ABHANDLUNGEN / ARTICLES

The "Roesler Model" Corporation

Roesler's Draft of the Japanese Commercial Code and the Roots of Japanese Corporate Governance

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I. Is the Draft Commercial Code of 1884 – Authored by a German in the German Language – Based on German Law?

The thesis of this paper is as follows.

It is a prevalent observation that Japanese corporate law is based on German law[1] because Roesler's draft of the *Shōhō* (Commercial Code)[2] (the "Draft"),[3] the first such draft in Japan, was written by a German scholar, Hermann Roesler, in the German language. This observation, however, does not hit the nail on the head. Similarly, a view that Japanese corporate law took into account mainly the Allgemeines Deutsches Handelsgesetzbuch (ADHGB) 1861 (General German Commercial Code of 1861, the "ADHGB 1861") in substance[4] is not correct. Japanese corporate law cannot be said to be German-oriented[5] because U.K. law and French law

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1 G. Rahn, *Rechtsdenken und Rechtsauffassung in Japan* [Legal Thought and Conceptions of Law in Japan] (München 1990) 93; S. Maruyama, *Historischer Überblick über das Aktienrecht Japans* [Historical Overview of Japan's Corporate Law], *Zeitschrift für Vergleichende Rechtswissenschaft* [Journal of Comparative Law] 94 (1995) 283.

2 *Shōhō,* Law No. 32/1890. The current version of the *Shōhō* was enacted in 1899 as Law No. 48/1899. In this paper, the former is called the "old Commercial Code" and the latter is called the "new Commercial Code." Also, "Commercial Code" in this paper generally refers to commercial law of Japan unless otherwise noted.

3 H. Roesler, *Entwurf eines Handels-Gesetzbuches für Japan mit Commentar [Draft Commercial Code for Japan with Commentaries],* 3 Vols. (Tōkyō 1884, reprint Tōkyō 1996) (hereinafter "Entwurf").

4 P-C. Schenk, *Der deutsche Anteil an der Gestaltung des modernen japanischen Rechtswesens und Verfassungswesens* [The German Contribution to the Modern Japanese Legal and Constitutional System] (Stuttgart 1997) 105.

5 There are still persistent views today that Japanese commercial law was most strongly influenced by German commercial law. See Y. Ito, *Das japanische Gesellschaftsrecht: Entwicklungen und Eigentümlichkeiten* [Japanese Company Law: Developments and Characteristics], Goethe University Frankfurt, Institute for Law and Finance, Working Paper Series No. 125 (2011) 5; T. Fujita, "De-codification" of the Commercial Code in Japan, GCOESOFTLAW-2012-5 (2013) 2.

Anyway, as for the Draft, it seems difficult to embrace the "German law mythology" view based on an empirical analysis. K. Takayanagi, Century of Innovation: The Development of Japanese Law 1868–1961, in: Mehren (ed.), Law in Japan: The Legal Order in a Changing Society (Boston 1963) 31; J-L. Halpérin, *Le Code du commerce au Japon: une brève histoire ou le code sans esprit* [Commercial Code of Japan: A Short History or a Code Lacking Spirit], in: C. Saint-Alary-Houin (ed.), *Qu'en est-il du Code de commerce 200 ans après?* [How about the French Commercial Code after 200 Years?] (Toulouse 2009) 401, 403.

Roesler himself made the following equivocal statement in a headnote of the item "Commercial Companies": "Compared to U.K. law and French law, as for provisions regarding commercial companies, the ADHGB 1861 – *though I cannot*

had the greatest influence on Japanese corporate law. While German law was surely taken into account as well, the Draft excluded certain characteristics of German law.

As a remarkable example of this thesis, we will demonstrate that the roots of the unique Japanese organizational structure of a corporation, which we call the "Roesler Model" in this paper, existed in the Draft written from 1881 to 1882.[6] By learning the roots of Japanese organizational structure, we should be able to find clues to resolve corporate governance issues in Japan today.

II. WHO WAS HERMANN ROESLER?

First, we will briefly introduce Hermann Roesler, who wrote the first draft of the Commercial Code.[7] He was born in 1834 in a suburb of Nuremberg (southern Germany), received doctorates in both law[8] and economics[9] in 1860, and further, at the age of 27 in 1861, was appointed as a professor[10]

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agree with all individual provisions – ranks highest in terms of completeness and thoroughness." ROESLER, *supra* note 3, vol. 1, 192 (emphasis added). This statement is probably one of the sources of the "German law mythology", but at any rate it is necessary to review and analyse the "individual provisions" thoroughly.

6 Although Roesler completed the Draft in 1884, a portion related to corporate law had already been written in 1882 (the Commercial Code Drafting Commissioner of the Legislation Bureau proposed a draft for general provisions and commercial companies by translating the Draft on August 31, 1882, which can be found in *Kōbun ruishū* (Collection of Official Documents), no. 6, vol. 69).

7 As for literature written on Roesler's activities in Germany and Japan, J. SIEMES, *Die Gründung des modernen japanischen Staates und das deutsche Staatsrecht* [The Founding of the Modern Japanese State and German National Law] (Berlin 1975) is a classical work. For a compilation of documents written by Roesler, see A. BARTELS-ISHIKAWA (ed.), *Hermann Roesler: Dokumente zu seinem Leben und Werk* [Hermann Roesler: Materials on his Life and Work] (Berlin 2007).

8 H. ROESLER, *Die rechtliche Natur des Vermögens der Handelsgesellschaften nach römischem Rechte* [The Nature of Company's Property in Roman Law], *Zeitschrift für das gesamte Handelsrecht* [Journal of Commercial Law], vol. 4 (1861), 252–326; this doctoral thesis was referred to in *Zur Geschichte der Handelsgesellschaften im Mittelalter* [The History of Commercial Partnerships in the Middle Ages], which was Max Weber's accomplishment in his earliest period as well as his doctoral thesis. M. WEBER, *Gesamtausgabe, I. Schriften und Reden* [Collected Works, I. Writings and Speeches], Vol. I/1 (Tübingen 2008) 15.

9 H. ROESLER, *Über den Wert der Arbeit* [On the Value of Work], Zeitschrift für die gesamte Staatswissenschaft [Journal of Institutional and Theoretical Economics], vol. 16 (1860), 232–310. *See* BARTELS-ISHIKAWA, *supra* note 7, 29.

10 H. ROESLER, *Zur Kritik der Lehre vom Arbeitslohn* [Critics of the Wage Theory] (Erlangen 1861). *See* BARTELS-ISHIKAWA, *supra* note 7, 30.

of nationhood studies in the philosophy department of Rostock University, located in a coastal town of northern Germany facing the Baltic Sea.

