

# The New Dematerialised Book-Entry Transfer System in Japan

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## I. INTRODUCTION

With the commencement of the new fully dematerialised book-entry transfer system for shares on 5 January 2009, Japan finalised almost ten years of the long journey to modernise the Japanese legal regime for the intermediated system<sup>1</sup> and the securities

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1 The terminology of the intermediated system focuses on the static legal aspect of indirect securities holding patterns. In the intermediated system, securities are held with one or more intermediaries such as banks, securities firms and the Central Securities Depositories ("CSD") that are on the top position of the tiered pyramidal hierarchy. Thus, investors hold their securities through their immediate intermediary, which in turn holds the securities through its own upper-tier intermediary with other investors' securities and its own. Due to this tiered holding structure, securities are held *indirectly* with intermediaries between investors and the CSD, which is the ultimate holder of the securities at a national level. For this reason, securities held with an intermediary are also called "intermediated securities", and this holding system is known as the "intermediated system". The basic components of intermediated systems in a country can, therefore, be said to consist of a CSD, intermediaries, collective securities deposit (or book-entries only in the case of dematerialisation),

settlement system.<sup>2</sup> This was accomplished by way of the full dematerialisation<sup>3</sup> of physical securities certificates. As the new legal framework is based on full dematerialisation, securities certificates like share or bond certificates no longer exist when a

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securities accounts and book-entry transfer of securities. The intermediated system is also called the “indirect holding system”, but this article uses the term “intermediated system”.

- 2 The securities settlement system is “a system which permits the transfer of securities: either free of payment (free delivery), for example in the case of pledge, or against payment”; see BANK FOR INTERNATIONAL SETTLEMENTS, *A Glossary of Terms Used in Payments and Settlements Systems* (Basel 2000) (hereinafter: “BIS Glossary”) 37. See generally M. NAKAJIMA/J. SHUKUWA, *Shōken kessai shisutemu no subete* [Everything about the Securities Settlement System] (Tokyo 2008) for the securities settlement system. See also M. GUADAMILLAS/R. KEPPLER, *Securities Clearance and Settlement Systems: A Guide to Best Practices*. World Bank Policy Research Working Paper 2581 (2001), available at <http://ssrn.com/abstract=632650> (all online resources last retrieved on May 11, 2011).

Settlement is a process to finalise a securities transaction by delivering the subject securities of the transaction and by paying the contract amount. The BIS Glossary defines settlement as “the completion of a transaction, wherein the seller transfers securities or financial instruments to the buyer and the buyer transfers money to the seller” or “an act that discharges obligations in respect of funds or securities transfers between two or more parties”, BIS Glossary, 38.

- 3 Dematerialisation is “the elimination of physical certificates or documents of title which represent ownership of securities so that securities exist only as accounting records”, BIS Glossary, *supra* note 2, 14). Another way to eliminate material certificates in settlement is “immobilisation”, a mechanism to get rid of the physical movement of securities certificates through the intermediated system. Germany and the US have adopted the immobilisation scheme.

The original terminology of immobilisation and dematerialisation was set by a seminal report of the GROUP OF 30 entitled “Clearance and Settlement in the World’s Securities Markets” (New York, London 1989); see J. BENJAMIN/M. YATES/G. MONTAGU, *The Law of Global Custody* (London 2002) 14-15. This report defines dematerialisation similarly to the BIS Glossary, while defining immobilisation as “the storage of securities certificates in a vault in order to eliminate physical movement of certificates and/or documents on transfer of ownership”. In the present day, dematerialisation has drawn much more attention throughout the world as a means for improving efficiency by completely eliminating economic and legal costs related to certificates. As one of the global efforts to make an efficient paperless environment, the Group of Thirty strongly suggests, even as its first recommendation in the 2003 Action Plan, that “[i]nfrastructure providers and relevant public authorities should work with issuers and securities industry participants to eliminate the issuance, use, transfer and retention of paper securities certificates without delay”; see GROUP OF THIRTY, *Global Clearing and Settlement: A Plan of Action* (Washington, D.C. 2003).

In Japan, instead of dematerialisation, the term “paperlessisation” (*pēpāresu-ka*) is frequently used. There is no common view on that concept, but it seems that the term is employed to include both “immobilisation” and “dematerialisation”; see X. CUI, *Pēpāresu riron – kokusai, shasai, kabushiki o chūshin ni* [Legal Theory on Paperlessisation (1)], in: *Ritsumeikan Hōgaku* 302 (2005) 409, n. 1, for more discussion of this nomenclature; see also KIN’YŪ SHINGI-KAI [Financial System Council], *21 Seiki ni muketa shōken kessai shisutemu kaikaku ni tsuite* [Reform of the Securities Settlement System towards the 21st century: Report of the Working Group as to Reform of the Securities Settlement System] (Tokyo 2000) 23, available at [http://www.fsa.go.jp/p\\_mof/singikai/kinyusin/tosin/kin20000705-2.pdf](http://www.fsa.go.jp/p_mof/singikai/kinyusin/tosin/kin20000705-2.pdf).

corporation decides to join the new book-entry transfer system, or if the corporation's shares are listed on a stock exchange in Japan. Accordingly, the objects to be credited and debited to a securities account are rights such as corporate bonds or shares that could previously be embodied in securities certificates. Through intermediaries (i.e. account management institutions<sup>4</sup> under the terminology of the new Book-Entry Transfer Act<sup>5</sup>), investors hold the rights themselves, and these rights are now evidenced on securities account books maintained by the intermediaries instead of being represented in securities certificates. This is a historical turn from the long-standing legal doctrine – the materialisation theory – that rights can be treated as tangible movables<sup>6</sup> when they are embodied in a paper (a securities certificate), whereby the rules of movables are applicable in the case of the transfer of rights embodied in the paper.

In this regard, this article introduces the new legal framework of the Japanese intermediated system, focusing on the dematerialised share transfer system. First, this article briefly explains the historical development of the Japanese intermediated system and the background of the reform. Second, it discusses the main legal features of the new Book-Entry Transfer Act and analyses the details of its provisions. Finally, evaluations and conclusions are presented.

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4 An “Account Management Institution” (*kōza kanri kikan*) is a person who opens a securities account for book-entry transfers for others, Art. 2 (4) of the new Book-Entry Transfer Act. The term “intermediary” is employed in this article as a generic term when it is not necessary to specify “account management institution”.

5 The official title of the Act is the Act on Book-Entry Transfer of Corporate Bonds, Shares, etc. (*Shasai, kabushiki-tō no furikae ni kansuru hōritsu*), Law No. 75/2001 as amended by Law No. 58/2009. In this article, this law is referred to as the “new Book-Entry Transfer Act” or the “new Act” interchangeably.

6 In fact, as in Germany, all movables (*dōsan*) in Japan are tangible movables, because things (*mono*) in the Japanese Civil Code are only tangibles (*choses* in possession), Art. 85 Civil Code (*Minpō*), Law No. 89/1896 and No. 9/1898, as amended by Law No. 78/2006. Therefore, according to the Japanese Civil Code, the term “intangible movables” (*mutai dōsan*) is not precise and should instead be replaced with “intangible property rights” (*mutai zaisanken*). In addition, the meaning of Art. 85 is significant, in the sense that the notion of ownership and possession is not applicable unless the subject matter of juristic acts consists of tangibles. Accordingly, the terms “ownership” and “possession” are not used when the subject matter consists of intangibles such as rights. In that case, the term “holding” (*hoyū*) is adopted instead. The verb “have” (*motsu*) is, however, employed in both cases.

## II. HISTORICAL DEVELOPMENT AND BACKGROUND

### 1. *Securities, Securities Certificates (Wertpapiere) and Book-Entry Securities (Account Securities)*

It might be surprising for readers with a common law background to find that there is no exactly corresponding definition of securities in Japan to that which is understood in Anglo-American law, where securities are shares, bonds, debentures or such kinds of rights or interests, including certificates thereof.<sup>7</sup> Following the Germanic legal tradition, securities in Japan, under the German materialisation theory<sup>8</sup> (*Verkörperungstheorie*),<sup>9</sup> are tangible things that are subject to the rules for rights *in rem* (*bukken*). In other words, corporate bonds or shares are not securities, but rather nothing more than (intangible property) rights (*mutai zaisan-ken*) that are subject to the rules of rights *in personam* (*saiken*) in their disposition.<sup>10</sup> Consequently, only if bonds or shares are incorporated in securities certificates could they be applicable to the *bona fide* acquisition rule through which the dynamic safety of securities transactions is ensured.<sup>11</sup> Accord-

7 It is uncertain when the term “securities” was initially employed in the UK, but it seems that it became common when corporations, in the middle of the 19th century, issued debentures (i.e. guaranteed bonds) or shares, or government bonds, all of which have some meaning of “guaranty or security” embedded in their nature. Hence, it is usually explained that securities include equity instruments and debt instruments. See J. BENJAMIN, *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (New York 2000) 4; E. MICHELER, *Wertpapierrecht zwischen Schuld- und Sachenrecht* (Wien 2004) 272-274, for the historical development regarding the meaning of securities. See also J.S. ROGERS, *The Myth of Negotiability*, in: *British Columbia Law Review* 31 (1990) 265, for the early history of the formation of the term “negotiable instruments”.

8 The idea of materialisation was initially proposed by Savigny in the middle of the 19th century; see F.C. VON SAVIGNY, *Das Obligationenrecht als Theil des heutigen römischen Rechts*, Vol. 2 (Berlin 1853) 93-100. There is also an epitomised English translation of this book; see A. BROWN, *Epitome and Analysis of Savigny’s Treatise on Obligations in Roman Law* (London 1872) 99-100. The main thought is that a certificate which reifies obligations is a tangible thing; thus the certificate can be an object of ownership and possession, and obligations can be transferred by delivery of the certificate; see at 99 of the original German version, and at 100 of the English version.

9 *Verkörperungstheorie* could also be translated as the embodiment theory or reification theory, but the term “materialisation” is employed in this article to contrast it with the term “dematerialisation”. In the US, it seems that it is also referred to as the doctrine of “merger”; see G. GILMORE, *The Commercial Doctrine of Good Faith Purchase*, in: *Yale Law Journal* 63 (1954) 1074-1076. In Japan, it is called *katai riron*; see generally H. TANABE, *Yūka shōken to kenri no ketsugō riron* [Securities and Union Theory of Rights] (Tokyo 2002). See MICHELER, *supra* note 7, 103-129, for more details of the historical development of the materialisation theory.

10 The assignment of receivables requires a notification by the assignor or consent of the obligor to make the assignment effective against the obligor and any third party, Art. 467 (1) Civil Code.

11 Unlike Germany, Japan has the statutory provision that bearer securities certificates are (tangible) movables, Art. 86 (3) Civil Code. It provides that “bearer certificates are deemed as movables”.

ingly, the common view of Japan defines securities (*yūka shōken*)<sup>12</sup> as certificates that represent a valuable private right, of which issuance, exercise and transfer shall all or in part be through the certificates.<sup>13</sup> For this reason, all the securities enumerated in the definition provisions of securities in the Financial Instruments and Exchange Act (hereinafter: FIEA)<sup>14</sup> are securities “certificates” (*ken*) in the original Japanese texts. The rights represented in the securities certificates and enumerated and defined in the FIEA can, nevertheless, also be *deemed* as securities certificates by a separate statutory provision,<sup>15</sup> as if such rights were materialised for the purpose of investor protection. However, even though originally they are not securities, it is worth noting that by means of a legal fiction for regulatory purposes, deemed securities signify that the rights are constructively regarded as securities certificates (*Wertpapiere*).

For this reason, as a bid to extend the rules concerning securities certificates to intermediated securities, the old custody and book-entry transfer regime<sup>16</sup> was modelled on

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12 The original Japanese – (*yūka*) *shōken* – implies certificates with value like the German *Wertpapiere*, which are also composed of value and certificates. Hence, the US and UK terminology of securities does not exist in Japan in a strict sense. Hasegawa indicates that *yūka shōken* is translated from the German “*die Wertpapiere*”, but there is no provision that defines them in the commercial codes of Germany and Japan; see Y. HASEGAWA, *Yūka shōken-hō tsūron* [General Part of the Securities Certificates Law] (Tokyo 2000) 1. The first time the term *yūka shōken* was used in a Japanese code was in the old Commercial Code (*Shōhō*, Law No. 32/1890, replaced by Law No. 48/1899, as amended by Law No. 57/2008); see TANABE, *supra* note 9, 3, n. 2.

13 See T. SUZUKI, *Tegata-hō.Kogitte-hō* [Law of Bills and Checks] (Tokyo 1957) 2. In Germany, securities are also defined as certificates in which a private right is represented so that the assertion of the right is required to possess the certificates. Additionally, creation of a security has to be understood under German law as producing the security certificate in print or other written form; see A. HUECK / C. CANARIS, *Recht der Wertpapiere* (München 1986) 1; W. ZÖLLNER, *Wertpapierrecht* (München 1987) 1, 14-21; and EUROPEAN COMMISSION, EU Clearing and Settlement Legal Certainty Group Questionnaire Horizontal Answers (2006) 5, 48, available at [http://ec.europa.eu/internal\\_market/financial-markets/docs/certainty/background/comparative\\_survey\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/certainty/background/comparative_survey_en.pdf).

