipulated more clearly in the company’s articles. When in the future the company sells the entire or a substantial part of its business or assets, such contracts must make provisions for the acquiring company to be willing to assume the assets and liabilities of the company being acquired. See PRIVATE PLACEMENTS 2005, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, PLI, 392-96 (2005).

of the business or assets, without any special agreement, is not concerned with the transfer of debt.

In addition, it needs to be noted that the wording of the Financial Holding Company Law and the Financial Institutions Merger Law is not entirely consistent with that of the Company Law and the Business Mergers and Acquisitions Law. Article 24 of the Financial Holding Company Law defines the term “Transfer of Business” as the sale of an entire business and its major assets **and debts** to another company, with the price paid in acquiring newly-issued shares of the company being equal to the net book value of such assets and liabilities. As for the concept of the transfer of a business, under this law this includes the transference of liabilities. Article 13 of the Financial Institutions Merger Law states that in the case where a bank in the form of a company limited by shares under certain conditions acquires the credit departments of ailing farmers’ and fishermen’s associations, the shareholders’ appraisal rights as per Article 185 of the Company Law are not necessarily applicable. This regulation, in terms of being a special regulation in relation to mergers and acquisitions among financial institutions, consistently includes liabilities within the scope of the transfer of a business or its assets. However, citing Articles 185-188 of the Company Law is actually inappropriate, the reasons for this having already been explained in the above discussions.²³

E. *The Fundamental Difference from a Split-Up*

A split-up basically refers to the situation where the company is broken up into a number of independent operating entities. Pursuant to Article 317-1 of the Company Law and Article 4, Paragraph 4 of the Business Mergers and Acquisitions Law, what the company that is split up pays is “all its independently operated business or any part of it”²⁴ in exchange for shares

23. Removing the applicability of Article 185 and beyond of the Company Law is likely to violate the safeguarding of the interests of minority shareholders. In relation to this, see Shao-Ling Liu, *Tsai Ching Kai Ke Yu Hsien Fa Chih Yueh-Yi Tu Li Tung Shih, Chin Jung Chieh Kuan Yu Chin Jung Ping Kou Wei Chung Hsin (Financial and Economic Reforms and Constitutional Restraints — With Independent Directors, Financial Supervision and Financial Mergers at the Center)*, in HSIEN FA CHIEH SHIH CHIH LI LUNYU SHIH WU(SSU) THEORY AND PRACTICE IN INTERPRETATING CONSTITUTIONAL LAW IV 115, 176-79 (Te-Chung Tang ed., May 2005); Shao-Ling Liu, *Chin Jung Fa Chin Kai Ke Te Kuan Nien Yu Tiao Chan (The Reform of the Financial Legal System: Concepts and Challenges)*, 62 TAI WAN PEN TU FA HSUEH TSA CHIH (TAIWAN L.J.) 112, 123 (Sep. 2004); Shao-Ling Liu, *Wo Kuo Ping Kou Fa Chih Te Jui Pien Yu Chien Chan (The Changes in and Outlook for Taiwan’s Mergers and Acquisitions Law)*, 32 CHING SHE FA CHIH LUN TSUNG (SOCIOECONOMIC LAW AND INSTITUTION REV.) 1, 25 (Jul. 2003) (in Chinese).

24. As to whether a business with independent operations refers to a company that has turned its business into a complete and independent operating entity (including the assets and liabilities) as a means for the “surviving company” (i.e., the one that absorbs the split-up) or the newly-established company (i.e., the newly-established split-up) to provide funds to pay for it, and that company or that

in the surviving company or the new company to be incorporated that succeeds the business of the split company. If it is a company to which the shares are allotted, the split-up is generally referred to as a “split-up of things” (which is actually similar to an investment). By contrast, if the shares in the company that is split up are assigned to shareholders then the split-up is a “split-up of people.” Following the amendments to the Business Mergers and Acquisitions Law in 2004, one part of the shares may be assigned to the company and another part may be assigned to the shareholders (Article 33, Paragraph 1, Subparagraph 4). As to whether the company that is split up is dissolved following the split-up, anything is possible.

When a split-up is discussed under U.S. law, three different kinds are distinguished. The first kind is simply a split-up. This so-called split-up refers to a company being split up into two or more parts. In terms of the method adopted, different parts of the company’s assets are transferred to two or more either already existing or newly-established companies in exchange for shares. After the dissolution takes place, the shares obtained are apportioned among shareholders. The second kind is a spin-off. The difference between this and the first kind of split-up is that the company that is split up has not been dissolved, and the shares that it obtains are allocated in accordance with their dividends among the shareholders. The third kind is a split-off. Similarly, the company that is split up has also not been dissolved. Like the second kind of split-up, the shares are allocated among the shareholders, but where this approach differs from the second type of split-up lies in the fact that the shareholders of the company that is split up must hand over a part of the shares in the company that is split up that they originally held in exchange for the shares in the acquiring company.²⁵ From this we can learn that the three different types of split-up under U.S. law are all similar to what is referred to in Taiwan as a “split-up of people.”

The Sixth Council Directive²⁶ of the EU contains regulations regarding a corporate split-up. From these regulations it can be seen that they only have what can be referred to as a “split-up of people.” The company that is split up is in principle dissolved following the split-up, unless the member state has a regulation that allows the company that is split up to continue to survive. In addition, if the split-up does not take place in any predetermined ratio (i.e., the shares acquired due to the split-up are not apportioned in accordance with the ratios of the shares held by the shareholders), the

company’s shareholders obtain new shares or newly-established shares issued by a third company, then another company should assume the assets and liabilities of these independent business operations. Please refer to Ministry of Economic Affairs (MOEA) Letter No. 09102168750 (2002) and MOEA Letter No. 09202012500 (2003) (in Chinese).

25. See H. G. HENN & J. R. ALEXANDER, *LAWS OF CORPORATIONS* 1010-18 (3d ed. 1983).

26. 82/891/EEC, O. J. 1982 L 378/47.

dissenting shareholders basically do not have appraisal rights.²⁷

As for the shareholders in the company that is split up, the approach adopted is a “split-up of people.” Regardless of whether or not the company is dissolved, its shareholders’ investment does not cease, and like a merger proceeds with a change in the content of the investment. From a taxation point of view the split-up should enjoy a deferred status. When a “split-up of things” is adopted, strictly speaking it is the composition of the company’s assets that changes, and all that takes place is that the original operations are changed into shares in a third company. For these reasons, this kind of split-up and a split-up of people both require that a certain resolution be passed in a general meeting, to the extent that the dissenting shareholders are given appraisal rights. It should be noted that this differs from the sale by the company of assets in the ordinary course of business, and instead involves the basic reorganization of the company. From a procedural point of view, special requirements are involved.

The process of splitting up likewise involves the problem of the “transfer of business,” only that such business by nature needs to be independent, a point that is very similar to “the transfer of all or a substantial part of the business.”²⁸ The significant difference is still the consideration that lies at the core: when the splitting up takes place, the consideration paid for by the existing or the newly incorporated company must take the form of shares. However, it is typical for cash to be used as the consideration in “the transfer of all or a substantial part of the business or assets.”

When “the transfer of all or a substantial part of the business or assets” stops with the original trading situation and cash or other property apart from shares is used as the consideration, the difference between this and a split-up is easy to see. However, when “the transfer of all or a substantial part of the business or assets” involves the exchange of shares in the acquiring company, it is as if the difference between them becomes indistinct or weak. At this time, the best way to distinguish this lies in whether or not the “acquisition takes place under transfer is based on the general assumption of assets and liabilities.” In the process of splitting up, the transferee company must in one instant absorb the assets and liabilities of that business. For this reason, a split-up must of itself combine the assumption of assets and liabilities with a transfer. On the contrary, even if the consideration in “the transfer of all or a substantial part of the business or assets” takes the form of shares, but that this is only one of many forms that the consideration

27. 82/891/EEC, O. J. 1982 L 378/49, Article 5.

28. If all of the business is involved, then there is independence. If a substantial part of the business is involved, then it must account for more than 50% of the overall business revenue in the last three years. This should therefore be interpreted as being characterized by independent business operations.

can take, by nature the consideration is not inherently different. Although the difference in tax cannot be neglected, these two different types of merger approach can still be distinguished.

To take the analysis a step further, let us suppose that the consideration in relation to “the transfer of all or a substantial part of the business or assets” not only comprises shares but goes so far as to include the transfer of the entire assets and liabilities and that the assumption of the assets and liabilities is stipulated in a special contract.²⁹ However, the company when planning a reorganization must select a reorganization approach, i.e., it must first decide on either a split-up or else adopt “the transfer of all or a substantial part of the business or assets.” There are two reasons for this: the first is that creditors are protected differently, and the second is that the channels through which shares are allotted among shareholders are also different. Each of these reasons is explained in turn as follows.

First of all, in terms of the orientation of a split-up, based on the transferee company’s assumption of a certain part of the liabilities of the company that is split up when assuming its assets and liabilities, as for the creditors that remain in the company that is split up or that is incorporated into the transferee company, the relationship is very significant, and for this reason it is then necessary to implement procedures to protect the creditors.³⁰ When a “transfer of all or a substantial part of the business or assets” takes place, the problems that arise due to the different kinds of consideration are likely to have very important tax implications. To the acquired company’s shareholders, this is also likely to be very important. However, to the company’s creditors, this relates to a change in the composition of the company’s assets, and at this stage there will not be any requests for special protection.³¹ If later there is a reduction in capital, the system for protecting creditors will proceed based on its own momentum.