Professor Roesler considered a modern society as not just a group of atomic individuals but an autonomous "cultural community". He criticized vigorously the ideas of free, private property rights as observed by Adam Smith – and even Marx's materialism.[11] Roesler feared that economic liberalism might destroy the society as a human cultural community.[12] He considered this "false natural law theory *(naturrechtliche Irrlehre)*." Roesler also appealed to the public for recognition of a "legal framework in a human cultural community *(Rechtsordnung der menschlichen Culturgemeischaft)",*[13] which he called "social administrative law."[14]

Roesler was disappointed that his scholarly ideas did not receive the praise nor the response that he expected – in particular, that he did not receive any offer of an appointment from universities in southern Germany where he was born. He also struggled with issues such as a conflict between conversion from being a Protestant to a Catholic and a requirement that every professor be a Protestant as well as hatred towards Bismarck's *"Kulturkampf"* against the Catholic Church.[15] In 1878, these factors made this academic prodigy give up his 17-year career in Germany and accept an offer from the Japanese government to come to Tōkyō.[16] After making a life choice that was extremely audacious for a European person at the time, in Tōkyō he vigorously engaged in writing various advisory and opinion statements and in drafting laws – most

11 Roesler was the first academic reviewer of K. MARX*, Das Capital, Erster Band* [Capital, Vol. 1] (Hamburg 1867), *Jahrbücher für Nationalökonomie und Statistik* [Yearbook of Economics and Statistics], vol. 12 (1869), 457–464.

12 H. ROESLER, *Über die Grundlehren der von Adam Smith begründeten Volkswirthschaftstheorie* [On the Economic Theory Founded by Adam Smith], (1st ed., Erlangen 1868) 56; (2nd ed., Erlangen 1871) 61. See H. MIZUTA, Adam Smith and Japan, in: Sakamoto/Tanaka (eds.), The Rise of Political Economy in the Scottish Enlightenment (London 2003) 197.

13 B. RITZKE, *Der ordo-soziale Wirtschafts- und Rechtsbegriff von Hermann Roesler (1834–1894)* [The Ordo-Social Economic and Legal Concept by Hermann Roesler (1834–1894)] (Frankfurt/M 2010) 85 ff.

14 H. ROESLER, *Das Sociale Verwaltungsrecht, Lehrbuch des deutschen Verwaltungsrechts* [Social Administrative Law, Textbook of German Administrative Law], vol. 1, Part 1 (Erlangen 1872), Part 2 (Erlangen 1873); Review of this work, *Revue de droit international et de législation comparée* [The International Law & Comparative Legislation Review], Vol. 4 (1872) 689 ff, 697 ff. (anonymous).

15 BARTELS-ISHIKAWA, *supra* note 7, 46 ff.

16 Shūzō Aoki, who studied law in Germany and was the First Secretary to the Japanese legations to Germany, the Netherlands, and Austria and later served as Foreign Minister, was a direct contact. SIEMES, *supra* note 7, 38; A. BARTELS-ISHIKAWA, *supra* note 7, 45 ff.

notably the Constitution and the Commercial Code – for the Japanese government, living an isolated, almost monastic existence and focusing entirely on his work.[17] That leaders of the Japanese government, such as Hirobumi Itō and Kowashi Inoue, relied on Roesler can be proven by his voluminous opinion statements[18] answering various questions concerning foreign affairs, law, and administrative matters, as well as the two renewals of Roesler's contract with the government.[19] In the end, he stayed in Japan for 15 years and returned to Europe only in 1893, suffering from cancer. In 1894 he died in a beautiful residence, Compil, in Bozen, South Tyrol, which is now also known under its Italian name Bolzano. Roesler devoted about half of his scholarly life to Japan.

While much has been written by scholars in Germany and Japan regarding Roesler's role in and influence on enacting the Constitution,[20] little research has been published regarding the Draft.[21] Further, research on the

17 *Hakase Roesler Shi Yuku* [Dr. Roesler Has Gone], *Taiyō* [The Sun] Vol. 1 (1895) 552 describes Roesler as follows:

"Everyone who met Roesler respected his hard work for the government. Roesler never visited any powerful families except in connection with government work, which may be called strange but is not unusual for scholars, in particular German academics. He would exchange letters even with colleagues in a different room within the same office. His research, however, was always detailed and extensive, which may have rather hindered the government's decision-making."

18 Volumes 1 through 7 of INSTITUTE FOR JAPANESE CULTURE AND CLASSICS, KOKUGAKU-IN UNIVERSITY (ed.), *Inoue Kowashi-den gaihen, kindai nihon hōsei shiryō-shū* [Additional Stories about Kowashi Inoue, Documents on the History of Modern Japanese Law] (Tōkyō 1980–1984) describe Roesler's answers.

19 The first contract for six years was entered between Roesler and Minister Aoki on October 5, 1878. Roesler was first employed as a legal advisor to the Ministry of Foreign Affairs, but he changed position and became an advisor to divisions including the legal and accounting divisions of the Department of State in July 1881. In December 1884, after the first contract had expired, the contract was renewed for the term of six years, and Roesler became an advisor to the Cabinet. The contract was again renewed for the term of three years in December 1890. The Draft was written between April 1881 and the end of January 1884.

20 J. SIEMES, Hermann Roesler and the Making of the Meiji State: With his Commentaries on the Meiji Constitution (Tōkyō 1966).

21 S. ITŌ, *Roesler shōhō sō'an no rippō-shiteki igi ni tsuite* [On the Historical Meaning of the "Roesler Draft" of the Commercial Code], in: Shiga/Hiramatsu (eds.), *Hōsei ronshū* [Essays in Legal History] (Tōkyō 1976) 191 ff.; 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/Boston 2005) 356; H. BAUM/M. BÄLZ, *Rechtsentwicklung, Rechtsmentalität, Rechtsumsetzung* [Legal Development, Consciousness, and Implementation], in: Baum/Bälz (eds.), *Handbuch Japanisches Handels- und Wirtschaftsrecht* [Handbook on Japanese Commercial and Business Law] (Köln 2011) 8.

Draft compares unfavourably with the development of research[22] on Boissonade's Draft of the Civil Code.[23] Various reasons for the scarcity of research can be guessed.[24] Most importantly, the Draft was written in German and contemporaneous Japanese translations[25] (the most prevalent one being "the Department of Justice" translation published in two volumes[26]) are extremely difficult for Japanese people to read.

In the following section, we will clarify the organizational structure presented in the Roesler Model by examining several specific provisions for

22 See Y. OKUBO, *La querelle sur le premier Code civil japonais et l'ajournement de sa mise en vigueur: le refus du législateur étranger?* [The Dispute over the First Japanese Civil Code and the Postponement of Enactment: The Refusal of the Foreign Legislator?], *Revue internationale de droit comparé* [International Review of Comparative Law], vol. 43 no. 2 (1991) 389 ff.

23 G. BOISSONADE, *Projet de Code civil pour le Japon: accompagné d'un commentaire* [Draft Civil Code for Japan with Commentary] (1st ed., Tōkyō 1880, 1882, reprinted in 1999) Vols. 1–3; *Projet de code civil pour l'empire du Japon: accompagné d'un commentaire* [The Draft Civil Code for the Empire of Japan with Commentary] (2nd ed., Tōkyō 1882–1889, reprinted in 1983) Vols. 1–5; (New ed., Tōkyō 1890-91, reprinted in 1999) Vols. 1–4; *Code civil de l'Empire du Japon: Accompagné d'un exposé des motifs, traduction officielle* [Civil Code of the Empire of Japan, with Explanatory Memorandum, Official Translation into French] (Tōkyō 1891, reprinted in 1993) Vols. 1–4.