14 *Kin'yū shōhin torihiki-hō*, Law No. 65/2006, as amended by Law No. 32/2010, Art. 2 (1). The previous Securities Exchange Act (*Shōken torihiki-hō*), Law No. 25/1948, was fully amended and replaced by the FIEA in June 2006. The FIEA aims to enhance investor protection and promote the movement of individual financial assets to the securities markets by establishing a cross-sectional framework of a wide range of financial instruments and services (cross-sectional protection of investors) and through introducing different rules depending on the characteristics of financial instruments or knowledge and experience of the investors (flexible regulatory structure). See FINANCIAL SERVICES AGENCY, *New Legislative Framework for Investor Protection: Financial Instruments and Exchange Law (2006)*, available at <http://www.fsa.go.jp/en/policy/fiel/20060621.pdf> for brief descriptions of the revision. See also C.T. HINES / T. TANIGAWA / A.P. HUGHES, *Doing Deals in Japan: An Analysis of Recent Trends and Developments for the U.S. Practitioner*, in: *Columbia Business Law Review* 2006, 364-365.

15 See Art. 2 (2) of the FIEA.

16 The old legal framework for share certificates and warrant certificates was governed by the Act on Securities Certificates Custody and Book-Entry Transfer (*Kabuken-tō no hokan*

the German intermediated system. Such a system preconditions the existence of securities certificates and applies the rules of rights *in rem* to securities transactions based on the concepts of co-ownership interests in the co-mingled collective securities bulk (*Miteigentumsanteile am Sammelbestand*) and the intermediated indirect possession (*mittelbarer Besitz*) of the physical securities certificates in custody with the Central Securities Depository (CSD) (*Wertpapiersammelbank*).<sup>17</sup> Thus, co-ownership interests in bulk were book-entered to a securities account and were the objects of transfers in a securities account. As a corollary, under the old custody and book-entry transfer system, securities certificates themselves were what investors held and what book-entry securities meant.

In contrast, in the new fully dematerialised book-entry transfer regime, rights that are to be represented in securities certificates are directly book-entered to securities accounts, and investors hold such rights through their immediate intermediary without the mediums of securities certificates and the concept of co-ownership. Consequently, no rules of rights *in rem* are directly applicable to the book-entry securities (account securities).<sup>18</sup> In the new regime, therefore, a statutory intervention was required to cut off the application of the traditional rules governing the assignment of rights under the Civil Code and to specify the method for transfer and pledge of the rights book-entered to a securities account (i.e. account securities). It was also important to introduce the same institution of the *bona fide* acquisition rule under the fully dematerialised system for the promotion of smooth and efficient circulation of such rights. These are the exact

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*oyobi furikae ni kansuru hōritsu*), Law No. 30/1984. See H. BAUM, Die Neugestaltung von Wertpapiersammelverwahrung und Effekten giroverkehr in Japan, in: Wertpapier-Mitteilungen 11 (1988) 357; and H. BAUM, The Present Has Finally Arrived: Settlement by Book-Entry in Japan, in: Butterworths Journal of International Banking & Financial Law 1991, 542, for the old custody and book-entry transfer regime in comparison with the German system. See also H. AKAKURA, *Kabu-ken hokan furikae seido no kaisetsu* [Commentary on Share Certificates Custody and the Book-Entry Transfer System] (Tokyo 1985); and I. KAWAMOTO, *Yūka shōken furikae kessai seido no kenkyū* [A Study on Securities Book-Entry Transfer and Settlement System] (Tokyo 1969) for the theoretical approach of and more specific information on the old intermediated system.

- 17 The CSD is the key player in the intermediated (book-entry transfer) system in a country. Some examples of CSDs are Clearstream Banking, Frankfurt (CBF) in Germany, Depository Trust Company (DTC) in the US, Euroclear UK & Ireland in the UK, the Korea Securities Depository in Korea, the Bank of Japan for Japanese government bonds, and Japanese Securities Depository Center, Inc. (JASDEC) for other securities in Japan. For reference, the oldest CSD is the Wiener Giro- und Kassenverein founded in Austria in 1872.
- 18 Book-entry securities under the new framework are rights themselves and thus differ from the notion in the old custody and book-entry transfer regime. In this regard and from the fact that rights are evidenced and transferred only in a securities account, book-entry securities in the fully dematerialised system could be better named “account securities” (*Kontoeffekten, kōzai shōken*), although the new Book-Entry Transfer Act chooses the term “book-entry transfer” bonds (Art. 66, *furikae shasai*), “book-entry transfer” shares (Art. 128 (1), *furikae kabushiki*) and the like.

purposes and core elements of the new Book-Entry Transfer Act.<sup>19</sup> In addition, the new Book-Entry Transfer Act takes up the unique safety net of the Participant Protection Trust as a last resort to protect participants (i.e. investors) by making the payment when intermediaries do not carry out their duty and become insolvent.<sup>20</sup>

## 2. *Background and Legislation History of Dematerialisation*

### a) *Problems of the Prior Legal Regimes*

The overhaul of the Japanese intermediated system began with the recognition of a dissatisfying situation regarding the quite fragmented, complicated, inefficient, legally unclear and thus costly undeveloped system in the 1990s. As the first effort to tackle the situation, the Committee for Reform of the Securities Clearing and Settlement System<sup>21</sup> was established in the Japan Securities Dealers Association in July 1999. However, the catalyst for the full-fledged debate on the reform of the securities settlement system was the report “Toward Reform of the Securities Settlement System” (*Shōken kessai shisutemu no kaikaku ni mukete*) published by the sub-committee of the Liberal

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19 Art. 1 of the new Book-Entry Transfer Act stipulates that “the purpose of the new Book-Entry Transfer Act is to promote smooth circulation of corporate bonds, shares, or other rights that are to be represented in securities certificates, by stipulating book-entry transfer institutions and account management institutions that make book-entry transfers of bonds, etc., procedures for book-entry transfers, and the participant protection trust to protect those holding such rights as well as other necessary matters.”

20 As discussed below, an intermediary has a duty to acquire inflated account securities and to amortise them by obliterating them from the securities account books (Arts. 78, 79 for bonds, and Arts. 145, 146 for shares). If the intermediary does not perform that duty, then its investors can bring a damages claim against the intermediary for the damage that investors could not exercise against the issuer (Arts. 80 (2), 81 (3) for bonds, and Arts. 147 (2), 148 (2) for shares). Unlike most other intermediated systems where investors ultimately assume the damage in their intermediary’s insolvency, Japan adopts the participant protection trust to protect investors further, even if the intermediary becomes insolvent. A similar regime applies to the depositor protection institution in the case of money deposit. Art. 2 (11) defines the participant protection trust as a “trust established according to this Act that is designed to protect participants by making the payment pursuant to Art. 60, and thus to maintain the confidence in book-entry transfers of bonds, etc.” With respect to the initial discussion over the investor protection plan in the fully dematerialised system, see FINANCIAL SERVICES AGENCY, *Shōken kessai shisutemu no kaikaku oyobi kore ni tomonau tōshika hogo-saku ni tsuite* [The Reform of the Securities Settlement System and the Protection Device of Investors Involved in the Reform] (2002), available at [http://www.fsa.go.jp/singi/singi\\_kinyu/tosin/20020215.pdf](http://www.fsa.go.jp/singi/singi_kinyu/tosin/20020215.pdf). For reference, as of March 2010, the accumulated reserves of the Participant Protection Trust are 10.7 billion Yen; see the website of the JAPAN INVESTOR PROTECTION FUND, <http://jipf.or.jp/trust.html>.

21 The literal translation of the committee name from the original text is the Reform Council Meeting of the Securities Delivery and Settlement System (*Shōken ukewatashi kessai seido kaikaku kondan-kai*). The establishment outline (*setchi yōkō*) of the committee can be found at [http://www.kessaicenter.com/joto/yoko\\_e.pdf](http://www.kessaicenter.com/joto/yoko_e.pdf).

Democratic Party for problems relating to corporate bonds certificates in August 1999.<sup>22</sup> The report identified four items as the main problems of the Japanese intermediated system:<sup>23</sup> (1) the inefficiency of the corporate bond settlement system; (2) fragmented settlement systems in accordance with securities types; (3) slow response to cross-border transactions or new financial products; and (4) the lag of STP.<sup>24, 25</sup>

From a legal point of view,<sup>26</sup> the first legal problem referred to the fact that the legal regimes diverged in accordance with the types of securities. For Japanese government bonds there were two different transfer systems, the book-entry methods based on issued material certificates and the registration scheme pursuant to the Act concerning Government Bonds.<sup>27</sup> In the case of corporate bonds, the Act on Registration of Corporate Bonds, etc.<sup>28</sup> governed the dematerialisation framework of corporate bonds, local government bonds or the like,<sup>29</sup> but it did not function well because the registration Act only provided that registration on the registration book was the requirement for enforcement

22 See NAKAJIMA / SHUKUWA, *supra* note 2, 393.

23 *Ibid.*, 394.

24 Straight Through Processing is the “capture of trade details directly from front-end trading systems and complete automated processing of confirmations and settlement instructions without the need for rekeying or reformatting data” (the BIS Glossary, 40).

25 The report of the FSA’s Financial System Council further developed a deeper discussion about the problems of the intermediated system in Japan and proposed plans to deal with them; see FINANCIAL SYSTEM COUNCIL, *supra* note 3, 2-18. See also C.W. MOONEY, Law and Systems for Intermediated Securities and the Relationship of Private Property Law to Securities Clearance and Settlement: United States, Japan, and the UNIDROIT Draft Convention, in: IMES Discussion Paper Series 2008-E-7 (2008) 28-30.

26 See H. KANSAKU, *Ilbon Jeungkweonsystem Gaehyukui Hyunhoangkwa Gwaje* [The Current Situation and Issues of the Securities Settlement System Reform in Japan], in: Korean Journal of Securities Law 4 (1) (2004) 308-312, for the problems of the old book-entry transfer systems. See also FINANCIAL LAW BOARD, Interim Note on Legal Rules Relating to Book-Entry Securities Settlements (2000) 11-13, available at <http://www.flb.gr.jp/epage/edoc/publication06-e.pdf>.

27 *Kokusai ni kansuru hōritsu*, Law No. 34/1906. Even here there were once two methods of registration. One was to issue government bonds without physical certificates; the other was vice versa. Later, in 1943, the second method of registration was abolished; see CUI, *supra* note 3, 366-373 for the registration system of government bonds. When government bond certificates were issued, they were settled by physical delivery or through the book-entry settlement of government bonds in the Bank of Japan based on the co-mingled bailment theory; see Y. TAKAHASHI, *Chikujō kaisetsu tanki shasai-tō furikae-hō* [Commentary on the Act on Book-Entry Transfer of Short-Term Corporate Bonds, etc.] (Tokyo 2002) 5-6; see also CUI, *Pēpāresu riron – kokusai, shasai, kabushiki o chūshin ni* [Legal Theory on Paperlessisation (2)], in: Ritsumeikan Hōgaku 303 (2005) 144-151, for the book-entry transfer system for government bonds.

28 *Shasai-tō tōroku-hō*, Law No. 11/1942; this act was annulled on 4 January 2008 by the *Shōken kessai seido-tō no kaikaku ni yoru shōken shijō no seibi no tame no kankei hōritsu no seibi-tō ni kansuru hōritsu* [Act on Improvement, etc. of Relevant Acts for the Purpose of Improvement of the Securities Market by Reform of the Securities Settlement System, etc.], Law No. 65/2002.

29 See CUI, *supra* note 3, 373-389, for details of the registration system of corporate bonds.

against the issuer and third parties. In addition, it had no rule concerning a requirement for the validity of the assignment of registration bonds, etc. Thus, there existed the legal uncertainty that registration bonds could be of double assignments, in the sense that it was the common opinion that the validity requirement for the assignment of registration bonds was just a conceptual agreement between the parties (Art. 466 Civil Code).<sup>30</sup> The Act on Share Certificates, etc. Custody and Book-Entry Transfer<sup>30a</sup> (hereinafter: “old Custody and Book-Entry Transfer Act” or “old Act”, interchangeably) applied only to share certificates, warrant certificates, etc. The old Act was the first statutory regime of the book-entry transfer that rested on the notions of physical securities’ co-mingled custody and co-ownership interests, but the old Act was especially criticised due to the fact that the securities applicable to the system were too limited.<sup>31</sup> This legal fragmentation, among other things, could hinder meeting new needs when new types of securities have to be accommodated in a book-entry transfer system, because new legislative measures should be taken in order to include the new types of securities.<sup>32</sup> Second, the old custody and book-entry transfer regimes were made based upon the fact that physical securities certificates exist. From the perspective of the continuity of the securities legal theory, the legal construction to give book-entry transfer the same effect applicable to the delivery of share certificates, and to give investors rights *in rem*, could seem advantageous and outstanding.<sup>33</sup> It was, however, criticised that this rather obviated the development of proper legal regimes and legal theories in the age of dematerialisation, which counts book-entries as its essence and in which certificates have no great economic importance.<sup>34</sup> Hence, it was thought that the legal construction of the old regimes triggered complex and conceptual legal relations.<sup>35</sup> Third, under Japanese law at that time, it was not possible to issue uncertificated securities, i.e. fully dematerialised securities; thus issuers and brokers incurred operational costs that resulted in social and economic inefficiency.<sup>36</sup> Finally, Japan had no clear private international

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30 KANSAKU, *supra* note 26, 308. It is said that 164 registration institutions for corporate bonds were jumbled up across the nation; see *ibid.* See also TAKAHASHI, *supra* note 27, 6.

30a *Kabuken-tō no hokan oyobi furikae ni kansuru hōritsu*, Law No. 30/1984.