Secondly, because the system of the split-up is such, the inevitable result of the allotment of the shares to the shareholders in the company that is split

29. That is, scholars believe that this at the same time is likely to constitute both Article 185 and a split-up, and that the choice is determined based on each individual case and the company’s needs. Please refer to Len-Yu Liu, *Kung Ssu Fen Ke Yu Ying Yeh Jang Yu (Corporate Split-ups and Business Transfers)*, 54 TAI WAN PEN TU FA HSUEH TSA CHIH (TAIWAN L.J.) 133, 139 (Jan. 2004) (in Chinese).

30. Apart from the procedures involving typical safeguards such as allowing the raising of objections among creditors in Article 32, Paragraph 5 of the Business Mergers and Acquisitions Law, paying off debts beforehand and furnishing an appropriate security, Paragraph 6 of the same Article requires that the existing or newly-incorporated recipient company, unless the liabilities existing before the division may be severed, shall within the scope of contributions made by the recipient company assume the joint and several responsibility of discharging the liability incurred by the divided company prior to the division.

31. However, there are still scholars who are of the opinion that the rights of creditors should be safeguarded. On this, please refer to Ming-Jye Huang, *Chi Yeh Ping Kou Fa Chih Chien Tao Yu Hsing Ssu(Hsia) (A Detailed Examination of the Business Mergers and Acquisitions Law (II))*, 97 YUEH TAN FA HSUEH TSA CHIH (TAIWAN L. REV.) 203, 203-04 (Jun. 2003) (in Chinese).

up will be a “split-up of people,” and the allotment of shares will be completed in accordance with the procedures for the split-up. On the contrary, the consideration obtained in “the transfer of all or a substantial part of the business or assets” belongs to the company. If the company desires to allocate the shares among the shareholders, theoretically speaking such an allotment constitutes a distribution of company assets to the shareholders. In other words, when this is not easy to do under the capital maintenance principle, apart from needing to implement procedures to safeguard creditors as well as the necessity and likelihood of implementing a reduction in capital, there are still disputes regarding the way in which the reduction in capital should be allocated. This will be discussed further in Part III.

To sum up, even if because of the many kinds of variables these two merger and acquisition approaches are likely to be hardly any different, according to the Company Law and the Business Mergers and Acquisitions Law they constitute two independent and different models. Thus the procedures to be implemented will still be different, and for this reason the board of directors will need to be decisive when referring to them. As to whether or not it is likely that reality standards can be adopted, it is not our intention to discuss this at the present stage.

III. THE ALLOTMENT OF SHARES OBTAINED FROM “THE TRANSFER OF ALL OR A SUBSTANTIAL PART OF THE BUSINESS OR ASSETS”

Although Article 185 of the Company Law does not clearly specify the types of consideration received in relation to “the transfer of all or a substantial part of the business or assets,” Article 39, Paragraph 1 of the Business Mergers and Acquisitions Law stipulates that “shares with voting rights” may possibly be one type of consideration. As to the reason why shares are used as consideration, this has already been discussed earlier in this paper.

What needs to be asked, however, concerns the means by which the shares obtained by the acquired company should be allotted among shareholders. It is believed that two different approaches can be adopted: the first involves an appropriation of the surplus, and the second a capital distribution. With regard to the appropriation of the surplus, if there are gains from the business or assets of the acquired company, then there is a surplus on the disposal of assets, which constitutes a capital surplus. However, pursuant to the Company Law, the capital surplus or reserve is to be mainly used to make good the deficit (or loss) of the company (Article 239, Paragraph 1). If the intention is to capitalize the capital reserve, then only two kinds of income, namely, income from the issuance of shares at a

premium and income from gifts received may be regarded as capital reserve, and so the surplus from the disposal of assets is not included therein. In other words, the selection of the way in which the surplus is appropriated must be ruled out.

If one looks at this from the angle of capital distribution, the Ministry of Finance's Department of Taxation has already provided the following explanation:

- (1) Business Mergers and Acquisitions Law Article 39 ... The so-called substantial part of business refers to the income of the latest three years of the transferor business amounting to not less than fifty percent of the total income from operations for each respective fiscal year; that is, it is necessary to achieve this standard in each of the last three years. If in one of these years the standard is not reached, then this article should not be applied to exempt the company from business income tax
- (2) If the company, pursuant to Article 185, Paragraph 1, Subparagraph 2 of the Company Law, transfers the immovable property of any essential part of the business in exchange for transferee company shares with voting rights (equal in value to the market prices for the immovable property) and that company has not transferred all of the shares it has obtained to the shareholders, without Article 39 of the Business Mergers and Acquisitions Law being applied, then the gain or loss from the company's transfer of immovable property should be dealt with in accordance with the Income Tax Law and related regulations.
- (3) is similar to (2). If the company transfers all of the shares it receives to the shareholders, then the explanations for the related taxes are as follows:
 1. Securities transactions tax-related part: ... If this conforms to Article 34, Paragraph 1, Subparagraph 3 of the Business Mergers and Acquisitions Law, this part can be exempt from securities transactions tax. Until the company transfers all of the shares it receives to the shareholders, this does not constitute the trading of securities, and the problem of levying securities transactions tax does not arise.
 2. Income tax-related part: (1) If the company transfers the property of an essential part of the business and conforms to Article 39 of the Business Mergers and Acquisitions Law, it can be exempted from profit-seeking enterprise income tax. Until such time that the accounts are dealt with, this should

be handled in accordance with the Business Accounting Law and related regulations. (2) If the company transfers all of the shares it receives to the shareholders, the rights of its shareholders are correspondingly reduced. In such instances, the company should in accordance with Article 168 of the Company Law implement a reduction in capital. The shares that are transferred by the company to the shareholders represent a repayment of capital by the company, and there is no need to levy a tax on shareholders' income.³²

There are several points regarding the Ministry of Finance's interpretation as described above that deserve our careful attention. First, from points (1) and (2) of the interpretation it can as a whole be inferred that the shares that are obtained in exchange for the transfer of a company's business or its assets are in a procedural sense first obtained by the company, regardless of whether after this takes place the shares are allocated among its shareholders, a process that differs from a split-up. In a split-up involving people, the way in which the overall merger and acquisition is designed is that the shareholders of the company that is split up directly acquire the shares, but in such instances this is not necessarily the case.

Secondly, when all or a substantial part of the business or assets is transferred in exchange for shares with voting rights, it is not necessary for the shares to account for eighty percent of the total consideration, nor is it even necessary for the shares to account for sixty percent of the consideration. The content and composition of the consideration are left to be determined by the contractual freedom of the acquired company and the acquiring company. However, if 80% is not achieved, it is unlikely that the company will be exempt from profit-seeking enterprise income tax. If 60% has not been achieved, it will not be exempted from securities transactions tax.

Third, the shares that are allotted to the shareholders are conceptually defined as a "return of share capital," and hence the company should implement a reduction in capital, and thus need not levy income tax on the shareholders. As for this last point, it can be argued here that this differs from U.S. federal tax law. As was pointed out above, issuing another company's shares to the shareholders in lieu of cash is really a kind of change in the content of the investment, but the investment is not the end of the story. That is, although at the current stage the tax is not levied, in the future, when these shares received in exchange are sold, they will still face the problem of capital gains. For this reason, they are not exempt from tax,

32. Taiwan Tax Administration Letter No. 0910453964 (in Chinese).

and it is only a matter of the tax being deferred.

As to a distribution of share capital involving a reduction in capital, this is essentially a reduction in capital. The reason for this is that it is necessary to implement a reduction in capital. Apart from following the procedures for a reduction in capital in order to safeguard the company's creditors, i.e., Articles 168 and Article 281 of the Company Law apply the provisions of Articles 73 and 74 of the same Act, *mutatis mutandis*, so that certain procedures are implemented to safeguard the creditors, the main reason for this reduction in capital is that the company shall not give the company's assets to its shareholders (either in their entirety or in part). In deliberating over the legislative intent of Article 15, Paragraph 1, and Article 185, Paragraph 1, Subparagraph 2 of the Company Law, as well as the equality of shareholders and the capital maintenance principle, although the Company Law does not expressly prohibit the company from giving its assets to its shareholders, to do so would go against the legal reasoning of the above articles.³³ That is, the acquired company needs to reduce its capital to act upon the principles that are consistently emphasized throughout the Company Law.

The Ministry of Economic Affairs has successively had two interpretations that are related to this. First of all, the so-called term "to transfer to" found in Article 39 of the Business Mergers and Acquisitions Law refers to all of the shares acquired by the company being transferred to the shareholders pursuant to this article, with the rights of these shareholders also being correspondingly reduced. In such circumstances, the company should pursuant to Article 168 of the Company Law implement a reduction in capital.³⁴ This interpretation makes it clear that the allotment of the shares in this way will give rise to the result that the originally-held part of shares will be eliminated. Secondly, "when implementing a reduction in capital, the amount of the approved reduction shall be in accordance with the proportions of the shares held by each shareholder, and such distribution will be limited to cash ... if compensation is made using assets other than cash, then because of the difficulties involved in estimating their values, it will be very easy to damage the rights of both the company and the creditors, and so the company's capital principle will be violated. That is, if the company reduces its capital and the amounts of the distribution to the shareholders are in accordance with their shareholding ratios, it shall not reimburse the shareholders with any assets other than shares or cash."³⁵

33. Ministry of Economic Affairs (MOEA) Letter No. 092006005180 (2003) (in Chinese).

34. Ministry of Economic Affairs (MOEA) Letter No. 09102222910 (2002) (in Chinese).

35. Ministry of Economic Affairs (MOEA) Letter No. 090021717720 (2001) (in Chinese). In addition, Ministry of Economic Affairs MOEA Letter No. 09202025650 (2003) (in Chinese) provides a similar opinion: "A company that reduces its capital may only use cash to reimburse its shareholders.