24 Compared to laws that are deeply rooted in legal culture and that are relatively stable, such as civil law and criminal law, commercial law has a technical characteristic and has been amended many times until today, depending on the development and changes of economic society. Therefore, the scholarly endeavour to follow the drafting, enacting, and amending of commercial law naturally becomes complicated and difficult. These circumstances probably lead legal history scholars to rather avoid becoming involved, and at the same time commercial law scholars either lose interest or doubt whether the endeavour has any meaning today that warrants the labour spent.

25 Quotations from the Japanese version of the Draft and other Japanese documents in this paper were translated into English by the authors.

26 At the government, a division for Roesler was established to translate the German draft as quickly as possible (the Legal Division of the Department of State started translating in May 1881, the Legislation Bureau took over the work in October 1881, and a special commercial law drafting division was established within the Legislation Bureau in March 1882). Although not all dates of completion were known, there are the following four versions titled "Roesler's Draft." The first version contains a total of 618 pages, is comprised of provisions only (Arts. 1 to 1133), and does not include notes. It was used and read at the first legal committee meeting at the Department of Justice from 24 March to 30 November 1886 (a personal copy of a commissioner, Junjirō Hosokawa, is preserved at the Ministry of Justice Library). The second version comprises eleven volumes with both provisions and notes (Arts. 1 to 1133). The third version comprises four volumes with both provisions and notes. The fourth version comprises two volumes and is the most popular (reprinted in 1995).

corporate organizational structure (Arts. 219 to 244 of the Draft), extracted from the German original and notes thereto as examples to capture the character of the Draft.

III. The Roesler Model – The Organizational Structure of a Corporation

Under the Draft, three organs are generally established in a corporation: the general meeting of shareholders, the board of directors, and (though it is a discretionary organ) the board of auditors.[27] Roesler says that the general meeting of shareholders *(Generalversammlung der Actionäre)* is "different from an organ for management *(Verwaltung)* or supervision *(Überwachung),* its being instead an organ for representation *(Vertretung)* of shareholders" (note to Art. 236 of the Draft).[28] Here, the organization for management refers to *"Directoren"* (i.e., (the board of) directors) while the organ for supervision refers to *"Aufsichtsrath"* (i.e., the board of auditors). The general meeting of shareholders, comprised of all shareholders, elects directors and members of the board of auditors, and directors and the board of auditors are respectively tasked with "managing" and "supervising" a corporation. This is a fundamental structure for the corporate governance of a Japanese corporation, formulated by Roesler.

1. The Board of Directors (Directoren)

It is noteworthy that although the term "third-party organ" *(Fremd-* or *Drittorganschaft)* is not used in the Draft, such a concept is emphasized in effect.

Roesler says that "as a fundamental characteristic of a corporation, the question of who functions as an administrative organization is an important issue", and he explains as follows:

"Shareholders do not have the right to represent a corporation. By all means, shareholders as a whole comprise the general meeting of shareholders, and a resolution of the general meeting will affect the management *(Verwaltung)* of the corporation. Management of a corporation, however, is neither the right of individual shareholders nor the right of the general meeting. Neither individual shareholders nor the general meeting can give a right to or impose an obligation on a corporation by their actions *(Handlungen)* through any means. To that extent a corporation is deprived of any human perspective, and it is probable that shareholders *(Actionäre)* may never be called partners *(Gesellschafter)* [as in a partnership]. Shareholders have only the right to elect representatives

27 Provisional organs include *"Inspectoren"* (examiners of business execution, Arts. 275–278 of the Draft) and *"Liquidatoren"* (liquidators, Arts. 293–308 of the Draft), but this paper will not discuss these.

28 Roesler, *supra* note 3, Vol. 1, 329.

of a corporation. Shareholders are obliged to elect representatives, and if shareholders neglect the obligation, the corporation will not work. Shareholders elect representatives through an election at the general meeting.[29] This draft will call them directors *(Directoren),* a term which is probably most widely known and easiest to understand."[30]

Roesler envisaged that shareholders should elect *"Directoren"* who are well-qualified as managers and representatives of a corporation, and who should not act like partners who execute operation of a partnership as its owners. Roesler's idea was probably considered normal and not strange even then (from 1881 to 1882), given that the Japanese National Bank Act[31] had already provided that more than five directors be elected (one of them being elected as president by mutual vote).

There was, however, something lost in translation. The "Ministry of Justice version" translated *"Directoren"* into "president" *(tōdori).*[32] Because *"Directoren"* in German is a plural form of *"Director",* the singular "president" may not always fit naturally.[33] The "president" means, as seen in the Japanese National Bank Act, the head director, and the position is usually assumed by a top-ranking director.[34] Instead, *"Directoren"* should have been translated into "directors", and it was actually revised to "directors" in a later process of enactment.[35]

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29 Note to Art. 222 of the Draft provides as follows:

"One of the characteristics of a corporation is that it cannot be represented by its members. First, a corporation issues an interest in the corporation's equity in the form of a share in response to a certain amount of investment. Second, because a corporation is a corporate form for a large company and many members, business execution by each individual member does not become an issue at all. Therefore, special organs *(besondere Organe)* have to be put in place to represent a corporation, and directors (*Directoren*) are exactly such organs." ROESLER, *supra* note 3, vol. 1, 321.

30 Note to Art. 219 of the Draft. ROESLER, *supra* note 3, vol. 1, 319.

31 In emulating the U.S. National Bank Act, the Japanese National Bank Act established an issue bank in 1872 (Vice-Minister of Treasury: Hirobumi Itō). The Act was wholly revised to issue fiat monies in 1876 (Minister of Treasury: Shigenobu Ōkuma).

32 There is a case where the Commercial Code Drafting Division translated *"Vorstand"* into "president *(tōdori)*". COMMERCIAL CODE DRAFTING DIVISION (K. IMAMURA et al.), *Doitsu futsū shōhō, jō* [German Commercial Code Vol. 1] (Tōkyō 1883) Arts. 1–431.

33 It can be said to be one of the disadvantages of the Japanese language that it does not distinguish between singular and plural. M. MARUYAMA/S. KATŌ, *Honyaku to nihon no kindai* [Translation and Modern Japan] (Tōkyō 1998) 85–86.

34 *Meiji zaisei-shi* [History of Financial Affairs in the Meiji Era], Vol. 13 (Tōkyō 1927) 36.

35 *Kaisha jōrei hensan i'in-kai, shōsha-hō dai-ichi dokkai hikki (November 21, 1884 (meiji 17))* [Company Code Legislative Committee, Minutes of Commercial Com-

Then, from which law did the concept of *"Directoren"* come? In notes to the Draft that address each individual issue, Roesler compared the concepts of *"Directoren"* under U.K., French, and German laws and sought commonalities among them, and when there were still differences, he adopted one of the laws.[36] More specifically, in formulating *"Directoren",* Roesler compared "directors" under the U.K. Companies Act 1862 (the "U.K. Companies Act"),[37] *"administrateurs"* under the *Loi du 24 juillet 1867, sur les sociétés* (Law of July 24, 1867 on the Companies, hereinafter "French Companies Act"),[38] and *"Vorstand"* under the ADHGB 1861, including the *Aktiennovelle von 1870* (First Amendment to the German Stock Corporation Law in 1870).[39]

The fact that Roesler compared these three laws can be shown in two places. First, in a footnote to Art. 222[40] of the Draft concerning the representative right of *"Directoren",* Roesler explained that he adopted a principle of representation by each "director"[41] under the U.K. Companies Act while explicitly rejecting the principle of joint representation by all members of the *"Vorstand"*[42] under the ADHGB 1861. Second, in a footnote to Art. 223[43] of the Draft concerning a qualification share for *"Directoren",* Roesler explained that he found that incentives for business execution would be lost under the old French code[44] and the ADHGB 1861,[45] both of which do not require directors to be shareholders, and to the contrary he adopted the U.K. Companies Act[46] and the French Companies Act,[47] both of which require directors to own qualification shares.