31 KANSAKU, *supra* note 26, 310.

32 See FINANCIAL LAW BOARD, *supra* note 26, 11.

33 See *ibid.*, 12 and KANSAKU, *supra* note 26, 310.

34 *Ibid.*

35 See FINANCIAL LAW BOARD, *supra* note 26, 12. Professor Kanda once mentioned the same effect, stating that “the existing construction is not thought to be the legal framework that reflects the reality due to the fact it rather overlooks the reality of modern transactions and their highly technological process, though it might be excellent from the viewpoint of continuity with the traditional legal theory”; see H. KANDA, *Pēpāresu-ka to yūka shōken hōri no shōrai* [Dematerialisation and the Future of the Securities Theory], in: Kishida/Morita/Morimoto (eds.), *Gendai kigyō to yūka shōken hōri – kawamoto ichirō sensei koki shukuga* [Modern Corporations and the Securities Theory, Festschrift for the Seventieth Birthday of Prof. Ichiro Kawamoto] (Tokyo 1994) 169.

36 See FINANCIAL LAW BOARD, *supra* note 26, 12.

rule applicable to transactions of book-entry securities that have an international element.<sup>37</sup>

*b) Three Steps of Legislation for Full Dematerialisation*

In recognising the problems of the old intermediated systems, Japan chose and pushed forward a fully dematerialised scheme to modernise the Japanese intermediated system, which abandoned the immobilisation framework that the German intermediated system utilises.

The first reform started with the legislation of the book-entry transfer system for the dematerialised commercial paper (“CP”). Based on the report<sup>38</sup> prepared by the Research Council concerning CP Dematerialisation in May 2000, the Act on Book-Entry Transfer of Short-Term Corporate Bonds, etc.<sup>39</sup> (hereinafter: CP Book-Entry Transfer Act) was promulgated in June 2001, and entered into force in April 2002. This Act laid a firm legal foundation for the new Japanese intermediated system in the sense that the relevant subsequent dematerialisation legislations were to complement the CP Book-Entry Transfer Act without amending the basic and essential rules: (1) investors directly hold dematerialised securities like CPs, bonds, shares, etc., and intermediaries and the CSDs are just account managers with no interest in account securities at all; (2) imputation of rights as to dematerialised securities is determined by a manual description or a digital record,<sup>40</sup> (3) transfer and pledge of such rights can be made only by matching debit and credit book-entries between accounts; (4) investors are presumed to legiti-

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37 *Ibid.* The Hague Securities Convention was adopted in 2002 for the conflict of laws rules applicable to proprietary aspects of dispositions of intermediated securities. The full title of the convention was “Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary”, and it introduced the subjective connecting factor as the default rule (Art. 4) by allowing limited party autonomy in the proprietary area traditionally controlled by the *lex rei sitae* – more specifically in the case of securities, the *lex cartae sitae* – rule. See generally R. GOODE / H. KANDA / K. KREUZER with the Assistance of C. BERNASCONI (Permanent Bureau), Explanatory Report on Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with Intermediary: Hague Securities Convention (Hague 2005) for the Hague Securities Convention.

38 This report is the result of research conducted by the council that was established in the Ministry of Finance and met eight times a year. The report is available at [http://www.fsa.go.jp/p\\_mof/singikai/cp/houkoku/cp01.pdf](http://www.fsa.go.jp/p_mof/singikai/cp/houkoku/cp01.pdf).

39 *Tanki shasai-tō no furikae ni kansuru hōritsu*, Law No. 75/2001; Professor Kansaku evaluated the CP Book-Entry Transfer Act as a landmark act that legislated the civil rules regarding fully dematerialised securities; see KANSAKU, *supra* note 26, 312.

40 The CP Book-Entry Transfer Act and other acts that replaced the former Acts and finally became the new Book-Entry Transfer Act employ the term “descriptions or records” (*kisai mata wa kiroku*) throughout the entire act. It appears redundant because one provision could have defined the two terms for the sake of brevity. At any rate, “descriptions” are intended to refer to writings on physical securities account ledgers, and “records” mean electronic entries therein; see TAKAHASHI, *supra* note 27, 158-157. In this article, the term “record(s)” is employed.

mately have the rights book-entered to their securities account; (5) statutory protection is given to a *bona fide* acquirer, if the acquirer is in good faith and without gross negligence; (6) when an inflated record occurs due to an over-record of rights and the *bona fide* acquisition thereof, the CSD and/or intermediaries who are responsible for the inflation have the duty to obliterate it, and the issuers have no liability to the over-recorded account securities; and (7) as a final safety net, the Act provides for the Participant Protection Trust.

The second legislation was put into effect by the Act on Improvement, etc. of Relevant Acts for the Purpose of Improvement of the Securities Market by Reform of the Securities Settlement System, etc. (hereinafter: Securities Market Improvement Act)<sup>41</sup> through which the title of the CP Book-Entry Transfer Act was changed to the Act on Book-Entry Transfer of Corporate Bonds, etc. (“Bond Book-Entry Transfer Act”), and the Bond Book-Entry Transfer Act became effective in January 2003. The main purposes of the second legislation were to enlarge the scope of applicable securities to corporate bonds, government bonds and other monetary debt securities, and to introduce a multi-tier book-entry transfer system.<sup>42</sup> In addition, the Securities Market Improvement Act enabled other securities that were not applicable to the Bond Book-Entry Transfer Act to be accommodated by JASDEC through amending the old Custody and Book-Entry Transfer Act. The Securities Market Improvement Act also empowered JASDEC to provide the services stipulated in the Bond Book-Entry Transfer Act, thereby enabling JASDEC to deal with all securities other than government bonds handled by the Bank of Japan.<sup>43</sup>

The last step was to include shares, share-related securities such as bonds with warrant, etc. in the dematerialised system. In June 2004, the Act Amending Part of the Act on Book-Entry Transfer of Corporate Bonds, etc. and Other Acts to Streamline Settlements Involved in Transactions of Shares, etc. (hereinafter: Settlement Streamline Act)<sup>44</sup>

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41 *Shōken kessai seidō-tō no kaikaku ni yoru shōken shijō no seibi no tame no kankei hōritsu no seibi-tō ni kansuru hōritsu*, Law No. 65/2002; see Y. TAKAHASHI / K. NAGASAKI / T. MAWATARI, *Chikujō kaisetsu shasai-tō furikae-hō* [Commentary on the Act on Book-Entry Transfers of Bonds, etc.] (Tokyo 2003) 2-19, for details of the Securities Market Improvement Act.

42 See H. KANDA (ed.), *Kabuken denshi-ka – sono jitsumu to ikō no subete* [Electronisation of Share Certificates: Everything about Its Practice and Transition] (Tokyo 2008) 8. The CP book-entry regime, meanwhile, was a one-tier system where all investors participated in the CSD system.

43 KANSAKU, *supra* note, 313.

44 *Kabushiki-tō no torihiki ni kakawaru kessai no gōri-ka o hakaru tame no shasai-tō no furikae ni kansuru hōritsu-tō no ichibu o kaisei suru hōritsu*, Law No. 88/2004; see M. HAMADA / A. OZAKI / S. YOSHIDA, *Kaisha-hō seitei ni tomonau shōken kessai hōsei no seibi* [Improvement of the Legal Regimes of the Securities Settlement Involved in the Enactment of the Companies Act], in: S. Aizawa, (ed.), *Rippō tantō-sha ni yoru shin-kaisha-hō kaisetsu* [Explanatory Notes on the New Companies Act], Bessatsu Shōji Hōmu 295 (2006) 312-332, for details of the amendments related to the securities settlement system.

was prepared to dematerialise shares certificates, warrant certificates, warrant with call option, etc. For that purpose, the Settlement Streamline Act especially included the non-issuance regime of share certificates by amending a relevant part of corporate law in the old Commercial Code.<sup>45</sup> The non-issuance system of share certificates made it possible for a stock corporation, which has no provision in the articles of incorporation in which it issues share certificates,<sup>46</sup> not to issue share certificates at all and to reject requests to issue share certificates from shareholders. The Settlement Streamline Act finally changed the title of the Bond Book-Entry Transfer Act to the Act on Book-Entry Transfer of Corporate Bonds, Shares, etc. The enforcement of the share-book-entry transfer system was supposed to be implemented on a date set by the Enforcement Ordinance before 8 June 2009, because it required much time to prepare practical matters such as the IT system, but the age of full dematerialisation was ushered in on 9 January 2009, earlier than the scheduled date. Since that date, all the listed share certificates on securities exchanges have compulsorily been dematerialised, and such shares certificates previously issued have become mere papers without the previous legal meaning. In addition, the old Custody and Book-Entry Transfer Act belonged to the ages, according to the commencement of the new intermediated system.

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45 In 2005, Japan enacted an independent corporate law statute (Companies Act, *Kaisha-hō*, Law No. 86/2005, as amended by Law No. 74/2009), separating corporate law from the Commercial Code. The task of the new corporate law has been thought of as the most significant and large-scale amendment since corporate law was first introduced in Japan in the late 19th century. The details of modernisation of corporate law can be found in the following articles: K. EGASHIRA, *Kaisha hōsei no gendai-ka ni tsuite – yōkō-an o chūshin ni* [On Modernisation of the Corporate Legal Regime – Focusing on the Outline Draft], in: *Securities Review* 45 (2) (2005) 1; S. AIZAWA, *Rippō tantō-sha ni yoru shin-kaisha-hō kaisetsu* [Explanatory Note on the New Companies Act], in: id (ed.), *Bessatsu Shōji Hōmu* 295 (2006). See also Y. TAKAHASHI/A. OZAKI, *Chikujō kaisetsu shasai, kabushiki-tō furikae-hō* [Commentary on the Act on Book-Entry Transfer of Bonds, Shares, etc.] (Tokyo 2004) 16-28, for the amendment to share and the share certificates-related portions of Commercial Code. (Note by the editors: see also in this Journal on the outline of the reform M. DERNAUER, *Die japanische Gesellschaftsrechtsreform 2005/2006*, in: *ZJapanR/J.Japan.L.* 20 (2005) 123 ff.; E. TAKAHASHI/M. SHIMIZU, *The Future of Japanese Corporate Governance: The 2005 Reform*, in: *ZJapanR/J.Japan.L.* 19 (2005) 35 ff.)

46 Through this amendment, it became a rule by default that a corporation does not issue share certificates. It was mandatory before the amendment that all stock corporations should issue share certificates immediately after the establishment of a corporation or payment of new issues (Art. 226 of Commercial Code before the amendment). See generally M. KITAMURA, *Kabuken fu-hakkō seido ni tsuite* [On the Non-Issuance System of Share Certificates], in: *Shōken Torihiki-hō Kenkyū-kai* (ed.), *Shōken no pēpāresu-ka no riron to jitsumu* [Theories and Practices of Securities Dematerialisation], *Bessatsu Shōji Hōmu* 272 (2004) 100-164, for details of the Non-Issuance Institution.

### III. LEGAL FEATURES OF THE NEW BOOK-ENTRY TRANSFER SYSTEM

From the legal point of view, the most significant features of the new legal framework are these: investors directly hold securities recorded on a securities account; transfer of account securities is finalised only by a credit record; and *bona fide* acquisition (“BFA”) is statutorily provided, though account securities are not tangibles by nature.

First, the underlying meaning of “direct holding of account securities by investors” is that investors mandate the management of affairs involved in their account securities with the immediate intermediary with whom the investors opened their securities account. The legal relationship between an investor and the investor’s immediate intermediary is a mandate (*Auftrag*);<sup>47</sup> thus the intermediary as a mandatary has no interest in the account securities of the investor (mandator). This results in fencing off investors’ account securities from the intermediary’s insolvency. As direct account securities holders, investors can exercise their rights regarding account securities directly against the issuer, but they cannot assert their rights against other intermediaries, especially upper-tier intermediaries who have no contractual relationship of a mandate. The investors can also exercise their rights through their intermediary when they make a request to their intermediary to that effect.<sup>48</sup>

In the early stage of drafting, a trust type of framework<sup>49</sup> was also considered, but it was finally discarded. The reasons for rejecting the trust type (i.e. the UCC type) are not clearly known,<sup>50</sup> but Professor Kanda mentions two reasons:<sup>51</sup> first, the new legal formulation for the intermediated system is “more consistent and more compatible with

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47 Professor Morita also characterises the relationship between an investor and the investor’s intermediary as a mandate contract in which the content is to manage the investor’s rights by recording them in the investor’s securities account; see H. MORITA, *Yūka shōken pēpāresuka no kiso riron* [Fundamental Theories of Securities Dematerialisation], in: Monetary & Economic Studies 25 (2006) 54, available at <http://www.imes.boj.or.jp/japanese/kinyu/2006/kk25-h-1.pdf>.

48 Under the regime of the old Custody and Book-Entry Act, investors could not exercise their rights through their intermediary.

49 The trust type chiefly meant the UCC Art. 8 framework in the US; see generally FINANCIAL LAW BOARD, *supra* note 26. The legal nature of the investors’ status in Part 5 of the UCC article is not a trust but a *sui generis* statutory right. The UK system is known to be built on English trust law. Professor Kawamoto properly points out this matter; see SHŌKEN TORIHIKI-HŌ KENKYŪ-KAI, *supra* note 46, 18.

50 The explanation found in the commentary is that, from the viewpoint of a connection with corporate law institutions such as the shareholders’ derivative suit, etc., it would be hard to be in harmony with such corporate regimes as investors have no direct rights against issuers; see TAKAHASHI/OZAKI, *supra* note 45, 21.