The above two interpretations are not substantially different, for they only describe a reduction in capital from two different angles. When a company decides to reduce its capital, this is likely to take the form of a “formal” reduction in capital or a substantial reduction in capital. The former does not involve the return of any property, and purely involves the shares held by the shareholders, whether or not this is a reduction in their face values, or a reduction in their numbers of shares, or a merging of their shares, in order to achieve the objective of reducing capital, and is not in any way related to the topic discussed in this paper. If a substantial reduction in capital takes place, then the company must pay a certain amount of money in exchange for the resulting reduction in or the lowering of the face value of the shares in accordance with the numbers of shares held by the shareholders.³⁶ This gives rise to disputes as to whether the company should resort to the use of property other than cash when reimbursing shareholders. On the other hand, because “the transfer of all or a substantial part of the business or assets” in exchange for shares gives rise in real terms to a reduction in capital when the shares are transferred to the shareholders, it is required, before the shareholders are paid back, that the company follow the procedures for a reduction in capital. Thus, when under normal circumstances a reduction in capital takes place, this means that the use of property other than cash in making a distribution is prohibited. There is thus some doubt as to whether shares can be used to make a distribution when there is a reduction in capital as the result of “the transfer of all or a substantial part of the business or assets.” Thus further explanation is needed as to how to validate this kind of difference.

The easiest way to explain this is to state that the Business Mergers and Acquisitions Law is a special law of the Company Law. Since the Business Mergers and Acquisitions Law allows the acquired company to transfer shares to its shareholders, we can see that this is a special regulation regarding the means by which shareholders should be reimbursed following a reduction in capital. However, this type of explanation tends to be too simple, for Article 39, Paragraph 1 of the Business Mergers and Acquisitions Law does not refer to a reduction in capital, but is merely a necessary condition for the shares being transferred to the shareholders to be exempt

Please refer to the MOEA’s Letter No. 09002177720 (2001/08/20) from which it can be inferred that a company, when reducing its capital, shall only pay back its shareholders using cash, and shall not use shares or other forms of property to pay them back. In relation to amounts paid back using the shares of companies listed on the stock or OTC exchanges, please refer to the stipulations of the above letter.” However, the MOEA has adjusted its holding in Ministry of Economic Affairs MOEA Letter No. 09700511280 (2008) (in Chinese) so that under certain circumstances, assets (including shares) distribution is permitted.

36. However, the law has clear stipulations in regard to the cancellation of shares or a merger. In relation to this, please refer to WEN-YEU WANG, KUNG SSU FA (CORPORATION LAW) 451-52 (2d ed., Aug. 2005) (in Chinese).

from profit-seeking enterprise income tax.

As to why the Ministry of Economic Affairs restricts the form of the distribution to shareholders in relation to a reduction in capital to cash, the main reason for this, apart from the company's and the creditors' rights as referred to in the MOEA Letter, may actually be that the shareholders' interests is the major consideration. When the company is incorporated or increases its capital afterwards, the funding provided by shareholders mostly takes the form of cash, and there is no dispute as to how the value of such funds is determined. Although Article 156, Paragraph 5 of the Company Law broadens the types of funds used to contribute to the company's equity capital to encompass certain other items besides cash, these other non-cash items must conform to certain valuation and policy procedures. On the contrary, among the regulations related to a reduction in capital currently in force, there are none that especially make such a provision or provide such relief. For the same reason, using cash to reimburse the shareholders is the most likely way of avoiding the inappropriate result where the majority shareholders allocate assets that are actually valued at relatively low prices among the minority shareholders. For this reason, if one starts with the most basic reasoning of the Company Law, when the company can form a consensus, apart from behavior that violates the law, any other behavior will do.³⁷ Of course, such behavior also includes the way in which the property is distributed. However, the likelihood of this kind of situation occurring in practice is extremely small (for the company to reach a consensus is really not easy), so that making the allocation using cash is the most appropriate method that can be used.

From this it can be inferred that, if the assets used to reimburse the shareholders are characterized by homogeneity, and they are divisible in terms of quantity, then the difference between such assets and cash from the point of view of those to whom the assets are allocated no longer exists. Put simply, as the company allots the shares and corporate bonds of the same company that are by nature assets that are completely the same among the shareholders, the outcome referred to above whereby there will be an inappropriate allocation will not arise. That is, what this means is that cash serves as a kind of example. Everything that can achieve the same results as cash should have no need to be prohibited. The Ministry of Economic Affairs has recently adjusted its interpretation regarding this issue based on such thoughts (MOEA Letter No. 09700511280 (2008)). The only thing that needs to be considered is that it seems that the law does not force the shareholders to receive something other than cash when a company

37. See Robert Goddard, *The Re Duomatic Principle and Sections 320-322 of the Companies Act 1985*, J. BUS. L. 121, 121-22 (Jan. 2004).

implements a reduction in capital. However, this has nothing to do with fairness, but instead gives rise to the problem whereby shareholders are forced to accept different investment contents. This point has already been discussed in detail above and the issue of appraisal rights arises due to such a situation.

IV. THE REQUIREMENTS OF “THE TRANSFER OF ALL OR A SUBSTANTIAL PART OF THE BUSINESS OR ASSETS”

According to the Company Law, if a company wishes to transfer all or a substantial part of its business or assets, it is necessary for a resolution to be adopted by a majority vote at a meeting of the Board of Directors that is attended by at least two-thirds of the directors (Article 185, Paragraph 5). Subsequently, the reason for or subject of the general meeting to be convened should be indicated, and a special resolution in the general meeting should be adopted by means of a vote. This regulation, when discussed from the point of view of the forming of the company’s intention, without doubt makes it clear that if the company wishes to engage in a major transaction, it is necessary for this procedure to be followed for it to take effect.

However, in practice there are likely to be two kinds of situation. The first is where the company does not act in accordance with this procedure, and the chairman represents the company in transferring all or a substantial part of its business or assets. The other situation is where, in spite of the company passing the resolution in its general meeting, mistakes are likely to be made in the process of passing the resolution. For example, when making a proposal, the board of directors may not pass a special resolution, or the general meeting may only pass an ordinary resolution. If any of the above situations occur, the kind of influence that “the transfer of all or a substantial part of the business or assets” may have is well worth discussing.

A. *Where No Resolution in a General Meeting Is Passed*

In relation to resolutions regarding “the transfer of all or a substantial part of the business or assets” of a company that have not been passed in a general meeting of shareholders, the Supreme Court has already accumulated a considerable number of judgments. What is frequently seen in practice is the situation where the counterparty to the company’s transaction requests that the company in accordance with the law make payment through the transfer of certain property, and where the company frequently regards such property as its principal property. However, the company makes the transfer without having a resolution for that purpose adopted in a general

meeting of shareholders, which increasingly leads to counterarguments. In practice the opinions expressed in the judgments may each consist of one of two main kinds.

Judgments that fall within the first category mostly express the following views: “The company shall, in relation to the different activities listed in Article 185, Paragraph 1 of the Company Law, obtain the approval of the shareholders for each item. Otherwise, such acts will not take effect,”³⁸ “... the company itself is not restrained by them”³⁹ or “... a special resolution that has not been passed in a general meeting is not effective in relation to the appellant (the company) ...,”⁴⁰ and so on. When looked at in terms of the meanings of the words, it would appear that this means that such acts are invalid. The general meeting resolution defined in Article 185 of the Company Law is an essential requirement for transferring the essential part of the assets of a company.

Another kind of practical view concerns that of further explaining the words “not taking effect” as: “With the chairman representing the company to the outside world, the general meeting is the company’s supreme decision-making body, and for this reason the chairman represents the company to conclude ..., Pursuant to Article 185 of the same law ... for the resolution to take effect, it needs to be adopted by a majority vote at a meeting of the shareholders, of which those in attendance represent two-thirds or more of the total number of the company’s outstanding shares. If the board chairman has not acted on the basis of such a special resolution passed in the general meeting and represents the company in concluding a contract ..., as to whether what he does takes effect, although the Company Law is not clear on this, Article 170, Paragraph 1 of the Civil Code stipulates that ‘a juristic act done by a person having no authority to act as an agent is ineffective against the principal unless ratified by the principal.’ By this is meant that a contract concluded by the chairman representing the company that has not been approved by a special resolution passed in a general meeting of shareholders will, in relation to the company, not take effect ... Since this is an act that does not take effect, if it is ratified after taking place then from the time it occurs it takes effect.”⁴¹

The main thrust of the second kind of explanation is that “the general meeting is the supreme organ of a company limited by shares, so that if the general meeting has not in accordance with the law decided to transfer all or a substantial part of the business or assets of the company, the executive

38. Supreme Court Decision, case no. 1980 Tai-Shang Tzu 3362.

39. Supreme Court Decision, case no. 1991 Tai-Shang Tzu 434.

40. Supreme Court Decision, case no. 1997 Tai-Shang Tzu 1893.

41. Judicial Yuan Letter, case no. 1990 Ting-Ming (1) Tzu 914 and Taipei District Court Decision, case no. 2002 Chung-Su Tzu 2465.

organ of the company, i.e., the board of directors delegates the authority to the company's president who enters into this company's business dealings with third parties, assets and trading contracts, it is difficult to recognize these acts as being the acts of the company, and so the company is not responsible for the actions."⁴²

Based on its special feature of being a legal person, the company in essence is unable to make its own decisions. However, according to Taiwan's Company Law there are basically two groups that can take responsibility for the company and shape its will: the general meeting and the board of directors (Article 202 of the Company Law).⁴³ As for the forming of the intention concerned with "the transfer of all or a substantial part of the business or assets," this is interpreted as being within the domain of the general meeting. However, it cannot be denied that a resolution being passed in a general meeting is based on the proposals initiated by the board of directors, which means that the board of directors is not completely without any role to play.⁴⁴

As a result, there are two possible interpretations. The first is that the regulation of the general meeting's special resolution is mandatory. If not abided by, the act will of course be void. The other interpretation is: if it is only that the company's will is not validly formed, which means that the principal does not have anything to express, regardless of whether it is a representative or agent, neither is able to restrain the principal, but can only be accorded the status of a "agent without authority," and this will revert to the situation where the validity remains undetermined. Summing up these practical opinions, when related judgments use the expression "not effective to the company," this means that the validity of the juristic act is uncertain. At this stage, the second interpretation is preferred, but in what is written below this paper will further discuss how powers are divided within the company in order to discuss this issue in detail.

