

Comparative study on legal solutions for possible risks to be incurred by the dual class share structure used by listed companies.

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Keywords: Dual class shares, weighted voting rights, start-up company, entrenchment risk, expropriation risk, minority discount risk.

1. Introduction

In 2005, the Companies Act of Japan was enacted to modernize Japanese company law system and also adjust it to real needs of business world in light of developed economy. As a result, the Companies Act 2005 has achieved deregulation of statutory rules on company limited by shares in many ways. To take some examples, firstly, it allows majority shareholder to cash out minority by special resolution at the shareholders' meeting for making use of the newly introduced class shares subject to class wide call¹, even in case of a public company including a listed company.

Secondly, the Companies Act 2005 of Japan makes it possible for only a private company to issue the class shares with weighted voting rights at the shareholders' meeting under the provision of its articles of association to that effect².

Meanwhile, in terms of corporate control structure of public company based on shareholding, the current Companies Act of Japan still prevents a public company from issuing the multiple voting shares, unlike US, UK, Singapore etc. In this respect, a very strict legal policy regarding one-share-one-vote principle is kept in Japan. This company law policy of Japan gives shareholders the proportionate voting rights by correlating the

¹ Section 108, Subsection 1, Paragraph 7, Sections 171 and 173 of the Companies Act 2005.

² Section 109, Subsection 2 of the Companies Act 2005.

number of shareholdings with the size of controlling power of shareholder to ensure that the shareholder(s) with majority shareholdings in number can hold controlling right.

However, there is a real need for using dual class share structure that a start-up company which plans to offer an admission to listing of its ordinary shares will issue another class of shares to give weighted voting rights, such as 10 votes per share to its founder shareholders/directors for the purpose of keeping controlling rights in the hands of them while raising much money from public investors on the securities market, in Japan as well as other developed countries³. Unlike US⁴, UK, Singapore, Hong Kong, a public company is not allowed to issue such class shares under the current law in Japan.

Thus, a Japanese listed company which wants to issue the multiple voting rights shares for that purpose must use the de facto dual class share scheme subject to the Listing Rules of Tokyo Stock Exchange. Use of Class B shares issued by Cyberdyne Inc., which is a listed company on the Growth market of Tokyo Stock Exchange is the case⁵.

Problem is that the availability of dual class share structure (DCSS⁶) is very limited in Japan by both the statutory rules, i.e., current Companies Act 2005 and the Listing Rules of Tokyo Stock Exchange, although there is an increased need for the special capital structure whereby a start-up company which plans to conduct IPO to raise large amount of fund from the capital market can also ensure the necessary figures in charge of leading innovative management of the company to continue their stable involvement in management for long term. Japanese Government takes it

³ Yu Hosaka and Shuya Ogawa, *Start-up Finance by making use of Class Shares*, the Commercial Law Review, No. 2126 (2017), p.56 (in Japanese).

⁴ For DCSS under the US law, see Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, Georgetown Law Journal, Vol.107, 2019, p.1453, Subodh Mishra, *Dual Class Share Structures: Is the Sun Setting Too Slowly?*, posted on December 19, 2022 at Harvard Law School Forum on Corporate Governance (<https://corpgov.law.harvard.edu/2022/12/19/dual-class-share-structures-is-the-sun-setting-too-slowly/>). See also <https://insights.issgovernance.com/posts/dual-class-share-structures-is-the-sun-setting-too-slowly/>

⁵ Cyberdyne, Inc., Annual Report 2022, p.54. https://www.cyberdyne.jp/company/download/AnnualReport_2022_en.pdf

⁶ This expression is used after UK Listing Review, 3 March 2021.

seriously and in February 2023 the Ministry of Economy, Trade and Industry (METI) raised an issue to the effect that introduction of multiple voting rights shares should be facilitated with a view to accelerating further growth of Japanese companies and national economy⁷.

Taking into consideration these circumstances in Japan, this article is to present a brief overview of the current statutory framework regarding dual class share structure under the Companies Act 2005 of Japan and explain about both the arrangement of de facto dual class share scheme alternatively used by a listed company and its limited availability under the Listing Rules of Tokyo Stock Exchange.

Afterwards, this article is to conduct a comparative legal study of relevant laws and regulations in UK and Singapore regarding the availability of de jure dual class shares in a public company, especially a listed company and the regulatory solutions to mitigate or avoid some accompanying institutional risks to be incurred by the DCSS.

Then, this article is to propose the possible reform to Japanese law in this respect.

2. Availability of dual class shares under Japanese Companies Act 2005 and the de facto dual class share scheme.

1) One-Share-One-Vote rule under Japanese Companies Act and the extent of availability of dual class share scheme in Japan.