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pany Code First Meeting (21 Nov. 1884)], Vol. 17 of *Nihon kindai rippō shiryō sōshō* [Japanese Modern Legislative Documentation Series] (Tōkyō 1985) 168.

36 Even for a single corporate organ, the Draft adopted multiple overlapping laws for each applicable legal relationship as the governing laws are chosen under conflict-of-law rules.

37 Companies Act 1862 (25 & 26 Vict. c. 89).

38 Loi du 24 juillet 1867, sur les sociétés.

39 *Allgemeines Deutsches Handelsgesetzbuch* (ADHGB) 1861 and First Amendment to the German Stock Corporation Law of June 11, 1870.

40 ROESLER, *supra* note 3, Vol. 1, 322.

41 Companies Act 1862, First Schedule, Table A, Cl. 55.

42 Art. 229 ADHGB 1861.

43 ROESLER, *supra* note 3, Vol. 1, 323.

44 Code de commerce art. 31.

45 Art. 227 ADHGB 1861.

46 C. WORDSWORTH, Law of Joint Stock Companies (10th ed., London 1865) 135; D. PITCAIRN /F. LATHAM, Shellford's Law of Joint Stock Companies (2nd ed., London 1870) 96.

47 Loi sur les sociétés art. 22.

These facts clearly show that the concept of "directors" under the U.K. Companies Act most heavily influenced *"Directoren"* in the Draft and that German law concepts were rather rejected. The term *"Directoren"* also resembles the term "directors" in English. In addition, while the minimum number of members of the board of directors can be one under the French Companies Act and the ADHGB 1861,[48] Art. 219[49] of the Draft requires three or more members, closer to the requirements of the U.K. Companies Act,[50] which requires a multiple of three in principle. The reception of U.K. law is also evident from the following description in the Draft:

> *"'Directoren'* can be divided into those who make decisions and those who execute daily and continuing business *(Geschäfte)* and transactions *(Verkehr)* with third parties. Such a division can often be seen in a distinction between the board of directors (Verwaltungsrath) and directors *(Directoren).* The number of members of the board of directors, a special organ within the board of directors (i.e., managing director, as referred to later), a representative qualification of each director, and the relationship between directors must be prescribed in the articles of incorporation.
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> The Draft only requires that at least three directors be elected, but there is no harm in having more than three directors. For a small company, a manufacturer, or any other similar entities, one managing director *(geschäftsführender Director)* is sufficient. In addition to the managing director, two directors can be elected as advisors *(Beirath)* and decide upon material management issues. For a larger company, signature by at least two directors is usually required for material decisions. Directors (who sign for material decisions) now comprise the board of directors *(Vorstand)* and are necessary by all means."[51]

The "distinction between the board of directors (Verwaltungsrath) and directors (Directoren)" as made above refers to a committee,[52] as a business execution or management organ, and to its individual members, which is equivalent to the distinction between "the board of directors" and "directors" under U.K. law.[53] Further, a "managing director *(geschäftsführender Director)*" who represents a company probably refers to the concept of "managing director" under U.K. law.[54]

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48 Loi sur les sociétés art. 22; Art. 227 Abs. 2 ADHGB 1861.

49 ROESLER, *supra* note 3, vol. 1, 320.

50 Companies Act 1862, First Schedule, Table A, Cl. 58.

51 Note to Art. 219 of the Draft. ROESLER, *supra* note 3, vol. 1, 320.

52 This committee is referred to as "directors", "council", or "managing committee" under U.K. law. F. PALMER, Company Law (2nd ed., London 1898) 119.

53 Under German law, it is equivalent to a distinction between "*Vorstand"* (the board of directors) and *"Vorstandsmitglieder"* (members of the board of directors). As described in the text, however, the Draft requires more than three members and is thus different from German law, where one member is sufficient.

54 By a curious coincidence, it would be the same term of the "managing director" *(geschäftsführender Director)* if we chose the one-tier board system (the U.K. model) of an EU corporation (Societas Europaea). *See* C. WINDBICHLER, *Gesellschaftsrecht*

The Draft, however, does not have a provision regarding the operation of the board of directors or a "meeting of directors"[55] in response to the above quotation. It is not clear why Roesler did not include such a provision and whether it is because he was afraid of increasing the number of articles. Anyway, this shortcoming probably led to the provisions that each director should "execute business and represent a company individually" (Arts. 186 and 143 of the old Commercial Code of 1890 and Arts. 169 and 170 of the new Commercial Code of 1899) – without a board of directors.[56]

After a long term of more than a half century of "no board of directors", Japanese corporate law went back to the basics of a board of directors with the reception of U.S. corporate law after World War II, following a de facto order of the General Headquarters, the Supreme Commander for the Allied Powers (GHQ/SCAP) (see *infra* section V).

2. The Board of Auditors (Aufsichtsrath)

The Draft contemplated, without its being mandatory, the establishment of a board of auditors *(Aufsichtsrath)*.[57] From a comparative law perspective, the board of auditors can, of course, be compared with German law's "Aufsichtsrath" (the board of auditors of a corporation (Aktiengesellschaft) and a partnership corporation limited by shares *(Kommanditgesellschaft auf Aktien)*) as well as "auditors" under U.K. law (accounting auditors) and "commis-

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[Company Law] (23th ed., Munich 2013) 493; M. HABERSACK/D. VERSE, *Europäisches Gesellschaftsrecht* [European Company Law] (4th ed., Munich 2011) 445.

55 Companies Act 1862, First Schedule, Table A, Cl. 66–71.

56 At a meeting for the new Commercial Code, in explaining the meaning of Art. 169 ("Business execution shall be decided by majority vote of the directors. The same applies to election and removal of the manager."), Keijirō Okano said as follows, not particularly contemplating "the board of directors" as a committee: "It is not necessary to explain this article. It prescribes that business execution of a corporation shall be decided by majority vote of the directors just because it follows a policy of the majority behind the provisions for a general partnership (*gōmei gaisha*) and a limited partnership *(gōshi gaisha)*." *Hōten chōsa-kai, shōho i'in-kai giji yōroku* [Code Investigation Commission, Summary Minutes of Commercial Code Committee Meeting], Vol. 19 of *Nihon kindai rippō shiryō sōshō* [Japanese Modern Legislative Documentation Series] (Tōkyō 1985) 187.