51 H. KANDA, Enhancing Legal Certainty over Investment Securities Held with an Intermediary, in: Uniform Law Review 10 (2005) 274. See also H. KANDA, Legal Issues Relating to Indirectly Held Investment Securities in Japan, in: Korea Private International Law Review 11 (2005) 146; H. KANDA, Intermediated Holding of Investment Securities in Japan, in: S. Grundmann et al. (eds.), Unternehmen, Markt und Verantwortung. Festschrift für Klaus J. Hopt zum 70. Geburtstag am 24. August 2010 (Berlin 2010) 3105.

general principles of property, commercial and corporate law in Japan.” Second, “from a practical standpoint, it was felt to be more appropriate to directly give investors various rights against issuers.” It seems noteworthy that the drafters thought that as one of the countries in the Germanic legal tradition, it would have been more complicated to remain consistent with the existing legal institutions if Japan had chosen the UCC type of legal framework.<sup>52</sup>

Second, in the new dematerialised system, as mentioned above, the objects of holding and dispositions such as sales or pledges are intangible rights themselves such as shares and bonds. The objects are neither co-ownership interests nor beneficial interests, and transfer of such rights is made by a credit to the transferee’s account. As to this, one could think that the possibility is open to view account shares and account bonds materialised in a securities account, because there is a provision that account securities might analogically be interpreted as tangibles. Article 161 (3) of the new Book-Entry Transfer Act stipulates that “the stock corporation and other third parties” of Article 130 (1) Companies Act shall be read as “other third parties” in transfer of book-entry shares. This means that if account shares are transferred through a book-entry, the transferee can enforce those rights against third parties without the registration of the transferee’s name on the shareholders’ book, as in the case of certificated registered shares.<sup>53</sup>

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52 See *ibid.* Against this opinion, Professor Morishita maintains that it is an unfounded fear to be concerned that reconstructing investors’ rights as a trust would be inappropriate to the civil law system, in the respect that Germany at least adopts a trust scheme over securities deposited in foreign countries; see T. MORISHITA, *Kokusaiteki shōken furikae kessai no hōteki kadai* [Legal Developments and Questions of International Securities Settlement], in: *Sophia Law Review* 47 (3) (2004) 214, 194.

53 All shares issued under the Companies Act are registered shares. Previously, a corporation could issue bearer or registered shares under the Commercial Code, but bearer shares could not be issued after the 1990s’ revision of the Commercial Code because there were nearly no corporations that issued bearer shares (there were only three corporations before World War II and one corporation in 1951 that issued bearer shares; see CUI, *supra* note 3, 421, n. 102). It is well known that the original draft of the old Commercial Code in 1886 was prepared by a German scholar, Carl Friedrich Hermann Roesler, and therefore Japanese commercial law has its origin in German commercial law where bearer shares are common. The reason why bearer shares were not utilised in Japan is not quite clear, but this author’s guess is that it is because the stock exchange rule had already been modelled after the rules of the London Stock Exchange in 1876. Under these rules, registered shares prevailed and the market practice had already been to issue registered shares, even before the preparation of the old Japanese Commercial Code. (See H. BAUM / E. TAKAHASHI, *Commercial and Corporate Law in Japan: Legal and Economic Developments after 1868*, in: Röhl (ed.), *History of Law in Japan since 1868* (Leiden 2005) 350-362, for the drafting history of the Commercial Code.)

With respect to the transfer requirement of Japanese registered shares, though it is outside the scope of this article, it is worth noting that Japanese registered shares are not original registered securities from the viewpoint of disposition methods, and their character is similar to that of bearer securities, because shares can be transferred merely by delivery of share certificates, Art. 128 (1). In addition, the transfer can be asserted to any third party except for the issuer (Art. 130 (2)), as long as the shareholder possesses such share certifi-

Through this provision one might think that account shares could be deemed as materialised shares, because the new Act applies the same rule for transfer of certificated shares. However, it is then also true that it would not have been necessary to have that provision, in the case of account shares being the same as certificated shares. More importantly, Article 86-3 of the new Book-Entry Transfer Act excludes the application of Article 688 (1) Companies Act, instead of Article 688 (2) or Article 688 (3).<sup>54</sup> This shows that the drafters viewed account bonds and account shares as intangible rights, and thus provisions of the new Act related to transfers were a special exception only applicable to bonds, shares or other securities recorded to securities accounts. The drafters should have provided that Article 688 (3) shall be excluded if account bonds were tangibles, because account bonds are intrinsically bearer securities, although the Act has no provision regarding whether account bonds are registered or bearer bonds.<sup>55</sup> In this regard, the exclusion of Article 688 (1) Companies Act in Article 86-3 of the new Book-Entry Transfer Act is meaningful, in that account bonds are bonds themselves as intangibles.

Account securities are created, transferred and extinguished only by book-entries. Transfer of account securities becomes legally effective when a credit record to the transferee's account is made, and nothing further is required.<sup>56</sup> Except for a credit record with a matching debit record,<sup>57</sup> there is no other method for transferring account securities. Hence, a title transfer for a security purpose (*jōto tanpo*) is not allowed in the case where the title transfer is done without a book-entry transfer but only by agreement between the collateral provider and the collateral taker and a constructive delivery

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cates. For reference, in the new Companies Act, the transfer requirements of registered bonds became the same as those of registered shares.

54 Art. 688 is as follows: 1) the assignment of bonds cannot be asserted against the bond issuer and other third parties unless the name and addresses of the assignee are recorded on the bond registry. 2) In the application of paragraph 1, when bond certificates are issued, the phrase "the bond issuer and other third parties" in paragraph 1 shall be read as "the bond issuer". 3) The preceding two paragraphs shall not apply to bearer bonds.

55 Cf. Art. 67 (3) of the new Book-Entry Transfer Act. When and only when the designation of a book-entry transfer institution is repealed or becomes ineffective, and there is no other book-entry transfer institution to succeed to its business, or in the event that account bonds are not to be addressed in the book-entry transfer institution, then bondholders have the right against the issuer to issue bond certificates, Art. 67 (2). In this case the bond certificates issued are bearer bonds, Art. 67 (3); see also TAKAHASHI/OZAKI, *supra* note 45, 59. There is no corresponding provision in the case of account shares. When account shares come to be outside the system, then they should be transferred by way of the rule for uncertificated shares, i.e. registration on the shareholders' book, Art. 130 (1) Companies Act. Needless to say, the corporation can also amend its articles of incorporation and then issue share certificates.

56 See KANDA, *supra* note 51, 144. See also H. KANDA, Answers of Japan to the questionnaire of EU Clearing and Settlement Legal Certainty Group (2006) 3, 7, available at [http://ec.europa.eu/internal\\_market/financial-markets/docs/certainty/japanese\\_law\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/certainty/japanese_law_en.pdf).

57 The new book-entry transfer system requires a strictly matching booking as if a tangible thing is transferred; see MOONEY, *supra* note 25, 33.

(*Besitzkonstitut*), which was interpreted as available under the old Custody and Book-Entry Act.<sup>58</sup> This is because account securities are no longer tangibles, and thus it should, in principle, be interpreted that a rule which preconditions corporeal things such as possession has no application to account securities.<sup>59</sup> Under the new Book-Entry Transfer Act, a title transfer by way of security is established through a credit to the collateral taker's securities account. When the collateral provider wants to be continuously treated as a shareholder, the collateral taker may do so by notifying the intermediary of that intention, and in turn the intermediary then provides such information to the issuer.<sup>60</sup>

Third, the new Book-Entry Transfer Act provides the statutory protection rule for a *bona fide* acquirer (hereafter: BFA rule). Originally, the BFA rule applies to tangibles of which possession is noticeable to others who could have confidence in the possessor's ownership of the tangibles due to the possession. However, in the case of the dematerialised book-entry transfer system, "something" to noticeably confide in no longer exists, and as a matter of fact, it is almost impossible to acknowledge the BFA rule in an interpretative way without a specific statutory provision.<sup>61</sup> For this reason, the drafters of the new Book-Entry Transfer Act provided for the BFA rule in Article 144 of the Act,<sup>62</sup> and excluded doubts about applicability of the BFA rule to account shares. However, there are still many issues in relation to the BFA rule under the new Book-Entry Transfer Act. For example, what is the object of the "*bona fide*"? What is the meaning of "in good faith and without gross negligence"? In other words, in what circumstance is a transferee presumed to be in bad faith or with gross negligence? For the first question, an explanation is the confidence in a book-entry record to a securities account.<sup>63</sup> There is, however, a sceptical opinion about this assertion, because it is not possible to know the details of the securities accounts of others due to the banking secrecy law,<sup>64</sup> and because

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58 TAKAHASHI / NAGASAKI / MAWATARI, *supra* note 41, 150 clearly mentions, though it is not exactly the matter of a title transfer by way of security, that imputation of the rights, from the beginning to the end, is determined by a record to securities accounts. The rights are not transferred by a mere agreement of assignment and transfer of the rights requires a book-entry record to the securities account.

59 The control agreement as one of the ways to create a security interest in UCC is not recognised under the new Book-Entry Transfer Act, see KANDA, *supra* note 42, 6.

60 Art. 151 (2). See TAKAHASHI / OZAKI, *supra* note 45, 157.

61 See KANSAKU, *supra* note 26, 315. See also KITAMURA, *supra* note 46, 93, 116 (the remark of Professor Kawamoto).

62 Art. 144 provides for the BFA of account shares as follow: "the participant (including book-entry transfer institutions having institutional accounts) who received a credit description or record of a certain class of book-entry transfer shares to its account (limited to the house account in the case of an account management institution), upon the request of a book-entry transfer, shall acquire such credited rights with respect to the corresponding class of book-entry shares, provided that such a participant shall not be in bad faith or of gross negligence." Art. 77 also provides for the BFA rule of account bonds with the same method.

63 See TAKAHASHI, *supra* note 27, 175-177.

64 See MORISHITA, *supra* note 52, 194. Professor Morishita refers to this opinion by introducing Professor D. EINSELE's article, Wertpapiere im elektronischen Bankgeschäft, in:

securities transactions are in reality concluded in a massive way on an exchange without identifying the counter parties of the transactions.<sup>65</sup> For these reasons, it would better be understood that the confidence in the book-entry transfer system is, in the long run, the reliance on the fact that a book-entry will be and is made to the account of the transferee herself.<sup>66</sup> In regard to the interpretation of the requirement of good faith and absence of gross negligence, one opinion is that the element of bad faith or gross negligence<sup>67</sup> can be seen as similar to the concept of collusion between the intermediary and the transferee in UCC Section 8-503 (e)<sup>68</sup> from the viewpoint of trial practices. This means that settlement finality<sup>69</sup> is fulfilled to the same extent as that in UCC by such an interpretative approach.<sup>70</sup>

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Wertpapier-Mitteilungen 2001, 7. See also KITAMURA, *supra* note 46, 116 (the remark of Masashi Kitamura).

- 65 See T. HAYAKAWA, *Tanki shasai-tō no furikae ni kansuru hōritsu to shōken kessai shisutemu* [Act on Book-Entry Transfer of Short-Term Corporate Bonds, etc. and the Securities Settlement System], in: *Jurisuto* 1217 (2002) 27.
- 66 See KITAMURA, *supra* note 46, 116 (the remarks of Professors Kitamura and Kuronuma); see also *ibid.*
- 67 For the requirement, Professor Morishita indicates that in Japan, unlike in Germany, bad faith or gross negligence seems to be determined only upon the condition of the transferee without consideration of the intermediary's bad faith; see MORISHITA, *supra* note 52, 193, n. 49.
- 68 UCC S. 8-502 gives the transferee protection when a financial asset was purchased for value and without notice of the entitlement holder's (i.e. transferor's) adverse claim, but under UCC S. 8-503 (e), the transferee cannot enjoy this protection when the transferee acted in collusion with the securities intermediary for the transaction. The entitlement holder (transferor) can bring a suit, but should first sue the intermediary before suing the transferee if the transferee has colluded with the intermediary. (*Nathan W. Drage, P.C. v. First Concord Securities, Ltd.*, 184 Misc. 2d 92, 707 NYS2d 782, 41 U.C.C. Rep.Serv.2d 673 (Sup 2000); see E. GUTTMAN, 28 *Modern Securities Transfers*, 3d ed. (Database updated in Oct. 2008) at § 11A:1 with accompanying n. 12.
- 69 Settlement finality means that the settlement is irrevocable and unconditional, thereby insulating against a systemic spread of the settlement failure of other transactions. The EU member states fulfil the settlement finality by Directive 98/26/EC of The European Parliament of the Council on Settlement Finality in Payment & Securities Settlement Systems.
- 70 See TAKAHASHI / NAGASAKI / MAWATARI, *supra* note 41, 23.

#### IV. THE SHARE-BOOK-ENTRY TRANSFER SYSTEM

The new book-entry transfer system for shares was prepared in the last stage of the full dematerialisation plan. In the case of corporate bonds or other debt securities, these are entered into the new system only when those bonds are newly issued (Art. 66 (2)). In other words, corporate bonds, issued before the commencement date of the book-entry transfer system of corporate bonds, etc., cannot be account bonds.<sup>71</sup> The share-book-entry transfer system, on the other hand, had to include all outstanding shares, and listed shares had to be compulsorily transferred to the new dematerialised system. More importantly, due to the fact that the exercise of rights attached to shares is more crucial in the case of shares, a more careful approach and preparation was required. For these reasons, the dematerialisation of shares was addressed at the last stage of the entire dematerialisation plan.<sup>72</sup> The following is a discussion of details of the share-book-entry transfer system.