DCSS is the special capital arrangement whereby a specific shareholder(s) may retain the majority voting control over a company disproportionate to number of shareholdings⁸. Typically, under DCSS, a company has issued two classes of shares, identical in all aspects except for voting rights at shareholders meeting, one of which is an ordinary share carrying one vote per share, while another is a multiple voting share usually carrying 10 or 20 voting rights per share. The latter shares are typically held by the founder of the company, while the former shares are held by general investors⁹.

⁷ The morning issue of *the Nihon Keizai (the Nikkei)*, 18 February 2023, p.11.

⁸ UK Listing Review, *supra* note 6, para.8.1 (Annex A).

⁹ UK Listing Review, *ibid*, para.8.1 (Annex A).

The Companies Act 2005 of Japan provides for the rule of equal treatment of shareholders by a company limited by shares as the mandatory rule. Section 109, Subsection 1 stipulates that a company limited by shares must treat its shareholders equally in accordance with the features and number of the shares they hold.

Based on this statutory principle, the Companies Act 2005 provides that shareholders¹⁰ are entitled to one vote for each one share they hold at the shareholders meeting¹¹, but exceptionally allows only a private company¹² to provide in its articles of association that each shareholder is treated differently with respect to the three main shareholder's rights listed in each paragraph of Section 105, Subsection 1. The shareholder's rights concerned are (1) right to receive dividends of surplus, (2) right to receive distribution of residual assets, and (3) right to cast a vote at shareholders meetings.

This exception makes it possible for a private company to provide not only that all shareholders shall have an equal voting right regardless of number of shareholdings, but also that the specific shareholder/shareholders shall be given multiple voting rights per share, while applying the one-share-one-vote rule to the other shareholders. Private company is given wider flexibility in designing corporate control structures under its articles of association than a public company.

In contrast, a public company is not allowed to adopt any provision for class shares with weighted voting rights in its articles of association even under the current Companies Act 2005 which has relaxed statutory regulations on a company limited by shares in comparison with the

¹⁰ Shareholder prescribed by Ministry of Justice Order as the entity in a relationship that may allow the company limited by shares to have substantial control of such entity through the holding of one quarter or more of the votes of all shareholders of such entity or other reasons shall be excluded from a shareholder holding voting right (Section 308, Subsection 1 of the Companies Act 2005, and Section 67 of the Regulation for Enforcement of the Companies Act).

¹¹ Section 308, Subsection 1 of the Companies Act 2005.

¹² Private company limited by shares is not a public company whose articles of association do not require, as a feature of all or part of its shares, the approval of the company concerned for the acquisition of such shares by transfer. Section 2, Paragraph 5 of the Companies Act 2005.

previous statutory rules provided by the Commercial Code. As a result, de jure dual class share structure is not available for a public company at all in Japan.

2) De facto dual class share scheme used by a public company in Japan.

a) Structure of de facto dual class share scheme in Japan.

However, for the purpose of achieving both aims to raise fund from capital market and to keep corporate control in the hand of current management even if hostile takeover will take place, it has been said that some listed companies, especially start-up public companies would like to take advantage of DCSS under the provision of their articles of association¹³. That is why an alternative method to de jure dual class share structure has been invented. It is the de facto dual class share scheme.

What is de facto dual class share scheme in Japan? This is a combination of class shares with voting rights and the Share Unit system under the Japanese Companies Act 2005. The Companies Act 2005 of Japan allows a company limited by shares which includes a public company and listed company to provide in its articles of association with respect to the shares it issues that a fixed number of shares shall constitute one unit of shares, which entitles a shareholder in it to cast one vote at a shareholders meeting or general meeting of class shareholders¹⁴, provided that the fixed number of shares to be stipulated in the articles of association may not exceed a number corresponding to 1,000 and 0.5 percent of the total number of issued shares¹⁵. This is the Share-Unit system. Now, most of Japanese listed companies have adopted this system under the provision of their articles of association to that effect and it is usual for them to stipulate 100 shares as the number of one unit of shares¹⁶.

The Companies Act 2005 also stipulates that a company with class shares must provide for the share unit for each class of its shares¹⁷, but it does not require the number of shares constituting one unit for each class

¹³ The morning issue of *the Nihon Keizai (Nikkei)*, 27 October 2014, p.5.

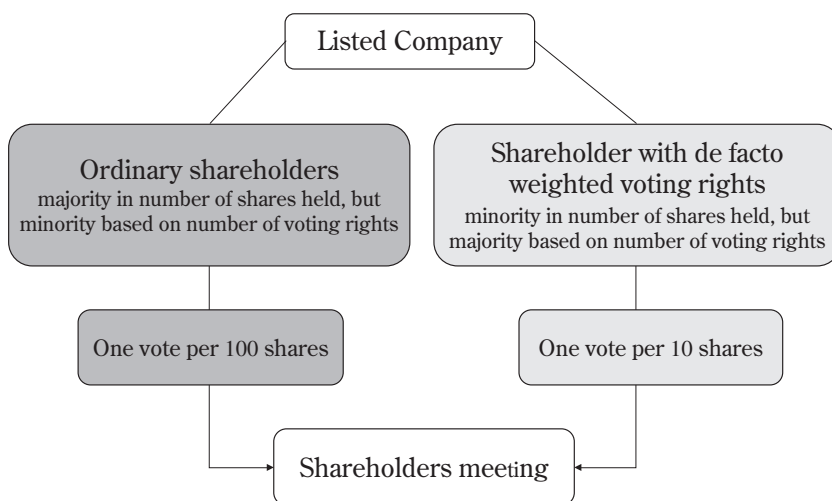
¹⁴ Section 188, Subsection 1 of the Companies Act 2005.