B. *Where a Resolution Has Been Passed in a General Meeting*

When a company convenes a general meeting to vote on "the transfer of all or a substantial part of the business or assets," yet it so happens that this

42. Supreme Court Decision, case no. 1988 Tai-Shang Tzu 1918.

43. However, in regard to substance, the chairman in relation to certain types of ordinary business has the power to shape the will of the company. Although the managers are an auxiliary body involved in the execution of the company's business, in relation to the handling of such business, they actually have the discretionary authority. This can perhaps be included as part of the shaping of the company's intention. The same applies to the responsible persons of other companies.

44. After the regulations governing the rights of shareholders to initiate proposals were passed, whether or not the transactions of Article 185 of the Company Act should be based on proposals initiated by shareholders and how these proposals should be handled merit further discussion.

proposal does not conform to the board of directors' procedures for making a proposal, or else there are errors in the way that voting rights are calculated, so much so that the voting method adopted is erroneous, what should be done on such an occasion?

The problems that arise based on the circumstances described above are basically problems to do with the validity of the resolutions adopted in the general meeting. Apart from the voting method adopted, both from an academic and a practical point of view, when there are problems with the procedures that the board of directors follow when making proposals or mistakes are made with regard to how voting rights are calculated, it is generally believed that there has been a violation in terms of the procedures for convening a meeting or the way in which resolutions are handled. The resolution passed in the general meeting is voidable, not invalid.⁴⁵

When a proposal is passed, not by a special resolution, but by a vote in accordance with the procedures for an ordinary resolution, there are different views that arise in relation to this. There are those scholars who advocate that if, where there should be a special resolution, an ordinary resolution or a tentative resolution is used instead, then the resolution is not established, and thus such a resolution is invalid. This means that the attendance at the meeting by shareholders representing a requisite number of shares is the necessary condition for the juristic act to be established. Its violation is not simply procedure.⁴⁶

In practice, the majority of scholars are of the opinion that "in regard to the acts listed in Article 185, Paragraph 1 of the Company Law, when the general meeting is convened and the shareholders in attendance are not sufficient to represent at least two-thirds of the total number of shares already in issue, there is a violation of Article 185, Paragraph 1 of the Company Law, and this is also a violation of the approach used to pass resolutions in the general meeting. Pursuant to Article 189 of the Company Law, a shareholder may, within 30 days of the date on which the resolution was adopted, petition to the court to rescind said resolution. This does not fall within the scope of Article 191 of the same law whereby the resolution is declared null and void."⁴⁷ There are not a few judgments that have agreed to such a decision.⁴⁸

45. Such as Supreme Court Decision, case no. 1991 Tai-Shang Tzu 1050 (without the shareholders participating in a vote).

46. FANG-CHIH KE, CORPORATION LAW (I) 274 (5th ed., Nov. 2002) (in Chinese); Kuo-Chuan Lin, *Su Ching Che Hsiao Cheng Hsu Hsia Tzu Chih Ku Tung Hui Chueh Yi (Petitioning the Court to Annul a Resolution that is Flawed due to the General Meeting's Procedures)*, 79 YUEH TAN FA HSUEH TSA CHIH (TAIWAN L. REV.) 20, 21 (Dec. 2003) (in Chinese). Supreme Court Decision, case no. 1976 Tai-Shang Tzu 1374.

47. Supreme Court Decision, case no. 1974 Tai-Shang Tzu 965.

48. Such as Supreme Court Decision, case no. 1996 Tai-Shang Tzu 1885, and Supreme Court Decision, case no. 2002 Tai-Shang Tzu 2183. Wang-Ruu Tseng, *Ku Tung Hui Cheng Hsu Wen Ti Chih*

If in accordance with the majority viewpoint, a decision to “transfer all or a substantial part of the business or assets” has been made that is not based on a vote in accordance with a special resolution, prior to that resolution’s annulment by the court, the resolution is still valid. In relation to this, a noticeable contradiction becomes apparent. There is such a contradiction if, prior to its being annulled, the resolution is still valid (this can be interpreted as meaning that such a resolution still represents a forming of the company’s intention), how is it, based on such an effective formation of intention, that the resulting acts are not deemed to be valid?

According to the Supreme Court Decision, case no. 1991 Tai-Shang Tzu 434: “If the transfer of all or a substantial part of a company’s business or assets does not comply with laws and regulations, then such a transfer is invalid. This differs from the situation where the company adopts procedures for convening a general meeting or an approach for adopting a resolution to perform this transfer that violates laws and regulations and the company’s articles of incorporation, in which case a shareholder may in accordance with Article 189 of the same law enter a petition in the court for the annulment of such a resolution.” This may explain why the court on the one hand adjudicates the transfer to be void while on the other hand argues that the resolution is voidable.

However, it needs to be asked how these two situations differ. Let us imagine that if the formation of the company’s intention is to be based on the regulations contained within the Company Law, then the emphasis should be on the general meeting. On such an occasion, the resolutions adopted by the general meeting are the only means by which such intention is formed. The key then lies in whether the validity of such “resolutions” and the validity of such “shaping of intention” can each be effectively judged. According to the judgments, these are two different things, but one can also imagine that if the formation of intention is separated from such resolutions, it needs to be asked what such resolutions really mean. That is, in theory these are not two different things, but are really the same thing.

The difficult problem then occurs. In the opinion of most scholars, on this occasion the problem is faced with a deadlock. On the contrary, if it is based on a minority view, then the problem is resolved. Based on the minority view, such a resolution is not validly passed, and thus void. Since the principal does not form the intention to transfer the business or assets, the legal effect of the said agency will be uncertain.

The main reason why the majority do not regard the resolution resulting from the special resolution not being appropriately adopted as not being

established or not taking effect is that only the voting method adopted has been in violation of the law. This differs somewhat from the general meeting's attendance threshold not having been achieved. In relation to the latter, it is basically not possible to regard the general meeting as already having been held in accordance with the law, and thus its resolutions have not been established.⁴⁹ On the other hand, the voting threshold can be differently designed. At times, the company's articles of incorporation can be a regulation with a higher threshold. For this reason, there are naturally reservations over whether or not it is necessary to cause its resolution to not be established or to be void.

We can now compare these two situations: (1) the general meeting by means of an ordinary resolution approves the transfer of all or a substantial part of the business or assets; and (2) the company uses a special resolution to approve it; however, subsequently it is discovered that because there was an error in the calculation the quorum for a special resolution is not achieved.⁵⁰ Essentially, neither of these two kinds of situation fulfills the requirement of a special resolution, but the former one is clearly in violation of the law in formality. However, in regard to the counterparty to the transaction, what is felt as a result should differ. As to what the objective of the regulation concerning the special resolution in Article 185 of the Company Law is, it is first necessary to make this clear.

In theory, the general meeting is one of the channels for resolving the agency cost problems between the shareholders and the managers, and it also protects the interests of the minority shareholders.⁵¹ Certainly, through the setting of special voting thresholds, the general meeting can to a certain degree prevent large shareholders from arbitrarily changing the company's basic events and structure. Related cases give rise to arguments over "whether or not a resolution should be passed in a general meeting for the company's internal events," based on which it is believed that this should not be used to oppose the counterparty, but with various opinions being held in judgments.⁵² These opinions differ so much that there are judgments that indicate that, even if the company's representatives' transactions with the trading counterparty appear in the minutes of the general meeting and the board of directors' meetings, if the company has in actual fact not already

49. Supreme Court Decision, case no. 1980 Tai-Shang Tzu 1415.

50. Regarding a quorum and a majority, please refer to Kuo-Chuan Lin, *Ku Tung Hui Chueh Yi Ting Tsu Shu Yu To Shu Chueh Chih Chi Suan (The Calculation of a Quorum and a Majority for a General Meeting Resolution)*, 65 TAI WAN PEN TU FA HSUEH TSA CHIH (TAIWAN L.J.) 199, 199-204 (Dec. 2004) (in Chinese).

51. See SHAREHOLDER VOTING RIGHTS AND PRACTICES IN EUROPE AND THE UNITED STATES (hereinafter *Shareholder Voting Rights and Practices*) 331 (Theodor Baums & Eddy Wymeersch eds., 1999).

52. Supreme Court Decision, case no. 1980 Tai-Shang Tzu 3362.

convened the general meeting, it is also not because of this that the transactions have been valid for the company.⁵³ From this it can be seen that the emphasis is on whether or not the procedures in Article 185 are indeed complied with. These procedures include the policy choice that “protecting the shareholders” is greater than “transactions safety.” In the two examples given above, in the case of a special resolution adopted in a general meeting where what constitutes a quorum or a majority is calculated wrongly with the result that the resolution is flawed, when looked at in the real world, the threat to the safety of transactions is even more serious. This is because, regardless of how the counterparty to the transaction is verified, the likelihood of being discovered is very small. However, if one proceeds from there not having been a special resolution adopted, the general meeting minutes may perhaps provide some clues.