##### 1. *Requirements for Being Account Shares*

Article 128 (1) of the new Book-Entry Transfer Act provides that

“the imputation of rights with respect to shares (excluding transfer restricted shares) of which issuer’s articles of incorporation does not provide the purport to issue share certificates, and which are dealt with in a book-entry transfer institution shall be determined by descriptions or records to the book-entry transfer account book.”

In accordance with Article 128 (1), therefore, three requirements should be met in order to be account shares.<sup>73</sup> First, shares should be those of an uncertificated share corporation (that is, a corporation whose articles of incorporation do not provide for the purport to issue share certificates). This is because it is inappropriate to couple the transfer of rights by way of both the delivery of physical certificates and book-entry transfers. Second, shares should not be transfer-restricted, since such restriction hinders speedy settlement, if approval of the Board of Directors is required for each book-entry transfer. Finally, shares should be those dealt with in the book-entry transfer institution (i.e.

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71 There is one exception under which corporate bonds already issued before the commencement date may be dealt with in the new system, if the Board of Directors of the issuer, which issued bonds, etc. from the enforcement date of the securities market improvement Act (6 January 2003) to 4 January 2008, decides that the issued bonds, etc. are subject to the Bond Book-Entry Transfer Act, and each bondholder notifies the book-entry transfer institution of their intention to be a holder of account bonds. See *ibid.*, 57-61, for details of this procedure.

72 KANDA, *supra* note 42, 9.

73 See TAKAHASHI / OZAKI, *supra* note 45, 77-83.

JASDEC) by consent of the issuers (Art. 13 (1)).<sup>74</sup> Shares issued based on foreign law cannot, however, be objects of the share-book-entry transfer system, even though they meet the foregoing three requirements. This is because the relationship of rights and obligations could be unstable and equivocal, as rights related to corporate interests are of importance in shares, let alone the smooth circulation of shares.<sup>75</sup>

Finally, one thing to notice is that account shares in their nature are, as emphasised above, the same as shares outside the share-book-entry transfer system. The only differences are the method used to transfer, pledge or establish a trust of them, and other practical procedural matters due to the characteristics inherent in the share-book-entry transfer system that will be discussed below.

## 2. System Structure, Players and Book-Entry Transfer Account Book

### a) The System Structure and the Players

One of the main features of the new book-entry transfer system is its multi-tier structure. As the CSD for account securities, JASDEC, other than government bonds for which the Bank of Japan is the CSD, is positioned at the peak of the hierarchy. Under the terminology of the new Book-Entry Transfer Act, JASDEC is called a book-entry transfer institution, and multiple book-entry transfer institutions may exist from the legal point of view. Currently, JASDEC is the only designated institution to do the business as a book-entry transfer institution.<sup>76</sup> Intermediaries are named as account management in-

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74 According to the new Companies Act, two kinds of corporations are possible. One is, by default, a corporation issuing uncertificated shares; the other a corporation issuing certificated shares. The former corporation, issuing uncertificated shares, can decide to join the share-book-entry transfer system by resolution of the Board of Directors (Art. 128 (2) of the new Book-Entry Transfer Act). Therefore, there result three kinds of corporations: a certificated share corporation, an uncertificated share corporation in the book-entry transfer system, and an uncertificated share corporation outside of the book-entry transfer system. The certificated share corporation can dematerialise its share certificates through the share certificate non-holding regime (Art. 217 Companies Act). Once an uncertificated share corporation becomes an uncertificated share corporation within the book-entry transfer system, the corporation cannot voluntarily come out of the system, and only if the shares of the uncertificated corporation are not to be dealt with in accordance with the business rule of the book-entry transfer institution, the corporation in the system becomes an uncertificated corporation outside the book-entry transfer system (Art. 13 (3) of the new Book-Entry Transfer Act). However, the uncertificated share corporation in the book-entry transfer system may amend its articles of incorporation, and become a certificated share corporation (see *ibid.*, 18-19), in which case book-entry records in securities accounts become meaningless (see *ibid.*, 44).

75 See *ibid.*, 38. Depositary receipts (DRs) and covered warrants, which have no statutory rules to issue them, are also not eligible for being account securities. On the other hand, foreign corporate bonds are eligible for the new book-entry transfer system, Art. 2 (1) (k).

76 Art. 3 stipulates the requirements to be designated as a book-entry transfer institution by the competent minister. A book-entry transfer institution should be a stock corporation, Art. 3 (a). The capital has to be over JPY 500,000,000, Art. 5 (2).

stitutions, which are defined as ones that opened securities accounts with the book-entry transfer institution (i.e. CSD) or another intermediary, in order to make book-entry transfers for others in accordance with the requests of others (Art. 44).<sup>77</sup> As the CSD can be multiple, a CSD can be an intermediary when it opens an account with another CSD for the book-entry transfer business (Art. 2 (4)).<sup>78</sup> Participants (i.e. investors) are the ones that opened a securities account with the CSD or an intermediary (hereinafter: “CSD, etc.” for both of the institutions) for the book-entry transfer of account securities (Art. 2 (3)). The structure and the players of the new system can be illustrated by the following *Figure 1*.

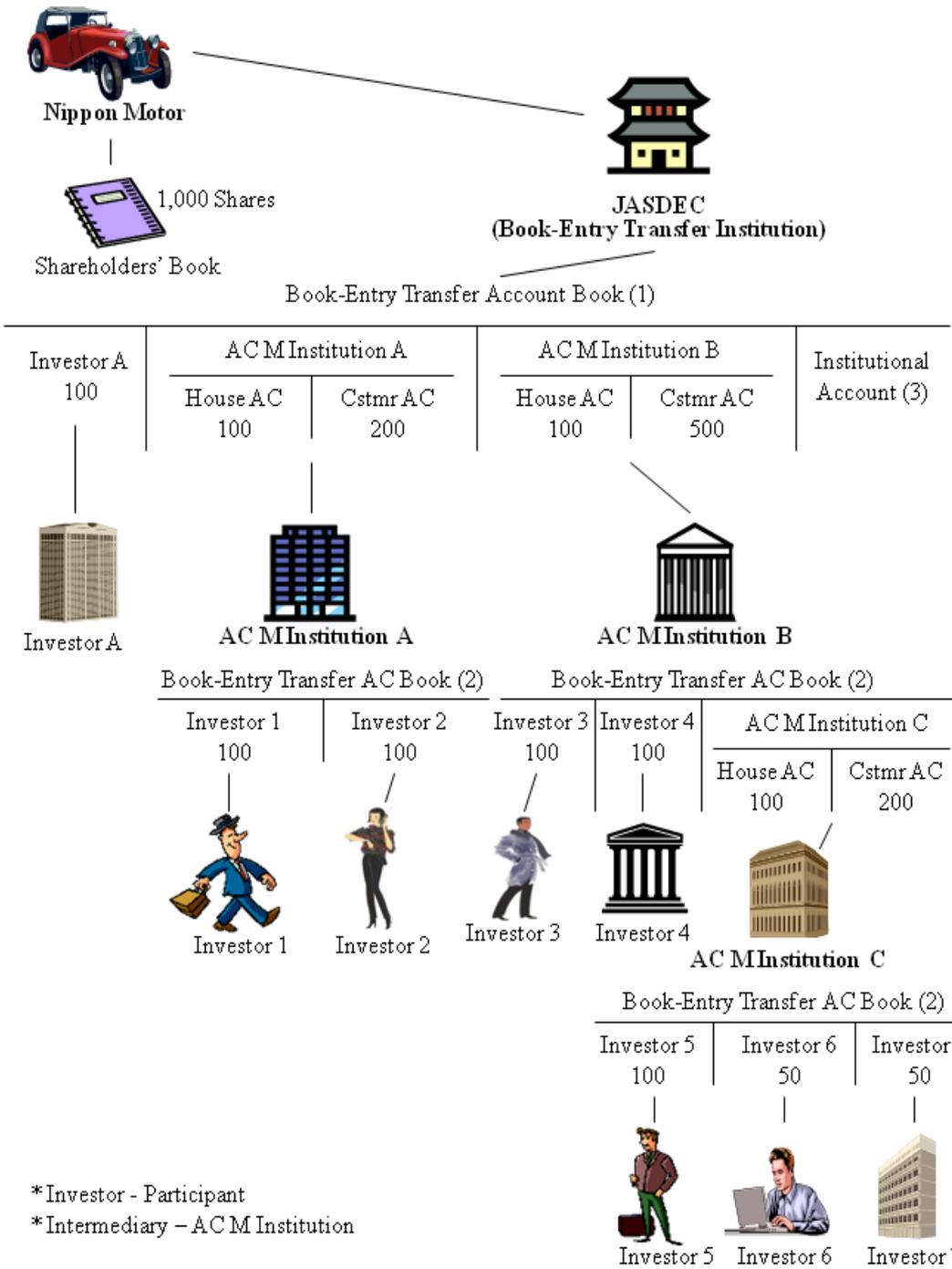
*Figure 1 (opposite page):*

**System Structure, Players and Securities Accounts**

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77 Art. 44 (1) enumerates the ones that can be an intermediary. Especially, Art. 44 (1) (m) sets forth that a foreign intermediary can be an account management institution if the foreign intermediary has a license from, made registration in, or received other measures from, its home country for the book-entry business, and is designated by the competent minister. However, it is understood that a natural person cannot be an intermediary.

78 The Hague Securities Convention defines an intermediary as “a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity”, Art. 1 (1) (b). A CSD is also regarded as an intermediary according to Art. 1 (4). The UNIDROIT Convention on Substantive Rules for Intermediated Securities of 9 October 2009 (“Geneva Securities Convention”) has the same definition in substance, and clearly includes a CSD in the definition of an intermediary, Art. 1 (d).



b) *The Book-Entry Transfer Account Book*

Since imputation, transfer, and pledge, etc. of account shares are determined by the record to the book-entry transfer account book (“account book”), the account book plays a key role in the new book-entry transfer system. Articles 12 (3) and 45 (2) respectively provide that the CSD, etc. must maintain the account book. Except for the two kinds of account books maintained by the CSD and Intermediary A, B and C in *Figure 1*, the CSD keeps the institutional account to which the CSD transfers account securities for the purpose of performing the obliteration duty in the case of inflation of the sum total in the securities accounts (Art. 12 (2)).<sup>79</sup> Unlike account bonds, the issuers open the special accounts for the shareholders or registered pledgees who did not notify the issuers of their own securities account. This is because in the case of shares, outstanding shares should be included in the new intermediated system, and this is also due to the shareholders who possess share certificates by themselves at home or elsewhere but did not deposit them before the commencement date of the new share-book-entry transfer system, i.e. before 5 January 2009.<sup>80</sup> When a shareholder wants to transfer shares in the special account, the shareholder has to first open a normal securities account with an intermediary and then transfer those shares to the (newly opened) account (Art. 133).

Accounts of intermediaries are in turn divided into two accounts: a house account (*jiko-guchi*), which indicates the numbers of their own account shares, and a customer account (*kokyaku-guchi*) in which the total numbers of investors’ account shares are recorded as an omnibus account. This segregation accounting is, of course, to protect investors’ account securities from their intermediary’s insolvency. If an investor is an intermediary for other investors (“indirect intermediary”),<sup>81</sup> then its immediate upper-positioned intermediary also has to maintain these two accounts. Intermediary B and Intermediary C in *Figure 1* are in such a relationship. Intermediary A is called the common immediate upper-positioned institution (“common intermediary”) of Investor (i.e. participant) 1 and Investor 2. Intermediary B is the common intermediary of Investor 3, Investor 4 and Intermediary C. Intermediary C is also the common intermediary of

79 There is no institutional account for intermediaries because intermediaries can use their own house account with the CSD or their immediate intermediary (Intermediary B in the case of *Figure 1*).

80 Art. 131 provides for the specific procedures to open special accounts for shareholders whose securities account is unknown. The statistics show that more than 90 percent of outstanding share certificates were deposited before the commencement date; see K. NAGAOKA, *Dematerialised New System (2009) 5*, presentation material of ACG Cross-Training Seminar, available at [http://www.acgcsd.org/data/cross\\_training/11th/Presentation%20material/1Depository%20Model\\_8\\_Japan\\_JASDEC.ppt](http://www.acgcsd.org/data/cross_training/11th/Presentation%20material/1Depository%20Model_8_Japan_JASDEC.ppt).

81 According to Art. 2 (n) of the business rule for book-entry transfer of shares, etc. of JASDEC, it is named as an indirect account management institution, and has to get approval from JASDEC to be an intermediary, though it does not open an account with JASDEC. The intermediaries that opened their securities account with JASDEC are called direct account management institutions (Art. 2 (m); “direct intermediary”).

Investor 5, Investor 6 and Investor 7. Investor A, Intermediary A and Intermediary B have JASDEC as their common intermediary.

Except for customer accounts that are omnibus accounts for investors' securities, each account is largely composed of a holding column (*hoyū-ran*) and a pledge column (*shitsuken-ran*). Due to the fact that the record of the pledgor as a shareholder in the pledge column has no effect of rights presumption, when the number of encumbered account shares of the pledgor as shareholders in the securities account of the pledgee is wrongfully recorded, no BFA comes into being.<sup>82</sup> However, if the number of encumbered account shares in the pledge column of the pledgee is wrongfully inflated and those pledged account shares are transferred to another investor, then the investor becomes a *bona fide* acquirer, and the intermediary which made the wrongful record becomes the pledgor for the inflated and innocently acquired account shares.<sup>83</sup> Of course, the negligent intermediary has the duty to acquire as many inflated account shares and to declare its intention to waive all rights with respect to the acquired account shares against the issuer as discussed below.