¹⁵ Section 188, Subsection 2 of the Companies Act 2005, Section 34 of the Regulation for Enforcement of the Companies Act.

¹⁶ <https://www.jpex.co.jp/english/equities/improvements/unit/index.html>

¹⁷ Section 188, Subsection 3 of the Companies Act 2005.

de facto Dual Class Shares Structure in Japan



of shares to be same. Thus, a company issuing both ordinary shares and different class shares may differentiate the number of shares constituting one unit of shares between the ordinary class shares and the other class shares. For example, a public company issuing ordinary shares and different class of shares is allowed to provide in its articles of association that the number of one unit for ordinary shares shall be 100, while the number of one unit for the different class shares shall be 10. Using such a technique, a listed company can give the class shareholder concerned ten times larger number of voting rights per share than an ordinary shareholder's voting right per share. This is one example of de facto dual class share scheme in Japan.

b) Case of Cyberdyne Inc.

Concerning de facto dual class share scheme in Japan, issuance of Class B shares by Cyberdyne Inc¹⁸. is a famous case. Cyberdyne Inc. is a listed company on the Growth Market of Tokyo Stock Exchange and conducts unique business with the application of Cybernetics technology that its CEO Dr. Yoshiyuki Sankai who is a professor of Tsukuba University

¹⁸ <https://www.cyberdyne.jp/english/company/IR.html>

Outline of shares in Cyberdyne		
	Ordinary shares	Class B shares
Dividends of surplus and distribution of residual assets	Receiving the same amount of dividends of surplus per share in the same rank.	
The number of shares constituting one unit of shares	100 shares (One voting right per 100 shares).	10 shares (One voting right per 10 shares).
Shares with put option	None.	Yes (One Class B share for one ordinary share).
Shares subject call	None.	Yes (One Class B share for one ordinary share).
Share split or share consolidation	Executed into the same numbers of shares simultaneously.	
Listing	Listed.	Unlisted.

Cited from Cyberdyne's Annual Report 2022, p.54 with minor modification.

has innovated. For the purposes of enhancing its Cybernetics business and implementing advanced technologies of this kind, Cyberdyne needs much more money to undertake R&D regarding the brand-new technologies. However, due to the potential risk for these technologies to be turned into tools of harming human beings or weapons in the military industry, this company has to adopt defensive measures against the improper takeover in order to ensure peaceful use of its advanced Cybernetics technologies¹⁹. In addition, Cyberdyne needs to keep Professor Dr. Sankai in charge of management of the company for the purpose of sustainable development as going concern.

Taking these needs into account, at the time of IPO, Cyberdyne has issued not only a large number of ordinary shares to wide ranging outside investors after IPO but also allotted class B shares to CEO Dr. Sankai and a couple of related corporations²⁰. According to the provision of the articles

¹⁹ Cyberdyne, Annual Report 2022, p.54.

²⁰ They are the Sankai Health Foundation and the Sankai Science and Technology

of association of Cyberdyne, both ordinary shares and Class B shares bring voting rights at shareholders meeting, but the number of shares constituting one share unit is differentiated between them, under which an ordinary shareholder has one vote per 100 shares, while a Class B shareholder holds one voting right per ten shares. Maximum number of authorized shares is 618,300,000 for ordinary shares and 77,000 for Class B shares respectively under the articles of association of Cyberdyne.

As of 31 March 2023, on one hand, total number of issued ordinary shares is 137,445,809 including 41,209 shares holders of which have shares less than one unit shares and so the total number of unit of shares is 1,374,046. It means that the total number of voting rights held by ordinary shareholders is 1,374,046²¹. On the other hand, total number of issued Class B shares is 77,700,000²², which gives 7,770,000 voting rights to CEO Dr. Sankai and related corporations. According to Annual Report 2022 of Cyberdyne²³, CEO Dr. Sankai has 80,738,000 shares including ordinary shares held by him, which amounts to 37.53% of total issued shares in Cyberdyne, but he controls more than 85% of total voting rights owing to the de facto DCSS.

3) Limited use of de facto Dual Class Share scheme in Japan.