For this reason, the majority view will probably not give rise to problems under certain circumstances. This is the case in view of the counterparty to the transaction actually being unable to verify every circumstance that is likely to lead to the general meeting resolution being annulled. In relation to this, consideration should be given to transaction safety being more important than protecting the minority shareholders. For this reason, all resolutions that go through the general meeting, regardless of the procedures used and regardless of their content, at least externally have the backing of a resolution passed in the general meeting. On such occasions, all of the acts performed by the chairman in representing the company will be effective. If the general meeting resolution is subsequently annulled (or based on the minority view, is deemed to be void), the validity of the transaction is accordingly decided by the rule of “apparent authority.” In other words, the validity of the acts listed in Article 185 will be adjusted in line with the majority view. However, at present such a development does not appear to be likely.

C. *The General Meeting Special Resolution Regulation*

Article 185 of the Company Law reveals a problem with the regulatory objectives in implementing the procedures for a special resolution. The items mentioned in the Company Law and the Business Mergers and Acquisitions Law that require that a special resolution be adopted in a general meeting of shareholders, besides those in Article 185, include (1) relaxing the statutory investment threshold; (2) changing the rights of the holders of special shares; (3) discharging directors; (4) removing the restrictions prohibiting directors from engaging in business competition; (5) increasing capital by

53. Supreme Court Decision, case no. 1988 Tai-Shang Tzu 1918.

recapitalizing dividends; (6) changing the articles of incorporation; and (7) a merger, split-up, acquisition, share exchange and a dissolution. Of these, apart from discharging directors, all other items are principally concerned with protecting the rights of shareholders. Those items listed that are likely to involve transaction safety involve (1), (3), (5) and (7).

By using investment as an example, it is commonly believed that even if a special resolution has not been adopted in a general meeting (and the articles of incorporation did not stipulate this or the company does not specialize in investing), an investment that exceeds 40% of the company's paid-up stock is still valid.⁵⁴ This view under normal circumstances is not in any way inappropriate, but if it is contrasted with "the transfer of all or a substantial part of the business or assets," then there are reasons to doubt it. With regard to the investment, regardless of whether or not a resolution has been passed in the general meeting, or whether or not the resolution adopted in the general meeting conformed to the requirements for a special resolution, none of this will affect the validity of the investment. If this is the case, then what is the meaning of a special resolution? As to whether or not the investment can exceed 40 percent of the paid-up capital is to be determined by the powers of the general meeting, for it is only the general meeting that can on behalf of the company cause this transaction to shape the company's will to be effective. When the general meeting has not already adopted this resolution, nor has a special resolution been adopted for this resolution (according to the minority view, the resolution is not established), or when the resolution is subsequently annulled (based on the majority view, even if an ordinary resolution is used, the problem is only one of voidance), these will not have any impact on the validity of the investment. Why, then, is this so? The only normal reason is that the protection of transaction safety is greater than the protection of the shareholders' expectations regarding the limitations on the company's original investment. From this we can learn that the effect of violating a special resolution is not unchangeable.

The following table analyzes the likely composition:

	Without a resolution passed in the general meeting	With a resolution passed in the general meeting (including passing by an ordinary resolution, or by a defective special resolution)	
validity of the resolution	No resolution, no validity to speak of	Valid, but voidable	Not established, invalid

54. See KE, *supra* note 46, at 28.

The validity of the Article 185 juristic act	Void	Validity undetermined	Invalid	Validity undetermined	Void	Validity undetermined
The validity of the Article 13 juristic act	Valid		Valid			

It is important to point out that if the company’s resolution is deemed to be void, the only reason for the company to take responsibility as a principal is to protect safety of transactions.⁵⁵ However, it can be imagined that, if the company’s resolution is valid, yet it is said that the acts of those that represent the company are either invalid or the validity has not been determined, such reasoning is unacceptable. For this reason, the Company Law needs to fully examine in each situation the kinds of legal interests that the special resolution wishes to protect. If the special resolution involves the interests of counterparties to the transaction apart from the company and its shareholders (or even directors), and the said resolution is valid but voidable, the acts performed based on this resolution should be valid as well. If it is considered that a special resolution is needed for the shareholders’ interests to be safeguarded, while the safety of the transaction is sacrificed, then such a resolution should be interpreted as invalid, in line with the transaction behavior that is void or whose validity has not been determined. In other words, when the general meeting should adopt a special resolution but such a special resolution is either not adopted or defective, it is likely that this cannot be resolved merely by making the resolution valid or invalid. The majority and the minority view each have their reasons in different circumstances, and thus one should take into consideration the legal objectives and clarify these reasons one by one.

V. THE DIVISION OF POWERS BETWEEN THE GENERAL MEETING AND THE BOARD OF DIRECTORS

When discussing the validity of “the transfer of all or a substantial part of the business or assets” in this paper, we first analyze this on the basis of the views of current practice and scholarship. However, a more profound

55. For instance, the French Companies Act (Law No. 66-357 of July 24, 1966) considers that even if the resolutions of the general meeting are invalid or are rescinded by the court, such resolutions cannot be used to oppose third parties (Article 369). See JEAN-PIERRE LE GALL & PAUL MOREL, FRENCH COMPANY LAW 138 (2d ed. 1992). For a related Chinese translation, see PANG-KUEI JIN (trans.), FRENCH COMMERCIAL CODE 247 (2000) (in Chinese).

question relates to the theory of parity in so far as it concerns the board of directors and the general meeting. A basic structure of the Company Law that is quite disturbing is the following: Is the company's capacity limited? If it is, how effective is it when it is exceeded? Within the limits of the company's capacity, how to demarcate the authority among the corporate representatives (or agents)? When the authority is exceeded, how then should the situation be dealt with? This is an inevitable outcome of the juristic acts arising from the company's dealings with third parties and a long-term and troublesome legislative problem. Because the validity of "the transfer of all or a substantial part of the business or assets" is being discussed, which arises in all types of business merger and acquisition activity, there will be doubts regarding the formation of the company's intention that the company and the representative (or agent) must both face. Discussing this issue has very significant meaning.

A. *The Limitations on the Company's Capacity*

As for the problems associated with the limitations on the company's capacity, traditionally, the emphasis has been on the "doctrine of ultra vires." Since a legal person's establishment needs to be based on certain objects, for this reason the legal person's business objects that are recorded in its articles of incorporation have all along been the main criteria that have determined the scope of the capacity enjoyed by that legal person. However, it needs to be noted that the capacity of a legal person is still restricted by laws. For this reason, broadly speaking, this so-called doctrine of ultra vires encompasses behavior that is in violation of the company's articles of incorporation as well as laws and regulations. All of these are included.⁵⁶

The doctrine of ultra vires has been fraught with a multitude of problems in its application. In real life, very rarely will counterparties to a transaction examine the categories of the targeted business recorded within the company's articles of incorporation, or look to see whether types of business recorded are insufficiently clear, all of which will be detrimental to the safety of the transactions.

The U.K.'s Companies Act in 1989 significantly changed the doctrine of ultra vires. Section 35(1) of the Companies Act 1985 stipulated: "The validity of an act done by a company shall not be called into question on the grounds of lack of capacity by reason of anything in the company's memorandum." However, if the company does not have a duty to perform certain acts to carry out its duty in regard to the counterparty, the

56. See DAVIES, *supra* note 3, at 131. "The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract." (*Ashbury Railway Carriage and Iron Co. Ltd. v. Riche* (1875) L.R. 7 H.L. 653.)

shareholders can still petition the court to prevent the company from engaging in such behavior, unless such behavior is based on a special resolution that has already been passed in a general meeting.⁵⁷ In addition, even if the general meeting passes a resolution that allows the company to engage in ultra vires behavior, the directors are not exempted from being held responsible (unless another separate special resolution has been passed excusing the directors from being held responsible).⁵⁸ This can be explained by the following example. When a company concludes a trading contract with a counterparty that is ultra vires, that contract is still valid, and the shareholders cannot bring a lawsuit to invalidate it. However, if the contract concluded by the company is an option to purchase, because the company has not executed its obligation to purchase, for this reason, before they exercise their right to buy, the shareholders can petition the court to order the company to cease and desist such behavior, unless a special resolution has already been passed in a general meeting.⁵⁹

By means of these revisions, the limitations on the capacity specified in the articles of incorporation has as a result been removed in reality, and the trading counterparty need no longer be concerned that the validity of the juristic act between itself and the company will be endangered by the wording in the articles of incorporation. However, the amendments to the law that have been directed toward the restrictions in terms of the articles of incorporation have not resulted in the limitations regarding the capacity in the law being changed. Put simply, if the behavior shown by the company is behavior that is forbidden by law, it is still void (under U.K. law, a more accurate way of putting this is to say that the company at this point in time does not exist).⁶⁰ It is worth mentioning that the new Companies Act 2006

57. Section 35 (2) provides: "A member of a company may bring proceedings to restrain the doing of an act which but for subsection (1) would be beyond the company's capacity; but no such proceedings shall lie in respect of an act to be done in fulfillment of a legal obligation arising from a previous act of the company."

58. Section 35 (3) provides: "It remains the duty of the directors to observe any limitations on their powers flowing from the company's memorandum; and action by the directors which but for subsection (1) would be beyond the company's capacity may only be ratified by the company by special resolution. A resolution ratifying such action shall not affect any liability incurred by the directors or any other person; relief from any such liability must be agreed to separately by special resolution." Such a special resolution indicates that the agreement of at least three-fourths of the shareholders in terms of their voting rights is needed. Based on the spirit of the doctrine of ultra vires, none of the items that exceed the powers of the company may be ratified by the shareholders, even if the shareholders unanimously vote in support of them.