Article 129 (3) (f) requires the CSD, etc. to record the corresponding date and number of daily credits and debits in the account books. This is to ensure that minority shareholders can exercise their rights, where Companies Act requires some period of continuous holding as in the case of the shareholder's right to proposal (Art. 303) or the shareholder's right to claim injunction of the acts of a director (Art. 360), both of which require consecutive holding for more than six months.

Finally, some shares that are prohibited to be purchased by foreigners are separately recorded.<sup>84</sup>

### 3. *Book-Entry Transfer, Pledge and Trust*

A transfer of account shares takes effect when the transferee receives a credit record germane to the transfer to the holding column in the transferee's securities account, upon the application for a book-entry transfer by the transferor (Art. 140). Likewise, in the case of a pledge, the encumbrance of account shares takes effect when the pledgee, upon the application for a book-entry transfer by the pledgor, receives a credit record pertinent to the encumbrance of the pledge's subject matter to the pledge column in the pledgee's securities account.

The procedure of book-entry transfer begins with an application of a book-entry transfer by the transferor to the intermediary and a debit record to the transferor's account (Arts. 132 (2), 132 (5) (a)), and ends with a credit record to the transferee's account. When the transferor and the transferee do not have their accounts with the

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82 TAKAHASHI / OZAKI, *supra* note 45, 86-87, 138, 141.

83 See *ibid.*, 141-142.

84 Art. 28 (2) of the Enforcement Ordinance of the new Act. See KANDA, *supra* note 42, 427-445, for the related details.

common intermediary, then the transferor's intermediary notifies its upper-tier intermediary of the details of the book-entry transfer, and this notification continues on to the transferee's intermediary. Suppose that Investor A transfers 100 shares of Nippon Motors to Investor 5 in *Figure 1*. Then, Investor A requests its intermediary, JASDEC, to transfer such shares to Investor 5. JASDEC notifies Intermediary B of the details of the transfer, after debiting 100 shares from Investor A's account and crediting 100 shares to the customer account of Intermediary B. Intermediary B, in turn, notifies Intermediary C, which maintains the account of the transferee, Investor 5, of the details of the transfer, while crediting 100 shares to Intermediary C's customer account. Finally, at the stage of Intermediary C the procedure of transfer is finalised by a credit record of 100 shares to Investor 5's account. In the case of a pledge, the same process applies.

With respect to the method of book-entry transfer and pledge of account shares, the following is noticeable. First of all, the methods of book-entry transfer and pledge correspond to those of certificated shares and the general theory of securities certificates.<sup>85</sup> In addition, it is generally understood that the theories of civil law, such as the theory of a juristic act or a declaration of intention, are still applicable to transactions of account shares.<sup>86</sup> Second, in relation to the first matter, it is important to consider how the phrase "upon the application for book-entry transfer" could be interpreted. In general, the meaning of the phrase is understood that an application for book-entry transfer premises an agreement of the contract parties with respect to the transfer.<sup>87</sup> Therefore, a book-entry made without an application for book-entry transfer or pledge is invalid.<sup>88</sup> However, it is not quite clear whether the credit record to the transferee's account is cancellable or voidable, though there was an application for book-entry transfer, when

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85 The commentary on the CP Book-Entry Transfer Act explains that "in this system, a credit record itself to the transferee's account pursuant to a transfer contract and an application of book-entry transfer is made as the validity requirement and the assertion requirement *against the issuers and third parties* in order to promote the circulation of corporate bonds to the extent of the case where bond certificates are issued (italics added)." See TAKAHASHI, *supra* note 27, 168. See also E. KURONUMA, *Shasai-tō no furikae ni kansuru hōritsu ni tsuite* [On the Act of Book-Entry Transfer of Corporate Bonds, etc.], in: Shōken Torihiki-hō Kenkyū-kai (ed.), *Shōken no pēpāresu-ka no riron to jitsumu* [Theories and Practices of Securities Dematerialisation], Bessatsu Shōji Hōmu 272 (2004) 6, stating that "it is based on the thought that the validity requirement of a book-entry transfer is nothing but the same effect to the delivery of bond certificates".

86 Professor Kuronuma clearly pinpoints this matter, mentioning that "after all, in the case of the method of rights transfer, as the premise of dematerialisation it is necessary to set forth the method of rights transfer by a statutory law, because the theory of securities certificates cannot be employed any more ... the theories of a declaration of intention or the theories of a juristic act are still borrowed as to the principle of rights transfer; see SHŌKEN TORIHIKI-HŌ KENKYŪ-KAI, *supra* note 46, 86.

87 KURONUMA, *supra* note 85, 6.

88 This interpretation may be possible based on the provision of Art. 140. See also TAKAHASHI/NAGASAKI/MAWATARI, *supra* note 41, 180-181.

the underlying contract comes to be cancelled or void due to defects in the juristic act with regard to the transfer contract. If the viewpoint that a credit record preconditions the theory of a juristic act is taken, it seems that the credit could be revocable or voidable. This is the same debate regarding the causality or abstractness of a proprietary disposition with respect to a contractual agreement in the country of the Germanic legal tradition. In other words, it can be said that the main issue here is whether even a defective application for book-entry transfer is effective against the intermediary. If a positive answer is taken, account shares are transferred to the transferee, even if the underlying contractual agreement is invalid, and the matters between the transferor and the transferee are treated as unjust enrichment.<sup>89</sup> On the other hand, when the defective application is invalid due to the lack of a valid agreement of transfer, it has such a meaning that two different requirements, i.e. a valid contractual agreement and an application, are necessary for the validity of a book-entry record.<sup>90</sup> In a case where any or both of the requirements are lacking, a book-entry made to the transferee's account is revocable or voidable. In the former position, it is merited that settlement finality can be ensured, because it is not allowed to revoke a book-entry transfer for the reason of a defect of a declaration of intention,<sup>91</sup> and from the practical viewpoint, intermediaries can do their business with certainty. In this opinion, however, it is difficult to understand and to explain how account shares can be transferred only by a book-entry record, coupled with the problem that such a test is far from the current doctrines of Japanese civil law.<sup>92</sup> It is said that the drafters' opinion is in the consideration of a two-stage test.<sup>93</sup> The other side of this debate can be understood as a question of whether settlement finality can be ensured by cutting off revocation in a chain of transactions. Since settlement finality can be ensured through the BFA rule, the issues between the transferor and the transferee are thought to be outside the intermediated system. This is because if the transferee did not transfer to others the account shares received from the transferor, the transferor can still take the shares back through another transfer order,<sup>94</sup> proving the defect of the contract or the juristic act. However, if the shares have already been transferred to a *bona fide* acquirer, then the transferor has no other way but to request monetary damages to the transferee as unjust enrichment. Given that no intermediary, in principle and in industry practice, asks a transferor whether there is a valid transfer contract, this debate seems to be restricted to contractual parties who know each other.

In the new share-book-entry transfer system, in terms of a pledge, two matters are different from the old custody and book-entry transfer system. While in the old system a

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89 KURONUMA, *supra* note 85, 21 (discussion of Professor Kuronuma and Professor Suzaki).

90 *Ibid.* (the remark of Professor Kuronuma).

91 SHŌKEN TORIHIKI-HŌ KENKYŪ-KAI, *supra* note 46, 85 (presentation of Professor Kuronuma).

92 *Ibid.*

93 *Ibid.*, 86.

94 If there is still a controversy regarding the defect of the juristic act or the contractual agreement, the transfer order could usually be made by a court decision.

registered pledge (*tōroku shichi*) was not available, and a pledge was established in the pledgor's account, in the new system a registered pledge is recognised and the name of the pledgee and other details of the pledge are notified to the issuer when the general shareholders notification is made (Arts. 151 (3), 151 (4)). If a pledge is an informal pledge (*ryakushiki shichi*), the information on the pledge is not notified to the issuer, in order to secure the pledge's anonymity.<sup>95</sup> In the new system, a pledge is attached and perfected when the pledgee receives in the pledgee's account a credit record germane to the pledge (Art. 141).

A trust can be set up and is enforceable against third parties when a record of the purport that certain account shares are subject to a trust estate is made in the trustee's account of the trust (Art. 142).

#### 4. *Bona fide Acquisition and Inflated Record*

##### a) *Presumption of Rights and the BFA*

Investors are presumed to legitimately have rights in respect of account shares recorded to their account (Art. 143). The "rights with respect to account shares" are typically shares themselves, pledge interests and, as an exception, title transfer interests by way of security.<sup>96</sup> This presumption implies that the way of thinking of the new Book-Entry Transfer Act is to record validly issued shares as its precondition.<sup>97</sup>

As discussed above, the transferee in good faith and without gross negligence acquires the account shares recorded to the transferee's account, resting on the presumption of rights of the transferor.<sup>98</sup> Generally, the *bona fide* acquisition (BFA) arises in two cases.<sup>99</sup> In *Figure 1*, for example, assume that Investor 3 requests Intermediary B to transfer 100 shares to Investor 5, but Intermediary B, after debiting 100 shares from Investor 3's account, mistakenly credits 100 shares to Investor 4's account instead of Intermediary C's customer account, and then Investor 4 transfers all of its 200 shares to innocent Investor 6. In this case, Investor 6 acquires 100 shares as derivative acquisition

95 TAKAHASHI/OZAKI, *supra* note 45, 158.

96 TAKAHASHI, *supra* note 27, 174. Art. 143 of the new Act is a corresponding provision to that of share certificates (Art. 131 (1) Companies Act), which specifies that "a possessor of share certificates shall be presumed to legitimately have rights of the shares with respect to such share certificates". See *ibid.*, 173-174 for the reasons to set forth this provision.

97 SHŌKEN TORIHIKI-HŌ KENKYŪ-KAI, *supra* note 46, 86 (Presentation of Professor Kuronuma). In this regard, dematerialisation in the new Book-Entry Transfer Act is not at the stage of rights creation, but at the stage of certificates issuance; see X. CUI, *Pēpāresu riron – kokusai, shasai, kabushiki o chūshin ni* [Legal Theory on Paperlessisation (3)], in: Ritsumeikan Hōgaku 305 (2006) 32.

98 As to the discussion on the object of confidence, see the discussion above, IV. Legal Features of the New Book-Entry Transfer System.

99 TAKAHASHI/OZAKI, *supra* note 45, 139. See also KURONUMA, *supra* note 85, 7-8; and SHŌKEN TORIHIKI-HŌ KENKYŪ-KAI, *supra* note 46, 97-99.

and 100 shares as the BFA. In the second case, which is known as the case of “something created out of nothing” (*mu kara yū ga shōjiru*), suppose that 100 shares are credited to Investor 1 because of a malfunction of the computer system, or a mistake of Intermediary A, and the total number of Investor 1’s shares becomes 200. Furthermore, assume that Investor 1 transfers 150 shares to Investor 5, who is in good faith and without gross negligence, and as a result, Investor 1 holds 50 shares and Investor 5 holds 250 shares. In this case, it might be interpreted that Investor 5 acquired 100 shares as derivative acquisition and 50 shares as the BFA.<sup>100</sup>

These two kinds of BFAs were also recognised in the old custody and book-entry transfer system,<sup>101</sup> but the second case of the BFA has a different meaning in the new book-entry transfer system. In the new system, if the second case of the BFA occurs, the total shares outnumber the shares in the shareholders’ book, and Intermediary A, the intermediary that caused the inflation, has the duty to acquire the inflated shares and to obliterate them. In the old system, however, when the second case happened, theoretically all the co-ownership interests of investors holding such wrongfully recorded shares were proportionally decreased, except for the shares acquired by the BFA and the CSD; in reality, all the intermediaries with a customer (i.e. investor) had the strict liability to jointly and severally make up for the loss in order to protect investors in the system.<sup>102</sup>

*b) Excess Record and Duty of the CSD, etc.*

When the second type of BFA takes place, triggering inflation of account shares, the CSD, etc. that is responsible for the wrongful excess record is obliged first, to acquire such over-recorded account shares (Arts. 145 (1), 146 (3)), second, to inform the issuer of its intention to waive all rights of such excess account shares (Arts. 145 (3), 146 (1))<sup>103</sup> and, third, to obliterate the record of the inflated account shares (Arts. 145 (5), 146 (5)). Intermediaries jointly and severally guarantee to their investors that they will fulfil the duty to acquire and obliterate excess account shares when their upper-positioned intermediaries do not perform this duty in its entirety (Art. 11 (2)). With respect to the liability structure, the responsible intermediary and only its lower-positioned intermediaries take up the duty. Therefore, it can be said that compared to the old system, the new book-entry transfer system has a “linearly immunised liability structure”. Since the acquisition and obliteration duty of the CSD, etc. is to promote harmony with the BFA

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100 The result differs depending on how to characterise the nature of the 250 shares of Investor 5. This issue arises due to the lack of specificity of account securities. Details are discussed below.

101 See Art. 25 of the old Custody and Book-Entry Transfer Act. See also TAKAHASHI, *supra* note 27, 186-190; TAKAHASHI/NAGASAKI/MAWATARI, *supra* note 41, 24; and SHŌKEN TORIHIKI-HŌ KENKYŪ-KAI, *supra* note 46, 86-87.