Cyberdyne case is taken as the first step for newly listed companies which will take similar capital structure strategically, but even now it is only Cyberdyne that adopts and utilizes the dual class share scheme in Japan. In fact, the use of such structure is very limited. What is the reason for that? Is that because there are no other companies than Cyberdyne which would like to use de facto dual class share scheme in Japan?

It is said that there actually exist some newly listed companies or unlisted companies planning to make IPO which want to take advantage of de facto DCSS as their capital strategy after IPO²⁴. So, the reason for limited use of de facto dual class share scheme by a listed company in

Promotion Foundation, both of which are represented and managed by Prof. Dr. Yoshiyuki Sankai, according to Annual Report 2022 of Cyberdyne, p.54.

²¹ Cyberdyne, Annual Report 2022, p.61.

²² Cyberdyne, Annual Report 2022, p.61.

²³ Cyberdyne, Annual Report 2022, p.61.

²⁴ The morning issue of *the Nihon Keizai (Nikkei)*, 27 October 2014, p.5.

Japan is probably that Tokyo Stock Exchange continues to take very strict policy concerning the availability of weighted voting shares to be issued by a listed company with its issued ordinary shares listed.

After conducting review on its Listing Standards for classified shares since 2006, Tokyo Stock Exchange introduced the Classified Stock Listing System in 2008. This system allows listing of classified shares only in case of an initial public offering and at the same time requires the listed company concerned to respect shareholders' rights²⁵.

Looking at the specific provisions of Listing Rules of Tokyo Stock Exchange, Rule 601 provides for "Delisting Criteria for the Main Markets" to the effect that where a listed domestic stock falls under any of the relevant circumstances, it shall be delisted. One of them is the case of unreasonable restriction on shareholders' rights (Subsection 1, Paragraph 15 of Rule 601 of Listing Rules). Details of the case where shareholders' rights and their exercise are unreasonably restricted are specified by the Enforcement Rules for Securities Listing Regulations.

Based on the rules, Tokyo Stock Exchange allows listing of classified shares, i.e. ordinary shares in a newly listed company at the stage of IPO, only if the classified share structure is found to respect shareholders' rights²⁶. Main criteria for reviewing the application for listing of shares are as follows²⁷.

- (1) Use of classified voting shares is found to be necessary in the common interest of shareholders as a whole and the contents of specific classified share scheme should be reasonable.
- (2) Classified share scheme must not be used only for the purpose of securing the position of management or blocking against hostile takeover.
- (3) Purposes of using classified share scheme and its necessity, and also the steps to be taken to mitigate relevant risks for protection of minority shareholders shall be disclosed thoroughly.

Incidentally, in terms of reasonableness of classified share scheme, Tokyo Stock Exchange pays attention to how the scheme would ensure

²⁵ Kentaro Hayashi, *Outline of TSE's Listing Standards for Classified Stocks*, Securities Analysts Journal, Vol.52, No.11 (November 2014), p.25 (in Japanese).

²⁶ Kentaro Hayashi, *ibid*, p.29.

²⁷ Kentaro Hayashi, *ibid*, pp.29-34.

that it should not put improper priority on the unproportionate interests of specific shareholder(s) with weighted voting rights to undermine the interests of shareholders and investors, and then Tokyo Stock Exchange requires the listed company concerned to provide in its articles of association that the classified share scheme would be likely to be eliminated if the scheme is no longer needed or if the shareholder with weighted voting shares does hold control over the company irrespective of extremely small number of shareholdings²⁸. It demands the company concerned to provide for Sun-Setting clause in its articles of association.

Anyway, the notable feature of Japanese law and regulations including Listing Rules of Tokyo Stock Exchange in this regard is that the statutory rule puts ban on issuance of multiple voting shares by a public company and also the Listing Rules of Tokyo Stock Exchange limit the scope of availability of de facto DCSS. This does not adopt the approach to allow wider availability of de facto weighted voting shares in a listed company with specific steps to mitigate accompanying risks to be caused therefrom, unlike UK and Singapore.

3. Possible risks to be incurred by use of the dual class share structure in a listed company.

1) Small-Minority Controller vs. Majority/Non-controlling shareholders.

Dual class share structure, whether de jure or de facto, has been used for the purpose of ensuring that the founder management who would usually become a minority shareholder in number of shares to be held after IPO could still maintain the majority based on number of voting rights to be exercised at shareholders meeting. Such a shareholder with weighted voting rights is called “*Small-Minority Controller*”²⁹. It is certain that a DCSS will contribute to stable management for long term after IPO.

However, it has been said that the DCSS would bring potential risks regarding corporate governance. The DCSS would throw the shareholders who have majority shares in number down into minority members in terms of voting rights. They could be called “*Majority/Non-controlling Shareholders*”. The capital structure of this kind would deliver the result

²⁸ Kentaro Hayashi, *ibid*, p.30.

²⁹ Lucian A. Bebchuk & Kobi Kastiel, *supra* note 4, at pp.1463-1464.

that the capital structure would be likely to distort the shareholder majority rule based on one-share-one-vote principle and also cause conflict of interests between the small-minority controller and the majority/non-controlling shareholders.