59. See DAVIES, *supra* note 3, at 139-40.

60. "The House of Lords ... expressly rejected the view that contracts beyond the scope of the objects clause were in effect prohibited by statute and therefore void for illegality. Instead, companies were viewed as having an inherently limited legal existence." See Andrew Griffiths, *An Assessment of Sections 35-35B and 322A of the Companies Act 1985 and the Protection of Third Parties Dealing with Companies*, in THE REFORM OF UNITED KINGDOM COMPANY LAW 105 (John De Lacy ed., 2002). This kind of explanation can also be used in relation to the validity of acts that are ultra vires and prohibited by law. The so-called legal prohibition, for example, the U.K. Companies Act prohibits

has substituted Section 39 for Section 35 of the Companies Act 1985 and repeals subsections 2 and 3 of Section 35. Accordingly, the new law has abandoned the doctrine of ultra vires, which is replaced by the issue of directors' representation being beyond their authority in the course of dealing with outsiders.

Following the amendments to Taiwan's Company Law in November 2001, Article 15, Paragraph 1 has already been deleted. Consequently, the articles of incorporation in relation to the restrictions on the company's capacity have almost completely lost their relevance, and all that is left in terms of the meaning of the articles of incorporation in relation to the limitations on the company's capacity are the responsibilities of directors and other responsible persons. However, when one touches upon Articles 13, 15 and 16 of the Company Law, it is generally believed that this is a limitation of the law on the capacity of the company.

Based on the view of the company's capacity being restricted, and in considering developments in the U.K., in theory, once the company exceeds its capacity, its acts are frequently referred to as not having any validity (under Taiwan law). However, the U.K. believes that this involves a more basic theory — i.e., the company basically does not have the ability to conclude a contract (because it does not exist). Although Taiwan has regarded the violation of the three articles discussed above as basically being "void," it has operated on the understanding that investment is valid. Although this is consistent with the concept of transaction safety, in regard to the substance of the limitations on capacity it is actually not compatible. For this reason, there is still some doubt as to whether the restrictions on investment are really within the scope of the legal restrictions on the company's capacity.

B. *The Division of Powers Within the Organization — The Board of Directors vs. the General Meeting*

In regard to acts that go beyond the company's capacity, theoretically speaking there are no corporate organs that can shape the company's intention, and there is also no problem with ratifying such acts retroactively. That is, there is no meaning in discussing the issue of the division of powers within the company here. From this, the following inference can be derived. Since the investment threshold in Taiwan can be increased by means of a resolution passed in a general meeting or by the articles of incorporation, and

the distribution of capital that is not in accordance with the law, and this so-called distribution includes the sale of assets of a subsidiary company at a price that is lower than their true value to a controlling company. *Aveling Barford Ltd. v. Perion Ltd.* [1989] BCLC 626. See also W. J. L. Knight, *Capital Maintenance*, in PERSPECTIVES ON COMPANY LAW I 60-61 (Fiona Macmillan Patfield ed., 1995).

the outcome of the law being violated is not that the juristic act is invalid, for this reason it is our view that Article 13 of the Company Law is essentially not a problem to do with the company's capacity, but only with how that authority is divided up within the company, that is, it is concerned with which body has the power to decide on the upper limit to an investment.

The division of powers within a company is closely related to each country's particular business characteristics. When the Company Law was revised in 2001, it proposed policies that ownership should be separated from management, a notable example being concerned with changing the qualifications of directors (Article 192). It also provided new thinking on the division of powers between the board of directors and the general meeting of shareholders (Article 202).⁶¹

Based on the current structure in Taiwan in relation to the forming of the company's intention, there are no intrinsic limitations imposed on the power of the general meeting or the board of directors. Article 202 of the Company Law gives us a clue in this regard. Based on that article, the Company Law and the company's articles of incorporation are the source of the limitations on the powers exercised in the general meeting. If these two do not specify that a certain item should be handled in the general meeting, then it falls within the powers accorded to the board of directors. A narrower interpretation is that the powers of the board of directors are very extensive. However, if the wording is carefully examined, the scope of the authority can in fact be very small, because it is only necessary for the articles of incorporation to state that certain items should be within the domain of the general meeting of shareholders and then they belong to the general meeting. Moreover, legally, the articles of incorporation are not restricted to just certain kinds of items. For this reason, in theory, the general meeting can amend the articles of incorporation so that many kinds of business are within the scope of the general meeting.⁶²

The regulations governing companies in Switzerland are contained within the Code of Obligations, which is a part of the Civil Code. The regulations within this Code of Obligations that are related to a company limited by shares (a share or stock company) (Aktiengesellschaft — "AG") are in the sections from Article 620 to Article 763.⁶³ Article 698 points out

61. LIU, *supra* note 16, at 200.

62. However, this clearly differs from the understanding that the board of directors should have in the ordinary course of business all the executive powers. Please refer to Len-Yu Liu, *id.* There are also scholars who argue that based on Article 202 of the Company Act, in regard to relevant regulations to do with business mergers and acquisitions, because this is part of the business conducted by the company, it should still be the board of directors that makes the final decision and takes the ultimate responsibility. See Wen-Yeu Wang, *Chi Yeh Ping Kou Fa Tsung Ping (An Evaluation of the Business Mergers and Acquisitions Law)*, 83 YUEH TAN FA HSUEH Tsa Chih (TAIWAN L. REV.) 70, 77 (Apr. 2002).

63. SWISS COMPANY LAW 5 (Bruno Becchio & Urs Wehinger et al., 2d ed. 1996).

that the general meeting is the supreme authority of the AG, and its powers include amending the articles of incorporation, appointing directors and supervisors, approving the annual report and the consolidated financial statements, resolving the distribution of the dividends, compensating the directors, and other items left for the general meeting in the articles of incorporation and law. These regulations are almost identical to those contained within the Company Law in Taiwan.

However, in Article 716a of that Code, Switzerland lists the non-transferable and inalienable duties of the board of directors. Apart from giving the board of directors the status of being the supreme operating authority within the company, all of the items listed below are specifically and exclusively the powers of the board of directors:

- (1) The establishment of the organizational structure;
- (2) Supervision of the accounting function, financial controls as well as financial planning, to the extent these are necessary for conduct of the company;
- (3) Appointment and removal of persons entrusted with the management and the representation of the company;
- (4) In relation to the above people, taking final supervisory responsibility to ensure compliance with laws, the articles of incorporation and other standards;
- (5) Preparing the annual report and executing the resolutions of the general meeting; and
- (6) When the company's debts become excessive, the court should be notified.

The demarcations between Articles 698 and 716a are related to the "theory of parity." The theory of parity points out that the company's "organ" may only exercise its powers without encroaching upon the authority of other organs.⁶⁴ From this we can see that the articles of incorporation may not subject the responsibilities referred to in Article 716a to final approval by a resolution of the general meeting. One example is based on the general meeting not being the executive authority, and for this reason it cannot resolve the upper limit on the investment, because the upper limit on the investment and the company's financial plan cannot be separated, since the financial plan has already been designated as being within the exclusive competence of the board of directors, and thus should not be decided in the general meeting.⁶⁵ This distinction as discussed above and the views to do with the characteristics of the regulations to do with the

64. "The theory of parity states a corporate body may exercise only that competence which does not infringe on the areas which belong to another body." See *SHAREHOLDER VOTING RIGHTS AND PRACTICES* (Theodor Baums & Eddy Wymeersch eds., 1999), *supra* note 51, at 317-18.

65. See *id.* at 318.

prohibition of investment in Taiwan are in perfect agreement with each other. German theory indicates that the competencies of the general meeting are restricted to taking basic decisions. Interference with business decisions is in principle impossible. In Portugal, the law expressly recognizes a principle of subsidiarity of the general meeting's powers, i.e. a sort of non-written general competence relating to those corporate matters and issues which the law and the articles of incorporation fails to expressly assign to any of the others corporate bodies.⁶⁶

Taiwan's Company Law apparently does not have the concept discussed above (or at least this kind of concept is not easy to see). Although the style of certain articles within the Company Law involves stating that "the company shall based on a resolution of the board of directors, ... (such as Article 156, Paragraph 4)," that is " ... adopted by a majority vote of a meeting of the board of directors attended by two-thirds or more of all the directors ... (such as Article 156, Paragraph 6, Article 167(1) and (2))," and "[a] company may, by a resolution adopted by the Board of Directors, invite subscription for corporate bonds ..." (such as Article 246), as to whether these kinds of regulations show that these powers apply exclusively to the board of directors, and thus the general meeting is not entitled to amend the articles of incorporation to transfer these powers to the general meeting, is not clear. In this paper, we tend to lean toward the negative answer and thus support the view that the general meeting is entitled to amend the articles of incorporation and transfer these powers to itself. When looked at from the point of view of the legislative changes in the division of powers between the general meeting and the board of directors, while Taiwan obtains its concept of shareholder primacy from the general meeting, that the role of the board of directors is gradually becoming more important is gradually being confirmed. However, of these articles discussed above, there are some that have been around from very early on, while there are others that have been amended or added along with Article 202 of the Company Law. Moreover, the legislative reasons for these related articles do not indicate that they specifically apply to the board of directors and have exclusive characteristics, and for this reason it is not possible to quickly conclude that these articles in Taiwan's Company Law specifically and exclusively exemplify and enumerate the powers of the board of directors.