57 There was also something lost in translation of the board of auditors. "*Aufsichtsrath"* means a *"Rat"* (council) that engages in *"Aufsicht"* (audit). In the enactment process in Japan, it was first translated into *"torishimari-yaku"* (director), then *"kensa-yaku"* (examiner), but as a result of reconsideration it was decided that it be translated into *"kansa-yaku"* at a meeting of the *Hōritsu Torishirabe I'in-kai* (Law Examining Committee) on 24 December 1887. A legal form as a "council", however, vanished into thin air under the law.

saires" (the auditors of a corporation) and "conseil de surveillance" (the board of auditors of a partnership corporation limited by shares).

At the first glance, Roesler seems to have adopted German law because "Aufsichtsrath" in the Draft and "Aufsichtsrath" under German law are the same term. These two terms, however, have different meanings.

Under German law at the time which Roesler was writing the relevant portion of the Draft (from 1881 to 1882), the articles of incorporation were required to provide in relation to the election of *"Aufsichtsrath"* (the board of auditors) that at least three members be elected by shareholders,[58] whereas the method of election and composition of the *"Vorstand"* (the board of directors) were left to provisions in the articles of incorporation.[59]

Therefore, as a matter of logic, the Commercial Code might adopt either (1) the current German "two-tier" organizational structure under which the general meeting of shareholders elects the board of auditors and, further, the board of auditors elects and supervises the board of directors (see *infra* section IV) or (2) the "Roesler Model" organizational structure where the general meeting of shareholders elects the board of auditors on one hand and the board of directors on the other hand.[60] The board of auditors under German law at the time of the Draft, however, was not an auditing organ; rather, as a representative of major shareholders, such as banks, it held the right to elect and remove members of the board of directors and had a strong tendency to use the board of directors at its beck and call.[61] You may go so far as to say that the board of auditors was a business execution organ in spite of its name.[62] Therefore, naturally, there was hardly a case in Ger-

58 Art. 209 no. 6 ADHGB, First Amendment to the German Stock Corporation Law on June 11, 1870.

59 Art. 209 no. 8 ADHGB, First Amendment to the German Stock Corporation Law on June 11, 1870.

60 H. TAKADA, *Roesler sōan ni okeru kikan kōzō: Takahashi Eiji kyōju no mondaiteiki o megutte* [The Legal Organization of Corporations drafted by Hermann Roesler: On the Issues raised by Professor Eiji Takahashi], in: Yamamoto (ed), *Kigyō-hō no hōri* [Legal Principles on Enterprise Law] (Tōkyō 2012) 207–208; E. TAKAHASHI, *Entwicklung und Hintergründe der Regelungen zur Corporate Governance in Japan mit einem Schwerpunkt auf der Reform von 2013* [Development and Background of the Regulations on Corporate Governance in Japan with a Focus on the Reform of 2013], ZJapanR/J.Japan.L. 35 (2013) 65. Japanese traditional corporate governance is classified as one of the "traditional Latin models". M. VENTORUZZO/P. CONAC/G. GOTO/S. MOCK/M. NOTARI/A. REISBERG, Comparative Corporate Law (American Casebook Series) (St. Paul 2015) 249–252.

61 K. HOPT, The German Two-Tier Board: Experience, Theories, Reforms, in: Hopt et al. (eds.), Comparative Corporate Governance (Oxford 1998) 231–232.

62 There are even criticisms that it was an error in the enactment of the ADHGB that the traditional "*Verwaltungsrat*", which now means "the board of directors" in the

many where the general meeting of shareholders elected both the board of auditors and the board of directors in parallel.[63]

By contrast, in the United Kingdom, where traditionally an auditor conducts an accounting audit,[64] and in France, where (the board of) auditors *(commissaires, conseil de surveillance)* are authorized to conduct an accounting audit in addition to a business audit, the general meeting of shareholders elects both a business execution organ and an auditing organ. The Roesler Model apparently chose the system under U.K. law and French law,[65] which can be compared to the "separation of the three branches" of national government.[66] The Roesler Model, therefore, is *not* "modeled after German law."[67]

Rather, a few examples prove that Roesler was wary of the board of auditors' interference with management in Germany.

First, Roesler describes the *raison d'être* of the board of auditors as follows:

"The auditors *should not execute business,* but supervise (*überwachen*) business execution by directors (Directoren) in terms of applicable laws and the articles of incorporation as well as interests of shareholders and creditors […]. The board of auditors has an

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one-tier board system, was changed to *"Aufsichtsrath"* as a perfunctory transfer of the board of auditors of a limited partnership corporation – which supervises the business execution of a general partner as a representative of limited partners – to a corporation. R. PASSOW, *Die Aktiengesellschaft* [Stock Corporation] (2nd ed., Jena 1922) 395–396.

63 H. STAUB, *Kommentar zum Handelsgesetzbuch* [Commentary on the Commercial Code], Vol. 1 (6/7th ed., Berlin 1900) 693.

64 Although the Companies Act of 1862 did not mandate the establishment of accounting auditors, in practice, many corporations established them under the articles of incorporation. R. BRAUN, History of Accounting and Accountants (London 1905) 326 ff.; A. WOOLF, A Short History of Accountants and Accountancy (London 1912) 176.

65 For further explanation, see S. KALSS/C. BURGER/G. ECKERT (eds.), *Die Entwicklung des österreichischen Aktienrechts* [The Development of Austrian Corporate Law] (Vienna 2003) 84.

66 Roesler himself did not refer to a "separation of the three branches" or a "separation of powers." However, you can, for example, find the following explanation in a later textbook written by Kenjirō Ume:

"There are a total of three managing organs in a corporation. They are the directors, the corporate auditors, and the general meeting of shareholders. If compared to a *nation,* the directors are equivalent to the Minister of State, the corporate auditors are *equivalent to the Board of Audit, which may have a little broader authority,* and the general meeting of shareholders is equivalent to the Congress. In other words, the directors conduct all business affairs, the corporate auditors supervise the directors, and the general meeting of shareholders decides everything including a yearly budget and is sometimes involved in the promotion and demotion of officers.", K. UME, *Nihon shōhō kōgi* [Lecture on Japanese Commercial Law] (Tōkyō [year unknown]) 650 (emphasis added).

67 TAKAHASHI, *supra note* 60.

apparent advantage as a special auditing organ (*Aufsichtsorgan*) given a solid function and authority to prevent business execution that will cause a breach of law or damages to a corporation."[68]

In sum, the board of auditors is – unlike the practice in Germany – not a business execution organ but a special auditing organ to supervise management in terms of protection of the interests of shareholders and creditors.

As to the right to audit, the Draft gave the board of auditors the rights to "first, supervise *(überwachen)* business execution by directors *(Directoren),* second, examine accounting *(Prüfung der Rechnung),* and third, call upon the general meeting of shareholders to make resolutions necessary for corporate interests." These are rights to (1) supervise business, (2) examine accounting, and (3) as a procedural right, call the general meeting of shareholders to report or make a proposal to the general meeting.