2) Accompanying Risks and Abuse.

First of all, a small-minority controller holding small number of class shares with weighted voting rights per share could retain and secure the control of the company for longer period than necessary without being disturbed by takeover, which would make it difficult or impossible for poorly performing management to be removed. This is an **entrenchment risk**³⁰.

Second, a small-minority controller would be likely to expropriate corporate profits at the sacrifice of interests of majority/non-controlling shareholders. This is an **expropriation risk**³¹.

Third, the DCSS would make it impossible for those who have acquired all the issued ordinary shares on the secondary market to obtain corporate control at all, which would be likely to deprive the capital market of its important function as the market for corporate control. This is a **risk to disturb the market for corporate control**.

Therefore, all the listed ordinary shares which are majority in number would be probably exposed to minority discount in share value. This is a **minority discount risk** which the ordinary shareholders are likely to face. Large number of shareholders holding the ordinary shares are likely to fall to minorities and consequently the value of their shares would be discounted due to minority. Their interests are likely to be abused.

Taking these risks regarding the DCSS into account, if a listed company is allowed to take advantage of such a capital structure, the adequate safeguards must be implemented to mitigate those risks and avoid abuse of the DCSS. In this regard, Japanese legal system narrows the path whereby a listed company can make use of de facto dual class scheme in order to combat the risks mentioned above, on one hand. On the other

³⁰ Takeshi Komatsu, et al., *The updates on statutory developments for listed companies in Singapore*, the Commercial Law Review, No. 2183 (2018), p.37 (in Japanese).

³¹ Takeshi Komatsu, et al., *ibid*, p.37.

hand, UK and Singapore take a different approach to tackle with the risks concerned.

4. Legal solutions to the risks from using dual class shares in a listed company under UK and Singapore listing rules.

1) De jure dual class shares in UK and Singapore.

a) UK regime.

In UK, it is commonly understood that a company, whether public or private, is allowed under the Companies Act to design and issue shares with such rights and/or restrictions as the company concerned may decide by ordinary resolution at the shareholders meeting under its articles of association to that effect³². The Companies Act gives wider freedom to a public company as well as a private company. This is a traditional approach of UK Company Law.

Thus, shareholder's voting rights can easily be altered by a relevant provision in the articles of association to enhance voting rights on certain shares either generally or on specific matters, even in a public company³³. In *Bushell v. Faith* (1970) A.C.1099, the specified class shares carried weighted voting rights at shareholders meeting on the resolution to remove directors³⁴.

b) Singapore regime.

In Singapore, the first Company Statute was the Companies Act 1967 which was enacted based on UK Companies Act 1948. The Companies Act 1967 has been reviewed twice since 1967. The first Company Law review was undertaken in 1999 with the result that the report of the Company Legislation and Framework Committee (CLFRC) was published. Following the recommendations of CLFRC, the Companies Act 1967 was reformed to

³² Section 284, Subsection 4 of the Companies Act 2006, Brenda Hannigan, *Company Law*, 6th ed., 2021, Oxford University Press, para.16-19, Suren Gomtsian, *Shareholder Engagement and Voting in the United Kingdom*, Harpreet Kaur, et al. ed., *The Cambridge Handbook of Shareholder Engagement and Voting*, 2022, Cambridge University Press, para. 20.3.4.

³³ Brenda Hannigan, *ibid*, para.16-23, Suren Gomtsian, *ibid*, para.20.3.4, Rosalind Nicholson, *Table A Articles of Association*, 1997, Sweet & Maxwell, p.10.

³⁴ Rosalind Nicholson, *ibid*, p.10.

enhance a number of shareholder protection rights. The second review was completed in 2014 with the enactment of the Companies (Amendment) Act 2014 to ensure that the Company legislation could contribute to strengthening the Singapore's position as a global hub center for corporate business and finance.

In terms of shareholder voting rights, the revised Companies Act of Singapore has removed the one-share-one-vote principle for a public company to allow it to issue multiple voting rights shares³⁵. Under the current Companies Act of Singapore, a public company may issue the class shares which confer special voting rights under the provision to that effect in the articles of association by special resolution of the shareholders meeting³⁶.

2) Listing of ordinary shares in a company adopting DCSS.

The UK Companies Act and the Singapore Companies Act enable a public company including a listed company to issue weighted voting shares subject to the provisions of the articles of association to that effect, so that Stock Exchanges of both countries need to take protective steps to mitigate the accompanying risks abovementioned and avoid abuse of interests of majority/non-controlling shareholders.