Having only been the result of an amendment in May 2005, Article 172 (1) of the Company Law is evidence of this. This new article is concerned with the rights of shareholders to initiate proposals. In terms of the content of the proposal, the only restriction applies "[w]here the subject (the issue) of the said proposal cannot be settled or resolved by a resolution to be

66. *See id.* at 115- 17, 240-41.

adopted at a meeting of shareholders,” in which case the board of directors should not accept it. In addition, if the company records it in its articles of incorporation, when implementing a candidates’ nomination system for directors and supervisors, shareholders that meet certain qualifications shall nominate candidates to the company (the newly-added Article 192-1).

The reason for adding this amendment concerning the rights of shareholders regarding making proposals is as follows: “In view of the structure of the current Company Law, the powers to operate and make decisions for the company are mostly vested in the board of directors, which is already clearly stipulated in the Company Law. The execution of the company’s business, apart from where it is specified in the Company Law or the company’s articles of incorporation that a resolution should be adopted in the shareholders’ meeting, should be based on resolutions made by the company’s board of directors. If the shareholders do not have the right to initiate proposals, then many motions which cannot be proposed by an extemporary motion have no chance to be discussed or resolved in the general meeting. For shareholders being able to actively participate in the company’s operations, the legislature decides to provide shareholders with the shareholders’ proposal rights.”⁶⁷ Such an explanation is not completely legitimate. The reason why some proposals are prevented from been raised by means of an extemporary motion is to ensure that the shareholders have a right to information concerning the meeting (so that they are prepared and actually attend). It has nothing to do with the division of powers between the general meeting and the board of directors. If one wishes to touch upon the division of powers between these two organs, the problem is one of the content of the proposal. That is, if conceptually, as in the case of Switzerland, there is the so-called concept of specific powers for each authority, then in relation to that which specifically applies to the board of directors, the shareholders should not make proposals. As to whether the stipulation contained in the newly-amended Company Law, which states “[w]here the subject (the issue) of the said proposal cannot be settled or resolved by a resolution to be adopted at a meeting of shareholders,” can after all have this meaning, there is no clue in the new law.

The interpretation of “[w]here the subject (the issue) of the said proposal cannot be settled or resolved by a resolution to be adopted at a meeting of shareholders” of course includes the situation where the proposal violates the law. However, whether or not it can be interpreted as saying that anything not stipulated in the laws and articles of incorporation is within the powers of the general meeting and can be initiated is completely left

67. The Legislative Yuan’s 2nd Meeting Proposal-related Documents, March 2, 2005, Yuan-Zong Tsu 618, Government Proposal No. 10048.

unregulated. To resolve this problem, it is necessary for the articles of incorporation to state the limits on the scope of the items to be left to be decided by means of a general meeting resolution. Put simply, it needs to be asked whether or not in Taiwan's Company Law one should develop a "concept of powers specifically (inherently) accorded to the board of directors." If one gives an affirmative answer to this, then how should this exclusive competence be defined?

In addition to the above-mentioned legislative examples, let us further explain the legal systems in the U.S. and the U.K. The U.K.'s Companies Act stipulates which items require a general meeting resolution, but it does not have any particular regulations regarding powers that specifically relate to the board of directors. However, the model articles of association Table A⁶⁸ is of considerable help. Table A, Article 70 stipulates that unless restricted by laws, the articles of association or a special resolution passed in a general meeting, the company's board of directors has the power to handle all business matters. Although this regulation gives rise to considerable doubt, the authority of the board of directors is considered to be general in nature. As a result, s. 35A of the Companies Act 1985 (Section 40, the Companies Act 2006) is concerned with the acts of a director who represents the company or of a third party who is empowered as an agent of the company. If the counterparty has acted in good faith, he is deemed to be free from any limitation under the articles of association, a resolution adopted in a general meeting, any other agreement entered into between the company and its shareholders. The transaction entered into with the third party is still valid. This regulation is not at odds with Table A, Article 70. Table A, Article 70 deals with the company's internal business matters. When the counterparty does not have a duty to understand the articles of association, the validity of acts toward outsiders is not affected, with the source of the discussion in the literature being mainly to do with "good faith."⁶⁹ From Article 70 of Table A, we can learn that the U.K. regulation is similar to Article 202 of Taiwan's Company Law.

68. Table A is based on the Companies Act 1985, s. 8 which refers to the Regulations for Management of a Company Limited by Shares (as prescribed by regulations s. 805 SI 85, amended by s. 1052 SI 85). Unless the company itself renders Table A inapplicable in the articles of association that it has drawn up itself, Table A is regarded as a part of the company's articles of association.

69. S. 35A basically regards the directors as having all authority, and so the counterparty to a transaction need not check the articles of association. If the directors really exceed their powers, then the company takes responsibility under the rule of apparent agency. However, the premise is that the counterparty must act in good faith. The responsibility to raise evidence where there are acts that are not in good faith rests with the company. Knowledge is not the only standard of judgment, but "dishonesty" is also an important factor. To give an example, if this transaction when seen on the surface can be fully doubted, then at this time the counterparty has a duty to conduct an investigation, otherwise this will become bad faith. The majority view is to use the concept of "commercial unacceptable conduct" to judge bad faith. See Griffith, *supra* note 60, at 117-19.

As for U.S. law, that which is related to this article is Regulation 14A that is concerned with the solicitation of proxies (as part of the Securities Exchange Act of 1934). Within this regulation are listed thirteen kinds of reasons why a proposal may be excluded (Rule 14a-8(i)), of which the 7th reason for excluding the proposal is concerned with whether or not the proposal deals with a matter related to the company's ordinary business operations, and the 13th reason for excluding the proposal if the proposal relates to specific amounts of cash or stock dividends. This indirectly confirms that ordinary business operations and financial planning come within the scope of the powers of the directors, and shareholders should not meddle with the concept of the division of powers (the theory of parity concept). In addition, the purpose behind the rules regarding proxies is to help economize on the company's costs, so that anything concerned only with the shareholders' individual interests and those things that economically have little to do with the company's operations are all removed.⁷⁰

As for the shareholders' proposal rights contained within Taiwan's Company Law, there is some doubt as to whether these proposals can be excluded, for to do so would surely significantly increase the costs of the company, and might cause the general meeting to inappropriately meddle in the general business engaged in by the board of directors. Even if the shareholders are not allowed to make these proposals, the shareholders can still table an extemporary motion in the general meeting, and so not allowing them to make the proposals cannot completely stop them. This explanation reveals a long-neglected problem, which concerns whether or not the general meeting can resort to tabling an extemporary motion in relation to anything not expressly referred to in Article 172, Paragraph 5 of the Company Law. Based on the wording of the article, there should be nothing that cannot be done. However, compared with foreign legislation, it would appear that such reasoning is inappropriate.

In Belgium, the general meeting may only discuss the items that have been included in the agenda that has been sent out to those eligible to attend the meeting. If there is a desire to modify the agenda and include additional items, it is necessary for all shareholders to attend the meeting in person or appoint agents to attend the meeting on their behalf, and they must unanimously agree to the changes, unless these additional items are very closely related to the original items on the agenda. If on the agenda "other miscellaneous items for discussion" are recorded, then only issues that are not important or that are not to be subjected to a vote can be included.⁷¹ Denmark also stipulates that the general meeting can only discuss and

70. Securities Exchange Act of 1934, Rule 14a-8(i)(4), (5).

71. See SHAREHOLDER VOTING RIGHTS AND PRACTICES (Theodor Baums & Eddy Wymeersch eds., 1999), *supra* note 51, at 28-29.

resolve the proposals recorded in the agenda for convening the meeting. When an agenda lists “any other business” as its last items, only discussion can take place and no resolution can be passed. If there are those who wish to include additional items on the agenda, they must conform to procedures that are the same as those for Belgium. In addition, amendments to a proposal mentioned on the agenda and voting on the amendment are possible as long as the new proposal only constitutes an amendment to the original proposal presented.⁷² Germany also has a similar regulation,⁷³ while Italy goes so far as to consider that a resolution based on “any other business” is not legally valid.⁷⁴ The things that these legal examples in the European countries have in common are concerned with the “safeguarding of the shareholders’ right to information,” for it is hoped that there will not be a surprise attack made on the shareholders at the meeting. The way in which the Company Law in Taiwan categorizes these things is quite simple. All items that are not listed by statute may be proposed by means of extraordinary motions. Such kinds of regulations do not favor corporate governance.

To sum up, the items to be discussed in the general meeting should be fully discussed in terms of their relationship with extraordinary motions and the scope of the proposal rights. If the items related to the resolutions to be discussed in the general meeting are limited to the items listed in the agenda that has been sent out, then the scope of the proposal rights can be broadened. On the contrary, if the status quo is to be maintained, then the restrictions on the proposal rights should be further controlled based on cost considerations. As to whether or not the items to be proposed are limited by the content of Article 172, Paragraph 5 of the Company Law, it is up to the judicial bodies to clarify this based on the wording of the articles.

As the role played by the general meeting gradually loses its luster and through legislative policies it is desired to strengthen the powers of the board of directors and hold them responsible, Article 202 of Taiwan’s Company Law may need to be further restricted, with certain business matters coming within the exclusive competence of the board of directors. Consideration can also be given to clearly stipulating how the board of directors can vest their powers in the executive directors or committees that are subordinate to them, in order to conform to business realities. On the contrary, if in terms of the legislative policies there is still the desire to preserve the spirit of the shareholders as the supreme policy-making organ within the company, the company shall keep all of the powers and their limitations contained within the articles of incorporation for the general meeting. Whatever is the case,

72. *Id.* at 65.

73. *Id.* at 120.

74. *Id.* at 162.

currently the law is still not clear, and the shareholders' proposal right is also too much lacking in specifics.