102 See *ibid.*

103 With the declaration of the intention to waiver, the rights of such account shares are extinguished, Art. 145 (4).

rule, it is a strict liability.<sup>104</sup> In practice, other than the provisions of Articles 145 through 148, the issuers, the CSD and intermediaries are supposed to collate the numbers of account shares in the book-entry transfer account books with shareholders' books each day in order to prevent excess recording.<sup>105</sup>

In calculating the number of shares to acquire, when it is proven that wrongfully recorded account shares are not acquired by anyone, such account shares wrongfully recorded but not yet transferred are not included in the number of shares to be acquired by the liable intermediary (Arts. 145 (2), 146 (2)). In this case, the intermediary can just correct the number of over-recorded account shares.

If the acquisition and obliteration duty is not carried out, the excess account shares cannot be effective against the issuer until the duty is fully performed (Arts. 147 (1), 148 (1)). This means that investors holding such account shares with the negligent intermediary and its lower-positioned intermediaries cannot exercise their rights against the issuer, proportionally to the extent of the number of the excess account shares.<sup>106</sup> In this case, account shares with different contents of rights come to exist in the system. The negligent CSD, etc. with the duty to acquire and obliterate excess account shares has the duty to compensate the damage of account shareholders who suffered the prevention of exercise of rights against the issuer (Arts. 147 (2), 148 (2)).

It is desirable to obviate a decrease in the voting right because such shrinkage is not easily and fully compensated for its damage, and because the exercise of the decimal point's voting right<sup>107</sup> could aggravate the workload of the issuer, and could cause confusion in the operation of the shareholders' meeting.<sup>108</sup> Hence, if the CSD, etc. bearing the acquisition and obliteration duty performs all of the duty against the issuer within two weeks after the general shareholders notification, and if the shareholders ("notified certain shareholders") who are notified to the issuer as shareholders regarding the excess account shares acquired by the CSD, etc. indicate to the issuer their intention to relinquish all the rights of such excess account shares within two weeks after the general shareholders notification, other shareholders of the once negligent CSD, etc. having the

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104 TAKAHASHI, *supra* note 27, 185.

105 See KANDA, *supra* note 42, 189.

106 In other words, reduction of rights arises. It is not a decrease of account shares as in the case of the old Custody and Book-Entry Transfer Act. In the case of corporate bonds, the responsible CSD, etc. bear an obligation to redeem the principal and to pay the interests on behalf of the issuer, Arts. 80 (2), 81 (2). It is understood that the responsible CSD, etc. assumes the obligation for the excess account corporate bonds, discharging the bond issuer from the obligation; see TAKAHASHI, *supra* note 27, 192-193; see also TAKAHASHI/OZAKI, *supra* note 45, 145, 149.

107 As an exception to the one-share/one-voting-right principle, the voting right of the decimal point is acknowledged in the case of the rights reduction, Art. 153.

108 TAKAHASHI/OZAKI, *supra* note 45, 146.

acquisition and obliteration duty can retroactively exercise their voting rights<sup>109</sup> without diminishment (Arts. 147 (3), 148 (3)).<sup>110</sup> Furthermore, when all the acquisition and obliteration duty is carried out, the minority shareholders' rights that require some consecutive period of holding such as the shareholder's right to proposal (Art. 303 Companies Act) can be exercised as if there were no interruption in the consecutive holding. This is an exception to the consecutive holding computation (Arts. 147 (4), 148 (4)). Finally, in order to expedite the fulfilment of the acquisition and obliteration duty, the issuer can dispose of its treasury shares with a fair price to the duty bearer (Arts. 147 (6), 148 (6)).

## 5. *General and Individual Shareholders Notification*

### a) *General Shareholders Notification*

Records on the book-entry transfer account book do not have a status equivalent to those on the shareholders' book maintained by the issuer. In principle, the shareholders recorded in the shareholders' book can exercise their rights against the issuer. Therefore, the issuer needs a procedure to identify the shareholders with voting rights, dividends, or other collective shareholders' rights by updating and preparing the shareholders' book. From the issuer's viewpoint, the general shareholders notification is the very procedure to update shareholders in the shareholders' book on the record date set for the collective shareholder's rights (Art. 152).

The CSD should immediately notify the issuer of each shareholder's name, the number of shares each shareholder holds, the registered pledgee, the collateral provider by way of a title transfer and other items stipulated in Article 151 when the issuer notifies the CSD of the record date for the voting rights (Art. 151 (1) (a)), the effective date of the share merger (Art. 151 (1) (b)), the date for the interim dividend (Art. 152 (1) (d)), or the record date set by a court for the corporate rehabilitation (Art. 151 (1) (g) of the new Act and Art. 39 of the Enforcement Ordinance of the new Act), when all of the certain class of account shares are obliterated (Art. 151 (1) (c)), when the CSD's designation is repealed or ineffective and there is no successive CSD (Art. 151 (1) (e)), or when a certain class of account share does not come to be dealt with by the CSD (Art. 151 (1) (f)). Other than the normal general notification of shareholders,<sup>111</sup> when the issuer has a

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109 This exception applies not only for the voting right but also for all collective shareholders' rights of Art. 124 (1) Companies Act other than the individual shareholder's rights, such as the minority shareholder's right, etc.

110 The same applies when the liable CSD, etc. acquires and obliterates the excess account shares from the issuer or the shareholder specified in Art. 308 (1) Companies Act, or when the acquired excess account shares are shares less than the unit and the record date is set only for determining the persons exercising voting rights; see Arts. 147 (3) (a)-(d), 148 (3). The reason is that these shares do not have voting rights.

111 In principle, it was two times a year that the CSD notified the issuers of the details of their shareholders in the old custody and book-entry transfer system. It seems that such a prin-

proper reason it can ask the CSD for the notification of shareholders with payment for the extra notification (Art. 151 (8)). In addition, the issuer can make a request to the CSD, etc. for the holding details of a certain shareholder with a payment when it has a proper reason (Art. 277 of the new Act, Art. 61 of the Enforcement Ordinance of the new Act).<sup>112</sup> This right to request holding information is different from the case of the general shareholders notification according to necessity, in the respects that the issuer should request of the CSD or an intermediary which maintains the account of the specific investor about whom the issuer wants to know, and that the information provided by the CSD or an intermediary is limited to such a specific investor.

Detailed information on shareholders is collected and notified from the bottom intermediaries of the tier structure to their immediate upper-positioned intermediary, and is in turn compiled and notified at each tier up to the CSD.

*b) Individual Shareholders Notification*

Shareholders frequently change on the securities market. Investors with newly purchased shares who want to exercise their rights as shareholders against the issuer have no proper way to prove their status as shareholders to the issuer because the shareholders' book is updated by the general shareholders notification in the fully dematerialised system. In the old custody and book-entry transfer system, investors could withdraw share certificates if they wanted and register them on the shareholders book, but this is impossible in the new book-entry transfer system. The individual shareholders notification is designed to fill this gap and to bridge new investors to the issuer as shareholders. Besides, as even the existing shareholders' holding status is changeable, the issuer needs to identify the exact, updated number of shares that a shareholder holds and to check whether the shareholder meets certain requirements when the shareholder tries to exercise her rights against the issuer. For these reasons, Article 154 of the new Act opens a way for shareholders to exercise their rights against the issuer whenever they want by excluding the enforceability requirement of registration *vis-à-vis* the issuer as a shareholder on the shareholders' book under Article 130 (1) Companies Act.<sup>113</sup>

If shareholders want to make use of this scheme, they first ask their immediate intermediary, and the request goes along the tier line up to the CSD with the details of their holding status and other relevant information (Arts. 154 (4), 154 (5)). The CSD then

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ciple continues in the new book-entry transfer system; see TAKAHASHI / OZAKI, *supra* note 45, 159.

112 Investors and other interested parties also have a right to request information recorded to *their own account* (Art. 277). Art. 61 of Enforcement Rule enumerates who the interested parties and the issuer are.

113 The legal nature of the individual shareholders notification is understood as an enforceability requirement against the issuer; see A. ONO *et al.*, *Kabuken denshi-ka kaishi-go no kaishaku-jō no sho-mondai* [General Interpretive Issues after the Commencement of the Electronisation of Share Certificates], in: Shōji Hōmu 1873 (2009) 52.

notifies the issuer of the shareholders' names, addresses and the number of shares with the daily balance and the date, etc. without delay. The information on the daily balance and the date is required to calculate the consecutive holding requirement of certain minority shareholders' rights. The applicant shareholders should exercise their rights within four weeks from the notification (Art. 40 of the Enforcement Ordinance of the new Act). However, there is no restriction regarding whether the applicant shareholders can sell their shares even right after the notification.<sup>114</sup>

c) *Skeletonisation of the Shareholders' Book*

The issuer is obliged to record in the shareholders' book the details given through the general shareholders notification. The shareholders' book is not changed at all by the individual shareholders notification or by the information provided pursuant to Article 277 of the new Book-Entry Transfer Act because account shares have no specificity, and the issuer cannot know from which shareholder on the shareholders' book the notified investor acquired the shares.<sup>115</sup> The general shareholders notification is the unique channel for the issuer to update and maintain its shareholders' book under the new Act (Art. 152 (1)).<sup>116</sup> Because in principle, the general shareholders notification is supposed to be done twice a year, if there is no other specific corporate action, or if the issuer does not request the general shareholders notification with a legitimate reason, the shareholders' book is always unreliable and its usefulness is only for a one-time corporate action such as voting rights, dividends, rights issues, etc. This phenomenon became very conspicuous due to the individual shareholders notification scheme. Under the normal corporate scheme of the shareholders' book, shareholders can exercise their rights if their names are on the shareholders' book, without further proving their status as shareholders. However, what the individual shareholders notification regime implies is that no shareholder on the shareholders' book has a position to exercise their rights against the issuer without the individual shareholders notification. The issuer, however, could recognise a shareholder in the shareholders' book without the individual shareholders notification.<sup>117</sup> This problem could result in the issue of information asymme-

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114 In a similar regime in Korea, when a shareholder requests the actual shareholder certificate, the intermediary of the applicant shareholder locks up any disposition during the period of the shareholders' right. If a shareholder wants to dispose of shares during the period, the shareholder may do that only after returning the actual shareholder certificate (Art. 32 of Enforcement Rule of Capital Market and Financial Investment Businesses Act).

115 TAKAHASHI/OZAKI, *supra* note 45, 165.

116 According to the sentence of Art. 152 (1) only, it is not quite clear that the general shareholders notification is the only way to maintain the shareholders' book. As the structure of the sentence is that the obligation to record the information in the shareholders' book is at the time when the issuer receives the general shareholders notification, from the position of the issuer it could still change the details of the shareholders' book if it can identify who the transferor and the transferee are.

117 One opinion is that the issuer could discretionally recognise the rights exercise of a shareholder under their responsibility and decision, even if there is no individual shareholders

try. The issuer could identify whoever the shareholders are through the general shareholders notification under Article 151 (8) or the right to request certain shareholders' details under Article 277, if the issuer has a legitimate reason and pays for the request. However, shareholders could merely implement the "exercise of their rights" with no right to identify updated shareholders. In other words, for example, shareholders can exercise their right to view the shareholders' book, but they would recognise that it contains untrustworthy and stale information on shareholders.<sup>118</sup>

The best way to correct the problem of the one-time use of the disposable shareholders' book is to reconcile the shareholders' book with the book-entry transfer books on a daily basis.<sup>119</sup> Another option is to deem the records of book-entry transfer books as those of the shareholders' book, but it might be hard for the issuer to accept it, because the issuer cannot know which shareholders are in the book-entry transfer books.<sup>120</sup>

## V. ISSUES INVOLVED IN SPECIFICITY

### 1. *Computation of Shares in the BFA and in the Minority Shareholders' Rights*

What is managed in the new share-book-entry transfer system is numbers of shares investors hold. The numbers (i.e. rights) have no specificity,<sup>121</sup> but the new Book-Entry Transfer Act applies similar rules of rights *in rem* to intangible conceptual numbers in the book-entry transfer account books; therefore, it raises the problem of how to calculate the number of account shares in the case of the BFA and the minority shareholders' rights, which require a consecutive period of holding.

First, for the case of the BFA, let's get back to the example given above in IV.4.a) (Presumption of Rights and the BFA). In the second example, it was assumed that Investor 1 comes to hold 200 shares due to malfunction of the IT system, and transfers 150 shares to Investor 5, who holds 100 shares. As a result of the second type of the BFA, it was explained that Investor 5 acquired 100 shares by derivative acquisition and 50 shares by the BFA. However, how can we know which shares Investor 1 transferred?

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notification; see ONO *et al.*, *supra* note 113, 58, n. 2. This is because the legal nature of the individual shareholders notification is the enforceability requirement to exercise a right against the issuer, which has a legal capacity to accept the exercise of the right according to the contrary interpretation thereof.

118 This assertion might differ depending on the scope of to what extent the right to view the shareholders' book is allowed.

119 See SHŌKEN TORIHIKI-HŌ KENKYŪ-KAI, *supra* note 46, 138, where Professor Kuronuma mentions that ideally daily notification is desirable if the technological problem is overcome.

120 *Ibid.*, 139 (Statement of Professor Maeda).

121 In the old custody and book-entry transfer system, what investors hold also had no specificity because they were co-proprietary interests in deposited securities certificates. Therefore, specificity is not a new issue of the new book-entry transfer system.