In this regard, Singapore Exchange (SGX) delayed in amending its listing rules to allow a listed company to issue weighted voting shares to specific persons in addition to listed ordinary shares under the dual class share structure. SGX did not permit it until 2018 revision to its listing rules³⁷. The reason for the delay in permitting listing of ordinary shares issued by a listed company taking advantage of the DCSS on SGX was the

³⁵ Wai Yee Wan, *Shareholder Engagement and Voting in Singapore*, Harpreet Kaur et al. ed., *The Cambridge Handbook of Shareholder Engagement and Voting*, 2022, Cambridge University Press, at para. 7.2.1. For detailed explanation of the background behind the 2014 reform to the Singapore Companies Act regarding inserting Section 64A to permit issuance of weighted voting rights shares, John Kong Shan Ho, *Allowing dual class share structure companies in the Premium listing segment of the London Stock Exchange: appreciating international experiences and recognizing local conditions*, *Capital Markets Law Journal*, 2021, Vol.16, No.3, pp.365-366.

³⁶ Section 64A, Subsections 1 to 3 of the Singapore Companies Act.

³⁷ Wai Yee Wan, *supra* note 35, at para.7.3.4.

concern about accompanying risks and abuse of DCSS³⁸. However, to compete with its rival capital markets, especially the Stock Exchange of Hong Kong (SEHG) which allowed a listed company there to give a small number of shareholders the disproportionate voting rights under de jure DCSS in April 2018, SGX ultimately decided to follow SEHG and to permit listing of ordinary shares carrying one-vote per share in a public company issuing weighted voting shares in 2018³⁹.

In UK, the Financial Conduct Authority (FCA) which is the supervisory authority did not permit a Premium Listed company to also issue the weighted voting shares. Because under the Premium Listing Principles 3 and 4, all equity shares in a class that has been admitted to premium listing had to carry an equal number of voting rights on any resolution at shareholder meeting, and in case of a listed company issuing more than one class of shares admitted to premium listing, the aggregate number of voting rights of the equity shares in each class should be proportionate to the relative interests of the classes in the equity shares of the listed company concerned. These rules prevented a premium listed company from taking advantage of DCSS⁴⁰.

However, in order to maintain London's prestigious position as a leading financial market in context of global competition with other capital markets, UK also relaxed the Listing Rules finally to permit premium listing of dual class shares in 2021 following the recommendations of the UK Listing Review⁴¹. Currently, under the revised Listing Rules, premium listing of dual class shares is permitted in UK.

3) Specific steps to mitigate relevant risks caused by DCSS.

a) Striking balance between permission for use of DCSS by a listed company and protection of minority shareholders.

Now, both the UK Companies Act and the Singapore Companies Act

³⁸ Wai Yee Wan, *ibid*, para.7.3.4.

³⁹ John Kong Shan Ho, *supra* note 35, at pp.365 - 368, Wai Yee Wan, *ibid*, para.7.3.4.

⁴⁰ UK Listing Review, *supra* note 6, at pp. 57-58 (Annex A), Brenda Hannigan, *supra* note 32, at para.16-23.

⁴¹ UK Listing Review, *ibid*, pp.11-12 (Recommendation 3) and Annex A, FCA, *Primary Market Effectiveness Review: Feedback and final changes to the Listing Rules*, Policy Statements (PS21/22), December 2021, paras.2.2 - 2.4.

allow not only a private company but also a public company including a listed company (even Premium Listed company in UK) to issue weighted voting shares under the provision in the articles of association to that effect. Thus, a listed company may take advantage of DCSS for the purpose of fundraising while keeping corporate control in hand of minority controller after IPO. UK FCA and SGX permit listing of DCSS.

However, as far as wider availability of DCSS is given to a listed company, adequate measures to mitigate the accompanying risks must be taken for protecting the interests of majority/non-controlling shareholders.

How do both countries strike balance between the advantage of minority controller holding smaller number of weighted voting shares and the interests of majority/non-controlling shareholders carrying larger number of ordinary shares?

b) Safeguard against entrenchment risks

First of all, in terms of entrenchment risks, one of the safeguards to mitigate such risks is the continuing obligation to provide for a maximum voting differential. In UK, according to the Listing Rule, 9.2.22C^[R], the specified weighted voting rights shares should meet following three conditions. Noteworthy is that UK Listing Rules not only put a cap on the maximum number of weighted votes per share to the special class of shares, but also limit the matters for which the weighted votes may be cast to the removal of a director except after change of corporate control and explicitly require the shares concerned to be held only by a director of the company.

- (1) Subject to Paragraph (2) of LR 9.2.22C, each share shall carry the same number of votes on matters at the shareholders meeting of the premium listed company as a share in the class admitted to premium listing (Paragraph (1) of LR 9.2.22C).
- (2) In relation to the following matters only, each share may carry up to 20 times the votes carried by a share in the class admitted to premium listing (Paragraph (2) of LR 9.2.22C, LR 9.2.22E^[G]).
 - (a) the removal of the holder as a director whether under Section 168 of the Companies Act 2006 or otherwise.
 - (b) the change of control matters, if there is a change of control.
 - (c) following a change of control in the company, any matter.
- (3) The shares may only be held by a director of the company or,

following the death of a director, a beneficiary of the director's estate.