C. *“The Transfer of All or a Substantial Part of the Business or Assets” — The Limitations on the Powers of the General Meeting and Proposal Rights*

First of all, in Taiwan the competence in regard to “the transfer of all or a substantial part of the business or assets” of a company in accordance with laws and regulations is vested in the general meeting, and for this reason it differs from Article 15, Paragraph 1 of Taiwan's former Company Law. It is Article 202 of the Company Law that refers to the items within the law that are kept for the general meeting, for which there is no doubt. For this reason, the trading counterparty should not claim that the company has a responsibility as a principal for its apparent agents based on the arguments that the board of directors is the organ for executing the business of the company or that the chairman or president have the power as representatives or agents of the company in accordance with the law to handle all of the business matters of the company. The key lies in whether there is a valid intention formed by the company's general meeting. Besides, whether or not the representative or agent has forged the minutes of the general meeting should be taken together to determine the liabilities imposed upon the company by these transactions.

The U.S.'s Model Business Corporation Act (§ 12.02(f)) and the Delaware General Corporation Law (§ 271(b)) both stipulate that, after a disposition has been approved by the shareholders, and at any time before the disposition has been consummated, it may be abandoned by the company without action by the shareholders, subject to any contractual rights of other parties to the disposition. These kinds of legislation make it all the more worthwhile for Taiwan to consider its related regulations. From the above, the U.S. laws stipulate that the board of directors can give up on proceeding with the transaction without it being necessary for the board to obtain the approval of the general meeting. It is also observed that the powers of the general meeting is exercised passively, and do not actively restrict the board of directors. In other words, without a resolution passed in a general meeting, the board of directors is unable to effectively engage in such transactions that involve basic changes in the company's organization. However, after the approval of the general meeting is obtained, it needs to be asked whether the powers of such transactions once again come within the competence of the board of directors.

Pursuant to the passing of Article 27 of the Business Mergers and Acquisitions Law that refers to “the transfer of all or a substantial part of the

business or assets” of companies in Taiwan, if the board of directors decides to abolish the original case, then on this occasion how should it be handled? In practice it is often seen that companies pass merger cases, but because of various kinds of factors, the merger does not go through, and the company will either at a special meeting of shareholders or at the next general meeting of shareholders table proposals to “temporarily slow down the merger” or else “stop the merger.” Such a proposal should be resolved or only be reported is of some interest. In fact, because a major item such as a merger or “the transfer of all or a substantial part of the business or assets” involves a counterparty, and this also differs from a company itself adopting a resolution for dissolution, even if the resolution is passed in the general meeting, this does not necessarily indicate that the board of directors will be able to implement it. Based on this, it should be appropriate for the board of directors to decide whether to carry on the transaction. However, when the board of directors decides to stop the merger, should it have already made every effort to do so, and finally in consideration of the company’s best interests only then decide to abandon the merger in the performance of its duties (i.e., this involves the interpretation of Article 193, Paragraph 1 of the Company Law, that is concerned with acting in accordance with laws and ordinances, the articles of incorporation and the resolutions adopted at the general meetings of shareholders)? If so, there is some doubt as to whether the board of directors can freely make this decision.

Although business conditions vary from one minute to the next, should the board of directors wish to abandon the original proposal, it should have a proper reason. If it is necessary to revise the conditions surrounding the transaction, then this should be listed as an item for discussion. By contrast, if such kinds of transactions need to be completely abolished, then a report on this must be prepared. Regardless of the circumstances involved, the directors should make every effort to perform their duties and disclose the necessary information as well as the reason for their decision. They should not arbitrarily back out of their decision, otherwise their fiduciary duties⁷⁵ as good managers may be called into question.

Secondly, do the shareholders’ proposal rights include motions to do with “the transfer of all or a substantial part of the business or assets”? If looked at on the basis of the reasons for the legislation, “the transfer of all or a substantial part of the business or assets” should not involve the use of extemporary motions for the making of proposals, but this is the main reason why these proposal rights occur, and thus become feasible. Nevertheless, there are several points that need to be considered. First, “the transfer of all

75. The U.S. theory on the business judgment rule can be referred. See Stephen R. Volk, Lewis H. Leicher & Raymond S. Koloski, *Negotiating Business Combination Agreement — The Seller’s Point of View*, 33 SAN DIEGO L. REV. 1077 (Summer, 1966).

or a substantial part of the business or assets” in accordance with Article 185, Paragraph 5 of the Company Law should come about as the result of a proposal by the board of directors, which is further subject to a vote at a general meeting of shareholders. Although the Business Mergers and Acquisitions Law does not have specific regulations regarding the board of directors, when interpreting it, the Company Law in such cases as this should be able to supplement it. Therefore, if shareholders make such a proposal, does the board of directors still have to follow the procedures to implement a special resolution? Secondly, is it appropriate for the shareholders to propose “the transfer of all or a substantial part of the business or assets”? Does a 300-word proposal clearly explain relevant information? Based on the examples of mergers and split-ups, the board of directors should propose the merger contract and the split-up plan in the shareholders’ meeting; it thus needs to be asked how a 300-word proposal conforms to this regulation. These difficulties make it clear that the legislative reasons are not necessarily correct. Proposals that cannot be raised by extemporary motions are not necessarily suitable for shareholder proposals. It may be possible for a dissolution, an election of new directors and supervisors and a change in the articles of incorporation to take place in this way. However, as for the ways in which mergers and acquisitions take place, there are difficulties to be faced in many different situations. As for “the transfer of all or a substantial part of the business or assets,” because related regulations have not required too much information, and only involve decisions “as to whether to sell or not,” such approaches are likely to be feasible. Nevertheless, even if after the resolution is passed in the general meeting, whether or not the board of directors needs to complete the transaction as described above does not seem to be mandatory. If the shareholders can make a proposal regarding “the transfer of all or a substantial part of the business or assets,” it would seem that it is not necessary for the board of directors to once again adopt a special resolution. On this occasion, it is the shareholders that would make the proposal, and not the board of directors. The board of directors in theory would also not have a duty to endorse such a proposal.

Finally, there is still one question that remains to be resolved. That is, if in the ordinary course of business the company transfers its business or assets, in principle this will be within the powers of the board of directors. However, if the business or assets so transferred constitute the whole or a substantial part of the business or assets of the company, because this transfer involves basic changes in the organization of the company, even to the extent that it is likely to lead to the company being dissolved, or at least having a major impact on the company’s operations, the powers to effect such a transfer must lie with the general meeting. Such a distinction appears

to be very clear cut, but can the transacting counterparty really discern it? In practice, it is as if the risks involved are given to the counterparty to bear. In practice, in purchasing the whole or a substantial part of the business or assets of a company, not a small amount of funds is involved, and thus there is a great deal the counterparty can become acquainted with. However, exceptions can still occur, in particular the 50% standard referred to in Article 39 of the Business Mergers and Acquisitions Law. In such an instance, if the counterparty does not have information on the company and is incapable of knowing what is happening, then this is a hidden risk. If one begins by protecting the interests of shareholders, the counterparty's interests will be sacrificed, and in the end Article 110 of the Civil Law can provide some relief.

VI. CONCLUSION

A long time before the Business Mergers and Acquisitions Law was passed the expression "the transfer of all or a substantial part of the business or assets" already existed in Article 185 of the Company Law. However, previously the focal point of the discussion was mainly on the so-called "principal business or assets." In the opinions delivered by the court the emphasis constantly changed, from the strict criteria "leading to the business engaged in by the company being unable to be accomplished," to the not very meaningful "inventory of essential property" standard, to the adoption of the "qualitative and quantitative merger observation" criteria advocated by scholars. From the time that the Business Mergers and Acquisitions Law referred to the regulation of a 50% share of business income or assets, there are also further changes. However, the "transfer of all or a substantial part of the business or assets" constitutes the fundamental change in the company's organization, a change that did not take place in the ordinary course of business, and hence created the need for a resolution to be passed in a general meeting.

However, as to whether these types of changes should without exception give the dissenting shareholders appraisal rights is not without doubt. Before the Business Mergers and Acquisitions Law was promulgated, there was hardly any discussion on the consideration involved in "the transfer of all or a substantial part of the business or assets." Nevertheless, the Business Mergers and Acquisitions Law clearly stipulates that shares are one of the items that could be chosen, and that under certain conditions tax incentives would be given. Furthermore, there is even more need to examine the meaning of various types of consideration to the shareholders of the acquired company and the difference between this and other kinds of merger and acquisition behavior. Clearly, if the consideration is cash and the company is

dissolved subsequently, there is actually no need for there to be any appraisal rights.

There is a further point of contention regarding “the transfer of all or a substantial part of the business or assets” that concerns its validity. Based on the general meeting resolution as a statutory procedure, it has all along been insufficiently clear how any such transfer behavior that violates this procedure should be dealt with in terms of validity. This also involves the division of powers between the general meeting and the board of directors, and goes further to affect the counterparty’s interest. It is advocated by most court opinions that the validity of the transaction and its underlying defective resolution should be determined separately. Such opinions deserve further criticism. As to the way in which the resolution is violated, its validity should be judged in accordance with different regulatory objectives.

Finally, “the transfer of all or a substantial part of the business or assets” is an issue that involves the powers accorded to the general meeting, and so other merger and acquisition behavior should also be determined in this way. That is, this type of merger and acquisition behavior does not of course give rise to the issue of the apparent agency. The law in Taiwan in relation to the basic concept of the so-called division of powers is uncertain. Accordingly, shareholders’ proposal rights should be adjusted in line with the confirmation of the division of powers between different organs. This will in turn enhance the safety of transactions.

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