The board of auditors, however, is not given the right to prohibit or veto a course of conduct. The reasons are explained as follows:

"The board of auditors does not have an independent means to respond to directors, particularly rights to prohibit *(Verbietungsrecht),* such as the right to veto. [In other words,] the board of auditors engages in examination *(Untersuchung)* and can only submit the result of the examination as well as a necessary proposal to the general meeting of shareholders to make a resolution. If the board of directors had to accept *a capricious interference by the board of auditors,* the position of the board of directors would evidently become *unstable and subjugated* (to the board of auditors). In addition, it would in effect assign *(übertragen)* the inherent obligation of the board of directors to the board of auditors."[69]

Many German corporations suffer from a detriment whereby the board of directors is used by the board of auditors at its beck and call. With that understanding, expressions such as "a capricious interference by the board of auditors" and "the position of the board of directors would become unstable and subjugated to the board of auditors" refer to excessive interference by the board of auditors in Germany, and the Draft can be read as intending not to give the board of auditors any right to prohibit business execution by the board of directors, thereby not importing such excessive interferences into Japan.

Further, and notably, obligations *(Obliegenheiten)* of the board of auditors do not follow German law, where the scope of supervision by the board of auditors is unlimited given the declaration that "the board of auditors supervises business execution by any management division of a corpora-

68 ROESLER, *supra* note 3, vol. 1, 326–327 (emphasis added).

69 ROESLER, *supra* note 3, vol. 1, 327 (emphasis added).

tion."[70] Rather, the Draft used an expression that seemingly sought to limit the scope mainly to one of supervising whether business execution is done legally and in conformity with the articles of incorporation and to point out a breach of the duties of care and loyalty: "to supervise (*überwachen*) whether business execution by directors and founders complies with applicable laws and, in particular, whether incorporation complies with the articles of incorporation and resolutions of the corporation and to detect (*aufdecken*) generally irregularities in business execution" (Art. 231(1)).

Roesler says as follows:

"In particular, in relation to supervision *(Überwachung)* of business execution, the board of auditors should note the following points. First, whether [the business execution] complies with applicable laws and procedures. Second, whether [the business execution] complies with the articles of incorporation. Third, whether there are irregularities *(Unregelmässigkeiten)* that cause damages to shareholders, for example, a breach of a duty, a cover-up of a material fact, quotation *(Anführung)* of untrue facts, and execution of a contract that benefits directors or other corporations. However, a pure review of the benefits of a transaction – that is, a purely speculative aspect of the transaction – is left to *the liberty of decisions (Freiheit des Entschlusses) of the board of directors* unless it is reserved to a resolution of the general meeting of shareholders."[71]

Roesler evidently paid attention to a third-party aspect, or independence, of auditing as the scope of auditing does not extend to pure management matters so as to shield a managerial judgment from the board of auditors. This may be the origin of today's theory of the scope of auditing – a prevailing view that "to audit whether a decision is appropriate" is the right of the board of directors whereas auditing by the board of auditors is limited to whether a decision is lawful.[72] Roesler, however, reserved as a right of the board of auditors the detection of risks such as a conflict of interest that may be lurking, hidden behind "a pure speculative aspect of a transaction". Therefore, Roesler is ultimately best interpreted as having intended that the right of the board of auditors extend almost unlimitedly to matters of business execution. If there is a difference between opinions of the board of auditors and the board of directors as to a particular matter, however, the board of directors can claim the liberty of managerial judgments and reject the opinion of the board of auditors provided that "no breach of applicable

70 Art. 225a ADHGB First Amendment to the German Stock Corporation Law on 11 June 1870.

71 ROESLER, *supra* note 3, vol. 1, 327 (emphasis added).

72 K. EGASHIRA, *Kabushiki kaisha-hō* [Laws of Stock Corporations] (6th ed., Tōkyō 2015) 523–524.

laws, provisions of the articles of incorporation, or duties of care and loyalty is recognized in business execution by the board of directors."[73]

In order to function effectively, it is of course necessary to consider the independence of the board of auditors from the board of directors. A supervising organ may become a sham not only if the board of auditors becomes too deeply involved in business execution, but also when the board of directors effectively controls the auditors.

In response to such a concern, Art. 233 of the Draft provides:

"A member of the board of auditors can share business obligations *(obliegende Geschäfte)*. In communicating with the board of directors or a corporation, however, all members of the board of auditors have to respond jointly and severally *(sammt und sonders)*. If all members of the board of auditors do not agree unanimously, in addition to a majority opinion and proposal, a minority opinion and proposal must be provided.

The Note to Art. 233 further explains:

"This article prescribes that, regarding the official authority *(amtliche Vollmacht)* of the board of auditors as an organ, not each individual member but only all members jointly and severally can respond to the board of directors. Therefore, members of the board of auditors have to be in agreement *(einig sein)* in their opinions, and the consensus *(Einigkeit)* is important as a guarantee for effective activities of members of the board of auditors and a protection against *careless and arrogant criticism* [toward the board of auditors] *that lacks a sufficient rationale*."[74]

Because the board of directors is the body that would issue "careless and arrogant criticism that lacks a sufficient rationale", the Draft proposes the board of auditors acting as a council *(Kollegium)* as one system of maintaining the power balance vis-à-vis the board of directors.[75]

What happens, however, if the board of auditors cannot unanimously agree? The Note to Art. 233 provides that "a minority has to have an equivalent right as the majority, and both have to provide their opinions at the general meeting of shareholders, leaving the final resolution to the share-

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73 Later, the Japanese legislature rejected Roesler's approach, and in the first general corporate law (*Shōhō ichibu shikō-hō* [Implementation Act for a Part of the Old Commercial Act] Law No. 9/1893), the authority of the corporate auditors was changed to "supervising whether business execution by the directors complies with laws, orders, the articles of incorporation, and resolutions of the general meeting of shareholders" (Art. 191(1)), and the authority to detect irregularities in business execution was removed.

74 ROESLER, *supra* note 3, vol. 1, 328 (emphasis added).

75 The Note to Art. 233 further provides that "the board of auditors can order the directors to re-examine, correct an error, and share information. Then, procedures [under the order] shall be complied with as they are in relation to the general meeting of shareholders." ROESLER, *supra* note 3, Vol. 1, 328.

holders." In addition, the Note to Art. 234 explicitly provides as follows regarding the right to audit the business:

"[Article 234] prescribes the rights of information (*Kenntnisnahme*) and examination (*Untersuchung*) so that the board of auditors can prepare to exercise the right of audit, or at least enabling them to do so, despite a limitation [that all members jointly and severally respond to the board of directors and the general meeting of shareholders], and therefore, the rights of information and examination are held by each individual member of the board of auditors."[76]

Thus, the rule enacted in a 1993 Amendment of the Commercial Code – a combination whereby the board of auditors acts as a collective, yet with each member preserving independence (or individuality) in exercising the right of audit – had in fact already been proposed in the Draft written more than 100 years earlier.

IV. The Roesler Model and the One-Tier / Two-Tier Board Systems

Today, the governance system described above is said to be unique, different from both the common-law type one-tier board system *(système moniste, Monistisches System),* which is the majority structure used globally, and the German-law two-tier board system *(système dualiste, Dualistisches System).*[77]

The one-tier board system means a system where directors elected at the general meeting of shareholders comprise the board of directors; and within the board, functions are divided between a CEO and executive directors, on the one hand, and non-executive directors, on the other; and the non-executive directors nominate and supervise the CEO and the executive directors. This one-tier system's board is also called a "supervisory board" because the functions of the board of directors are concentrated on election and supervision of the CEO and executive directors.