In Singapore, SGX's Listing Rules also permit only up to 10 voting rights per share for weighted voting rights shares and then prohibit increase in the number of weighted voting rights per share after IPO (LR 210 (10) (d))⁴². In addition, ordinary shareholder(s) may demand the company to hold the shareholders meeting, if they hold at least 10% of total number of voting rights to be calculated on a one-share-one-vote basis. It would make it possible for ordinary shareholders to call the management and the directors to account at the shareholders meeting⁴³. In Singapore, for certain matters, such as appointment and removal of independent directors and a change in class rights, all shares shall carry one vote per share, irrespective of DCSS⁴⁴. Considering that an independent director should play important roles in terms of corporate governance of listed company, restricted availability of weighted voting rights under DCSS can be taken as reasonable step to mitigate the entrenchment risk. UK also adopts similar policy in this regard.

Another safeguard is to limit the availability of DCSS within a certain period of time after IPO and to require the company to put the sun-setting clause regarding the duration of DCSS in the article of association. For instance, UK Listing Rules currently provide for 5-year sun setting after initial listing (LR 9.2.22A[R] (3) and (4), 9.2.22B[G]). The purpose is that this rule is to ensure that holders of specified weighted voting rights shares only participate in the shareholder votes for 5 years from the date of the company's initial listing, according to the UK LR 9.2.22B[G].

Besides, in Singapore, new issuance of weighted voting rights shares after IPO is not permitted (SGX LR 803A (1))⁴⁵. UK also seems to take the same approach as Singapore. In terms of sun-setting step, SGX Listing Rules provide for automatic conversion of weighted voting rights shares into ordinary shares with one vote per share, in cases where the weighted voting rights shares are sold or transferred to third parties except

⁴² Takeshi Komatsu, et al., *supra* note 30, at p.37, Wai Yee Wan, *supra* note 35 at para.7.3.4.

⁴³ Takeshi Komatsu, et al., *ibid*, p. 37, Wai Yee Wan, *ibid*, para.7.3.4.

⁴⁴ Wai Yee Wan, *ibid*, para.7.3.4.

⁴⁵ Takeshi Komatsu, et al., *supra* note 30, at p.37.

permitted holders, or the holder of the weighted voting rights shares ceases to assume executive role under the sun-set clause in the articles of association (SGX LR 210 (10) (f))⁴⁶.

c) Safeguard against expropriation risks

Second, the safeguard to mitigate expropriation risks must be the strengthened corporate governance. It is noteworthy that SGX Listing Rules provide for the mandatory setting of the board of directors and the nomination, remuneration and audit committees, and also for the mandatory compliance with Corporate Governance Code of Singapore instead of comply-or-explain approach (SGX LR 210 (10) (i))⁴⁷. As pointed out above, SGX Listing Rules require the appointment and removal of an independent director to be decided on one-share-one-vote basis irrespective of the DCSS (SGX LR 730B). This is an enhanced voting process whereby shareholder votes are cast on the basis that one multiple voting share is limited to one vote.

In addition, for the safeguard to tackle with incurred expropriation, the statutory minority shareholders' remedy for unfair prejudice under the Companies Act⁴⁸ would give legal ex post facto solution to that abuse in both countries.

d) Safeguard against minority discount risks

Finally, as the safeguards to mitigate minority discount risks, limited matters subject to weighted votes could reduce the minority discount risks by lessening the effect of DCSS on the market price of ordinary shares to possible extent.

The disclosure of information regarding the rights attached to equity shares is also needed for that purpose. For example, UK Listing Rules provide that a listed company must forward to FCA for publication a copy of document describing the rights attached to its listed equity shares and so on (LR 9.2.6E[R] (1)). The purpose of this disclosure is to require a listed company to maintain publicly available information regarding the rights attached to its listed equity shares so that investors can access such information (LR 9.2.6G[G]). For the purpose of protecting the interests of

⁴⁶ Takeshi Komatsu, et al., *ibid*, p.37.

⁴⁷ Takeshi Komatsu, et al., *ibid*, p.37.

⁴⁸ The Companies Act 2006 of UK, Section 459 and the Companies Act 1967 of Singapore, Section 216.

general shareholders against the potential minority discount risks, the mandatory disclosure of rights attached to specified class of shares would inform the risks of investors.

In Singapore, a listed company adopting DCSS needs to disclose the fact it has taken advantage of DCSS, the specific contents of DCSS and so on (SGX LR 610 (1), 753, and 1206 (7) and (9) (i))⁴⁹.

5. Proposed reform to the Companies Act and the Listing Rules in Japan—lesson from comparative study of UK and Singapore regimes.

Comparing the Japanese regulatory regime with the regulatory systems of UK and Singapore, some remarkable differences in legal and regulatory policy and specific regulations can be seen.