If we assume that Investor 1 transferred 100 shares that were wrongfully recorded and 50 shares that he originally held to Investor 5, then the result could be opposite and Investor 5 would acquire 50 shares by derivative acquisition and 100 shares by the BFA. Depending on the interpretation, the number of shares that Intermediary A has to acquire and obliterate could be significantly different. It is explained that the former interpretation – i.e. the first-in-first-out test – is reasonable because it is a matter of interpretation of intention, and it should be interpreted that the shares which a transferor can legitimately transfer are first transferred,<sup>122</sup> and that shareholders normally sell from what they had.<sup>123</sup> Besides these reasons, in the case of the BFA, the first-in-first-out test should be taken because, more fundamentally, the responsible intermediary's burden should be mitigated, and the risk of rights reduction should be minimised as much as possible, whereby the whole system integrity could be maintained.

Second, in the case of the minority shareholders' rights, it is thought that the test should be opposite, in the sense that the minority shareholders' rights should not be hindered by issues inherent in the system. For better understating, further assume that Investor 5 now sells some of the 250 shares, which have been held for more than six months. On Day 1, Investor 5 sells 150 shares, on Day 2 Investor 5 buys 150 shares, on Day 3 Investor 5 sells 100 shares again, and Investor 5 holds 150 shares on Day 4. Further, assume that on Day 5 Investor 5 applies for the individual shareholders notification to exercise the shareholders' right to proposal. If the first-in-first-out test is taken, Investor 5 has no shares to meet the requirement of the continuous six-month holding, because on Day 1 and Day 3 Investor 5 sold all of the 250 shares that met the requirement. However, if the first-in-last-out test is employed in this case, Investor 5 can have 100 shares eligible for the right to proposal.

Currently, there is no statutory provision that addresses these issues, though it is a critical matter that affects intermediaries' duty and shareholders' rights. It is thought that such tests should be included at least somewhere in a regulation or a rule.

## 2. *Different Kinds of Account Bonds and Account Shares*

Where an intermediary wrongfully or without negligence makes an excess record, and such over-recorded account securities are transferred to a *bona fide* acquirer, the intermediary and its lower-tier intermediaries jointly and severally bear the duty to acquire all of the inflated account securities, to declare to the issuer its intention to waive all the rights with regard to the excess account securities, and to obliterate all of them. However, if the intermediaries – i.e. the intermediary that caused the excess record – and its lower-positioned intermediaries do not carry out their duty, then rights with respect to the excess account securities cannot be exercised against the issuer, and the

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122 KURONUMA, *supra* note 85, 22 (the remark of Professor Maeda).

123 *Ibid.* (the remarks of Professor Kuronuma).

rights are proportionally curtailed to the extent of the excess amount or number of account securities until they perform all of the duty. In this case, if the excessively recorded securities are account bonds, the intermediaries should, in lieu of the bond issuer, pay the principal and the interests of the over-recorded bonds to the account bondholders, whose rights are proportionally abridged, discharging the bond issuer's obligation. If the excessively recorded securities are account shares, the intermediaries have to compensate any damage caused by such a rights reduction.

In the case of the non-performance of the acquisition and obliteration duty, there can be normal account bonds and excess account bonds, and the latter's contents of rights are considerably different from the normal account bonds. In the event of the issuer's insolvency, the investors holding excess account bonds can still exercise their rights associated with the excess bonds to their intermediary in spite of the issuer's insolvency, while the investors holding normal account bonds could just participate in the insolvency proceedings of the issuer as general creditors. Even in the case of the insolvency of their relevant intermediary, as are the investors holding normal account bonds, the investors holding excess account bonds are guaranteed of their payment up to JPY 10 million by the participant protection trust.<sup>124</sup> In the case of excess account shares, the investors holding excess account shares can claim from their intermediary compensation of the damage caused by the fact that they could not exercise their rights. Until this point, the difference is acceptable, in that the issuer has no reason to take up the risk completely resulting from the intermediated system. However, in the case where the issuer goes insolvent and further, the responsible intermediaries become insolvent, the investors holding excess account shares are compensated by the participant protection trust not only for the damages caused by non-exercise of their rights but also for the excess account shares themselves.<sup>125</sup>

As a matter of fact, it is highly unlikely that these kinds of cases happen in reality, but it is not easy to logically explain why investors holding excess account securities are more protected than ordinary account securities holders. It is also difficult to explain how the legal nature of excess account securities could be understood.<sup>126</sup> Are they still securities or mere general claims against the intermediary, or mutants of original account securities? An answer could be given and disputed, but it is more important to admit that this regime should be understood as uneschewable when the new system was built up with a strictly matching structure which is originally applicable to identifiable,

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124 Art. 5 of the Enforcement Ordinance of the new Book-Entry Transfer Act.

125 Arts. 58 (t), 58 (u). Art. 60 provides the phrase "claim with regard to the damage a participant suffered because of her intermediary's wrongful record, etc.," and it seems that the claim includes excess account shares because excess account shareholders are inherently unable to participate in the issuer's insolvency procedure. However, it is not clear how the value of the excess account shares is computed.

126 According to Professor Kuronuma, it is said that in a strict sense, new bonds are not created, but similar rights to account bonds (*ruiji shasai-ken*) come into being, SHÖKEN TORIHIKI-HÖ KENKYÜ-KAI, *supra* note 46, 87.

tangible things to which the rules of rights *in rem* apply, coupled with the “second type of the BFA” which could in turn trigger the inflation of the total number of account securities, the acquisition and obliteration duty of the intermediary liable for the inflation, the joint and several surety of the liable intermediary’s lower-positioned intermediaries, proportional diminution of rights as to the account securities of the liable intermediary and its lower-positioned intermediaries during the period of non-performance of their duty, and the participant protection trust as a mitigation mechanism of such risk inherent in the new intermediated system structure – more precisely, embedded in the legal principle regarding account securities dispositions.

## VI. CONCLUSIONS

The date of 5 January 2009 marked a historic turning point in the Japanese book-entry transfer system. On that day, all of the listed corporations’ shares were dematerialised, and dispositions of such shares were to be made only by records on the book-entry transfer account book.

This article identified the following as the most outstanding features of the new book-entry transfer system: full dematerialisation of most investment securities, mandatory dematerialisation without an account securities holders’ option to be out of the dematerialised system, conceptual direct holding of account securities by each investor, actualisation of the legal theory as to account securities dispositions corresponding to or paralleling the rules applied to the dispositions of physical securities certificates, statutory recognition of the BFA rule, and the participant protection trust as a safety net and a risk mitigation mechanism. Among these characteristics, as the purpose provision (Art. 1) of the new Book-Entry Transfer Act makes clear, the focal point of the new Act is on the facilitation of the circulation of intangible account securities similar to that of physical securities certificates. Consequently, as the transfer rule of account securities, the new Act adopts the formal approach that a credit record should be made to the transferee’s account based upon the application of the transferor, together with a strictly matching debit record to the transferor’s account. In spite of the full dematerialisation, this legislation approach provides a considerably familiar legal environment for investors, intermediaries and other users of the new Act when compared with the traditional legal doctrine of *yūka shōken*, i.e. securities under Civil Code and Commercial Code.

In the application and interpretation of the new Book-Entry Transfer Act, there are, however, some issues that should be made more clear. As to the matter of abstractness of a disposition, this article is in favour of the causality approach together with more clear interpretation of the BFA rule. In connection with this, the requirements of the BFA – i.e. good faith and absence of gross negligence – should be more specific in their interpretation and approach. As to the issue of non-specificity, two opposite but reasonable computation tests were presented in the cases of the BFA and the minority share-

holders' rights. Finally, this article discussed the issue of different kinds of account securities as the result of inflation of account securities and non-performance of the acquisition and obliteration duty. This article concluded that it was an inevitable measure, in spite of some theoretical problems.

In sum, the new Book-Entry Transfer Act may be evaluated as a well-modernised regime compatible with the Geneva Securities Convention adopted in October 2009.<sup>127</sup> The new Act is also thought to be a safer, more efficient and more user-friendly law, which harmonises the traditional *yūka shōken* theory with regard to a disposition thereof and the novel dematerialised but long-lasting book-entry transfer practices of the securities industry. In this regard, the new Act could be a creative model to other countries of the Germanic legal tradition that consider a full dematerialised intermediated system.

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127 Since the new Act does not apply to cross-border transactions, the Geneva Securities Convention would be of good guidance for rules applicable to cross-border transactions. Especially in the countries that have different regimes for domestic transactions and international transactions, it seems worth studying the Convention further for the adoption of the Convention. For reference, it is usual for such countries that give investors direct interests or rights attached to securities to provide different regimes for domestic securities and foreign securities from the perspective of private international law. There is, however, an opinion that the new Book-Entry Transfer Act can be applicable in a restricted way when Japanese law is determined as the law applicable to a cross-border transaction. For the opinion, see T. MORISHITA, *Kokusai shōken kessai hōsei no tenkai to kadai* [Development and Legal Tasks of the Book-Entry Transfer Settlement of International Securities Transactions], in: *Sophia Law Review* 51 (1) (2007) 22-26.

## ABSTRACT

*With the commencement of the new fully dematerialised book-entry transfer system for shares as of 5 January 2009, Japan completed the ten-year plan for modernisation of the Japanese intermediated system. The kernel of the modernisation lies in the full dematerialisation of physical securities certificates.*

*Since the new legal framework is based on full dematerialisation, securities certificates like share certificates or bond certificates no longer exist when a corporation decides to join the book-entry transfer system (voluntary dematerialisation) or when the corporation's shares are listed on a stock exchange in Japan (compulsory dematerialisation). Accordingly, the objects of book-entries to a securities account are rights themselves – such as corporate bonds or shares – which could previously be embodied in securities certificates. Through intermediaries, investors conceptually hold these rights themselves, and these are now evidenced on securities account books maintained by the intermediaries instead of being represented in securities certificates. This is a historical turn from the long-standing legal doctrine – i.e. the materialisation theory (Verkörperungstheorie) – that rights can be treated as tangible movables when they are embodied in a paper (a securities certificate), whereby the rules of movables are applicable in the case of transfer of the rights.*

*In this regard, the article introduces the new legal framework of the Japanese intermediated system, focusing on the dematerialised share-book-entry transfer system. First, this article briefly explains the historical development of the Japanese intermediated system and the background of the reform. Second, it discusses the main legal features of the new Book-Entry Transfer Act and then analyses the details of its provisions. Finally, the evaluations and conclusions are presented. In its evaluation, this article unveils and concludes that as one of the countries in the Germanic legal tradition, Japan chose to keep the basic legal doctrines of the Germanic legal tradition while departing from the materialisation theory. The new fully dematerialised intermediated system in Japan has its own characteristics but is a kind of path-dependent, well-organised legislation.*

## ZUSAMMENFASSUNG

*Am 9. Januar 2009 trat in Japan das neue dematerialisierte Verbuchungssystem für Wertrechte (Bucheffekten) in Kraft. Dies war der Schlusspunkt eines zehnjährigen Reformprozesses zur Modernisierung der intermediär-gestützten Wertpapierverwahrung (Wertpapiersammelverwahrung). Im Zentrum der Reform steht eine vollständige Dematerialisierung von Wertpapieren.*

*Da das neue Regime auf einer solchen aufbaut, können diejenigen japanischen Unternehmen, die sich entschließen, an dem Verbuchungssystem teilzunehmen (freiwillige Dematerialisierung), oder deren Aktien an einer der japanischen Börsen notiert sind (zwangsweise Dematerialisierung), künftig keine Wertpapiere im klassischen Sinne wie*

*Aktien oder Schuldverschreibungen mehr begeben. Stattdessen gibt es nur noch Wertrechte, die auf den „Wertpapier“-Konten der Intermediäre verbucht werden. Konzeptionell halten die Inhaber der Wertrechte diese, vermittelt über Intermediäre, selber und der Nachweis von Existenz, Ausgestaltung und Inhaberschaft erfolgt durch die Eintragung in den Wertpapier-Konten, die bei und von den Intermediären geführt werden. Die Eintragung übernimmt mithin die Funktion, die zuvor die Verkörperung der Rechte in den Wertpapierurkunden leistete. Dies ist eine historische Abwendung von der lange Zeit geltenden Verkörperungstheorie, nach der die in den Papieren verkörperten Rechte in diesem Umfang juristisch als bewegliche Sachen qualifiziert wurden und für deren Übertragung entsprechend sachenrechtliche Regeln galten.*

*Der Beitrag stellt den neuen rechtlichen Rahmen für die intermediär-gestützte Wertpapierverwahrung in Japan vor und analysiert das dematerialisierte Verbuchungssystem für Wertrechte, das an die Stelle der früheren Sammelverwahrung getreten ist. Den Anfang macht ein kurzer Überblick über die rechtliche Entwicklung, an den sich eine Diskussion der zentralen regulatorischen Struktur anschließt. Als drittes folgen Analysen von Detailregelungen. Den Abschluss bildet eine Evaluierung der Reform, wobei der Verfasser herausarbeitet, dass Japan, das in wesentlichen Teilen seines Rechtssystem in einer deutschrechtlichen Tradition steht, sich entschieden hat, an den Grundlinien dieser Tradition festzuhalten, auch wenn es die Verkörperungstheorie als solche aufgegeben hat. Das neue dematerialisierte Verbuchungssystem für Wertrechte in Japan weist zwar einerseits starke eigene Charakteristika auf, ist aber andererseits zugleich ein Beispiel für eine gelungene pfadabhängige legislatorische Fortentwicklung.*

*(Übers. durch d. Red.)*