In contrast, the two-tier board system means a system where an executive board and a supervisory board are systematically and explicitly separated (by prohibiting concurrent membership).[78] Under German law, since

76 Roesler, *supra* note 3, Vol. 1, 328.

77 M. Ventoruzzo et al., *supra* note 60.

78 Since the second amendment of the Stock Corporation Act in 1884, concurrent posts on the board of directors and the board of auditors have been prohibited to guarantee the independence of each post. Art. 225a ADHGB Second Amendment to the German Stock Corporation Act on 18 July 1884; Art. 248 HGB 1897; Art. 90 AktG 1937; Art. 105 AktG 1965. See M. Eisenberg, The Structure of the Corporation: A Legal Analysis (Boston/Toronto 1976) 179. The prohibition of concurrent

enactment of the ADHGB in 1861, the former has been called the *"Vorstand"* and the latter has been called the *"Aufsichtsrat"*.[79]

A comparison of the one-tier board system and the two-tier board system is not only a matter of scholarly interest. In practice, when the European Corporation (Societas Europaea, the "SE") was implemented, names were given in view of functions rather than the historical terms used in each country: "administrative organ" *(organe d'administration, Verwaltungsorgan)* instead of the traditional "board of directors" in the one-tier board system and "supervisory organ" *(organe de surveillance, Aufsichtorgan)* and "managing organ" *(organe de direction, Leitungsorgan)* in the two-tier board system.[80] This governance system of the SE is useful as a tool of comparative law in both theory and practice.[81]

When it comes to governance under Japanese law, a traditional corporation (that is, a corporation as structured before the enactment of the Companies Act in 2005, and what is still the most popular model among listed corporations) uses a board of directors that supervises business execution by directors and so seems to belong to the one-tier board system described above (Art. 362(1), (2)(ii) Companies Act).[82] A majority of the members of the board of directors, however, are usually executive directors (Art. 363(1) Companies Act) or employees, and in that respect the Japanese board of directors rather resembles the "managing organ" in the two-tier board system. In addition, under Japanese law, auditors (or the board of auditors) as well as the board of directors assume a function of supervising business execution. Therefore, the Japanese system is significantly different from those in countries that have the one-tier board system.

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posts was tightened by the enactment of the Stock Coropration Act in 1937. Even under the prohibition of concurrent posts, however, there is a criticism that control by a majority shareholder in election of both auditors and directors will result in self-supervision in effect. See HOPT, *supra* note 61, 230.

79 The term *"Aufsichtsrat"* was chosen during the enactment process of the ADHGB in lieu of *"Verwaltungsrat"* (board of administrators) as used before. It is observed that a *"Verwaltungsrat"* in practice tends to become a de facto business execution organ composed of parties such as majority shareholders and representatives of banks, which in many cases uses the "*Vorstand*" at its beck and call as a superior, and which has maintained this tendency even after the enactment of the HGB 1897. See HOPT, *supra* note 61, 231.

80 Council Regulation 2157/2001 on the Statute of the European Company, 2001 O.J. L 294/1.

81 WINDBICHLER, *supra* note 54, 490.

82 H. KANDA, Comparative Corporate Governance Country Report: Japan, in: Hopt/Kanda/Roe/Wymeersch/Prigge (eds.), Comparative Corporate Governance (Oxford 1998) 925–926.

In particular, auditors (or the board of auditors) have a powerful examination authority that can be exercised anytime in relation to business execution (Art. 381 Companies Act), and they have the authority to audit financial statements of each fiscal year (Art. 436 Companies Act). In theory, therefore, there is an issue as to how to define the relationship between the auditing authority of auditors (or the board of auditors) and the supervising authority of the board of directors. A prevailing view holds that the former is limited to whether a decision complies with applicable laws and the articles of incorporation whereas the later extends to whether a decision is appropriate.[83]

Also, under the Companies Act, the board of directors elects and removes representative directors who have business execution authority (Arts. 362(1)(iii), 363(1)(i)) while auditors (or the board of auditors) do not have the authority to elect and remove representative directors. In other words, auditors (or the board of auditors) in Japan have, on theone hand, the authority to audit anytime whether business execution by a director complies with applicable laws and the articles of incorporation, but on the other hand they do not have the authority to elect and remove executive directors. Such election and removal authority can be called an ultimate auditing authority and is reserved to the general meeting of shareholders.

In contrast, although common-law countries that have the one-tier board system also traditionally have an auditor, the auditor typically does not have the authority to audit business execution as it exists in Japan. The auditor resembles the professional "accounting auditor" required of large corporations, including listed corporations since a 1974 Amendment of the Commercial Code in Japan.

This complicated parallel and dual system proposed by Roesler[84] is said to be difficult to understand for countries other than Japan today. Traces of such

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83 In response to the prevailing view, there is a concern whether it is possible to clearly and with certainty distinguish the former from the latter. Also, for example, there is a view that if a director ascertains a fact that could cause substantial damage to a corporation (e.g., insolvency of an important business partner) and reports the fact to (the board of) company auditors (Art. 357 Companies Act) before a corporate decision (i.e., a decision to continue business with the business partner) has been made, the company auditors should propose the best solution for the corporation (e.g., cancellation of the business and collection of debts). H. KANDA, *Jizen kansaron no kokoromi* [A Proposal on the Prior Auditing Theory], *Kansa-yaku* [Audit & Supervisory Board Members] Vol. 236 (1987) 11.

84 Okushima points out that Japan chose a "middle ground" between the one-tier board system and the two-tier board system and "though Japan has the dual board system, it is not the two-tier system. In other words, Japan has a parallel organizational system or a parallel one-tier system, where direction, execution, and auditing of appropriate-

a system can be seen even today in Europe in traditional systems in Italy[85] and Portugal,[86] but it existed only for a limited time in the distant past in the United Kingdom and France. The system has been uniquely developed and functions robustly today only in one East Asian country, Japan.

V. The Reception of U.S. Law in the 1950 Revision of the Commercial Code – The Revolution in Corporate Governance

A big turning point for the Roesler Model came in 1950 after World War II, when the Commercial Code was amended with the U.S. led occupation playing a leading role (the "1950 Amendment"). As for the content of the 1950 Amendment, we will refer to the following three items in the "Commercial Code Amendment, Revised Draft by the Committee of the Commercial Code, dated October 29, 1949" as set forth in Professor Masafumi Nakahigashi's book, "*Shōhō kaisei (1950–51 kaisei) GHQ/SCAP bunsho* (Commercial Code Amendment (1950–51 Amendment) GHQ/SCAP Documents)": (1) Reception of the Board of Directors, (2) Creation of Representative Directors, and (3) Abolition of Auditors.

1. Reception of the Board of Directors

"19-2 To adopt the board system and to provide that the administration of the affairs shall [be] determined by the board of directors."[87]

There is no doubt that the 1950 Amendment intended to introduce a U.S. law type board of directors because the above explicitly says "the board system." Under U.S. law, however, daily business execution would be as-

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ness belong to the board of directors and auditing of legality belongs to (the board of) company auditors." T. Okushima, *America-gata kei'ei-model to nihon no dokuji-sei* [American Management Style and the Uniqueness of Japanese Management], in: Okushima, *Kigyō hōgaku no saigetsu* [My Life with Enterprise Law] (Tōkyō 2010) 255, 263; see L. Bosetti, *Corporate governance e mercati globali* [Corporate Governance and Global Markets] (Milano 2010) 206, Fig. 7.1 *Systema dualistico orizzontale in Giappone* [Horizontal Dual Board System in Japan].