Japan does not permit a public company to issuance of weighted voting rights shares at all. Concerning the availability of de facto DCSS as an alternative by a listed company, Tokyo Stock Exchange continues to take stricter policy so that the gate to take advantage of DCSS is very narrow for innovative newly listed companies, with view to avoiding accompanying risks to DCSS.

In contrast, UK and Singapore permit a public company including a listed company to issue weighted voting rights shares under the Companies Act and also allow a listed company to adopt DCSS as the post IPO capital strategy with several safeguards to mitigate or avoid the risks and abuse.

It is difficult to decide which is better, Japan way or UK and Singapore approach. However, considering increased global competition among capital markets, it can be thought that now Japan should change the legal policy regarding availability of DCSS for a public company to reform the Companies Act to permit a public company as well as a private company to issue weighted voting rights shares subject to reasonable requirements and with effective safeguards to mitigate or avoid accompanying risks arising therefrom. Then, the Listing Rules of Tokyo Stock Exchange should also be revised to this direction.

First of all, the Japanese Companies Act should add a new type of class of shares to introduce weighted voting rights shares into the list of eligible

⁴⁹ Takeshi Komatsu, et al., *supra* note 30, at p.38.

class of shares to be issued. For a public company to adopt DCSS under the provision of the articles of association to that effect, it should be approved by the enhanced special resolution which needs 75% of voting rights held by the shareholders constituting a statutory quorum. If some shareholders oppose to the introduction of DCSS, they would be entitled to appraisal rights, which could provide a statutory solution to the minority discount risks to be incurred by the DCSS.

Second, the Listing Rules of Tokyo Stock Exchange should also be revised to widen the listing of DCSS for at least a listed company on the Growth Market and then to provide for the safeguards to mitigate entrenchment risks, expropriation risks and minority discount risks, with reference to the relevant listing rules of UK and Singapore beforementioned. Additionally, the assessment of suitability of a listing applicant with DCSS by Tokyo Stock Exchange would be also important. In Singapore, according to the Listing Rule, Section 210, Subsection 10, Paragraph (b), a listing applicant company which intends to list with a DCSS must be suitable for listing with DCSS. In terms of the suitability requirement, SGX shall assess whether the listing applicant company meets the requirement or not, taking into consideration the suitability factors, such as the business model of the company, track record of the company, group or business, the role and contribution of intended multiple voting shareholders to success of the company and its business, other features of the company or business that require a DCSS⁵⁰. Referring to the operation of SGX, if the Listing Rules of Tokyo Stock Exchange were to be relaxed, Tokyo Stock Exchange should examine the suitability of the company with DCSS which would intend to apply for listing as a gatekeeper of the capital market.

6. Conclusion.

DCSS has both advantages and disadvantages in terms of corporate governance. In Japan, some are skeptical about the relaxation of current regulatory regime and argue that revision to the current regime should be considered very carefully.

⁵⁰ SGX, Responses to Comments on Consultation Paper: Proposed Listing Framework for Dual Class Share Structures, 26 June 2018, paras. 1.15, 2.31, Takeshi Komatsu, et al., *ibid*, pp. 36-37.

However, it is thought that now it is the time for Japan to change the course and regulatory policy to move forward to review and revise both the Companies Act and the Listing Rules concerning DCSS. In doing so, insightful and useful lessons could be taken from the regulatory developments in UK and Singapore.

Incidentally, UK FCA has proposed the reform of Listing Rules to replace current standard and premium listing share categories with a single listing category for commercial company issuers and to relax current requirements on availability of DCSS on a premium listed company. As far as DCSS is concerned, FCA has proposed that (1) weighted voting rights could be exercised on all matters, (2) specified voting ratio or voting limits would be deleted, and (3) duration of weighted voting rights would be expanded to 10 years⁵¹. From the viewpoint of protection of interests of general ordinary shareholders against accompanying risks from DCSS, the proposed reform in UK should be reviewed carefully.

Anyway, in light of the comparative study between the regulatory regime of Japan and the legal frameworks of UK and Singapore, Japan should not be satisfied with the preservation of the status quo concerning this regard, but should seek for development in regulatory system in order to catch up with the social and economic developments and to be able to response to reasonable social and/or economic needs properly, while providing appropriate safeguards to potential risks to be incurred by deregulation.

* This work was supported by JSPS KAKENHI Grant Number JP22K01265.

⁵¹ FCA, *Primary Markets Effectiveness Review: Feedback to DP22/2 and proposed equity listing rule reforms*, Consultation Paper CP23/10, May 2023, paras. 4.19-4.25, Herbert Smith Freehills, *UK Listing Regime Reform*, pp.3 and 8 (<https://marketing.hsf.com/20/29354/landing-pages/summary-of-fca-s-radical-new-listing-blueprint--4-may-2023.pdf>).