85 F. Pernazza, Corporations and Partnerships in Italy, (2nd ed., Alphen aan den Rijn 2012) 198 ff. K. Hopt/P. Leyens, Board Models in Europe – Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy, European Company and Financial Law Review (2004) 158 ff.; Bosetti, *Ibid,* 69 Fig. 3. 1. *Il modello dualistico orizzontale (o modello tradizionale italiano)* [The Horizontal Dual Board Model (or Traditional Italian Model)].

86 M. Cameira, Portuguese Business Law, Vol. 1 (London 2009) 28 ff.; Bosetti, *Ibid,* 191 Fig. 6.4. *Systema dualistico orizzontale in Portogallo* [Horizontal Dual Board Model in Portugal].

87 Original in English.

sumed by officers, who are senior employees or executives, but no such positions were introduced in Japan. Instead of officers, representative directors were created as below.

2. *Creation of Representative Directors*

"19-6 To provide that the company shall have one or more directors to represent it and that he or they shall be nominated by a resolution of the board of directors."[88]

It goes without saying that the term "directors to represent [the company]" as used above refers to an institution called "*daihyō torishimari-yaku* (representative directors)" prevalent in Japan today. In the United States, however, you cannot find an exactly equivalent organ.[89]

For example, the Japanese term *"daihyō torishimari-yaku"* is sometimes directly translated as "representative director."[90] In the United States, the board of directors delegates comprehensive authority regarding execute business to officers, including a CEO. Officers, however, are essentially employees, positioned under the board of directors and controlled by the board of directors. In practice, in the United States a CEO is commonly a director concurrently, and there are many cases where a CEO also assumes the position of chairman of the board of directors. But a CEO is not required to be "elected" from members of the board of directors under U.S. law and thus is different from a "representative director" in Japan (Art. 362(2)(iii) Companies Act). On the other hand, in the United Kingdom, a managing director resembles a "representative director" in Japan in the sense that he or she is delegated business execution authority as one of the members of the board of directors. But in the United Kingdom, a corporation can as an alternative introduce U.S. type officers by providing for them in the articles of incorporation.[91]

In sum, representative directors in Japan resemble officers in respect of the authority to represent a corporation and execute business, but they are different from officers in the United States and the United Kingdom in that they must be directors under Japanese law.

On reflection, however, it is not clear whether a representative director in Japan is an "officer-director", who is first a director but, like an officer, has been delegated by the board of directors the authority to represent a

88 Original in English.

89 Y. KURASAWA, *Kaisha hanrei no kiso* [Basics of Company Case Law] (Tōkyō 1988) 137.

90 I. KAWAMOTO/Y. KAWAGUCHI/T. KIHIRA, Corporations and Partnerships in Japan (Alphen aan den Rijn 2012) 264.

91 P. DAVIES/A. WORTHINGTON, Gowers' Principles of Modern Company Law (10th ed., London 2016) 361.

corporation and execute business, or a "director-officer", who is first an officer but is required to be a member of the board of directors concurrently under Japanese law. This feature of the representative director as "a body with two heads", with the two possible interpretations above, is a striking characteristic of the 1950 Amendment.[92] In respect of the concurrent officer position, it cannot be overlooked that an officer essentially belongs to a lower position than the board of directors in the corporate hierarchy.

Even before the 1950 Amendment, large Japanese corporations customarily called specific members of the board of directors "representative directors" by conferring upon them the authority to represent a corporation under provisions of the articles of incorporation[93] and by deeming such directors to be human representatives of the corporation as a whole.[94] The practice seems to have made it easier for Japanese corporations to accept a new institution called "representative directors" under the 1950 Amendment, without anyone becoming particularly conscious of differences from the traditional organization or feeling a sense of discomfort. Further, a social view that a representative director represents a corporation and is at the top of the corporate hierarchy, whether viewed from within or outside the corporation, has not changed from before the 1950 Amendment until the present day.

Such a view, however, overlooks two points that should have been fundamentally different from the role of a representative director before the 1950 Amendment. First, upon introduction of the board system under the 1950 Amendment, the business execution authority was given not to each individual director as before, but essentially to the board as a whole. Second, the board system basically does not allow control by a specific director (i.e., representative director), but has each director mutually audit business execution. In view of (i) the 1950 Amendment's creating not an officer but a "representative director" and (ii) the prevailing view deeming a representative director to be a representative of a corporation both within and

92 KURASAWA, *supra* note 89, 127.

93 G. MATSUMOTO, *Shōhō kaisei-hō hyōron* [Review of Revised Commercial Code] (Tōkyō 1911) 73.

94 In the beginning of the *Showa* period (1926–1989), there was a practice similar to that of the United Kingdom and the United States where important business was discussed by the board of directors. G. MATSUMOTO, *Nihon kaisha-hō-ron* [Japanese Company Law] (Tōkyō 1929) 247. The practice, however, merely provided a solely elected director and others an opportunity to discuss (or to receive an instruction from a representative director). There were some large corporations that devised a system with a "chairman of the board" and non-director "officers." The system was similar to, but different from, those of the United Kingdom and the United States because it did not contemplate the board system.

outside the corporation and also a business execution institution,[95] we see Japanese elements, different from elements of the U.S. law from which the 1950 Amendment was derived.

In addition, since the 1950 Amendment assigned to the board of directors the function of auditing directors mutually, it also abolished auditors – the traditional business auditing organ – so as to avoid overlap.

3. Abolition of Auditors

"19-7 To abolish the *kansayaku* system and to make provision for an organ to examine the accounts of the company."[96]

The above described English version does not translate "*kansa-yaku*" (auditors),[97] recognizing implicitly that the Japanese structure is unique. In

95 T. SUZUKI/T. ISHII, *Kaisei kabushiki kaisha-hō kaisetsu* [Commentaries on the Amended Stock Company Law] (Tōkyō 1950) 141.

96 Original in English.

97 There have been several proposals as to how to best translate *kansa-yaku*. Relatively recently, one can find use of terms such as *"interner Prüfer"* (I. KAWAMOTO, *Handels- und Gesellschaftsrecht* [Commercial and Company Law], in: Baum/Drobing (Hrsg.), *Japanisches Handels- und Wirtschaftsrecht* [Japanese Commercial and Business Law] (Berlin/New York 1994) 68, 80; J. WESTHOFF, *Formen und Bedingungen unternehmerischer Tätigkeit in Japan* [Form and Conditions of Entrepreneurial Activities in Japan], in: Baum/Bälz (eds.), *Handbuch Japanisches Handels- und Wirtschaftsrecht* [Handbook on Japanese Commercial and Business Law] (Köln 2011) 213) and "company auditors" (KAWAMOTO/KAWAGUCHI/KIHIRA, *supra* note 90, 283), but these translations contain a strong nuance of "accounting examiners within a corporation" vis-à-vis external accounting auditors and regrettably do not necessarily express the point that *kansa-yaku* has the business auditing authority. In that regard, terms such as "audit and supervisory board" and "audit and supervisory board member" ably express the point that *kansa-yaku* has not only the account auditing authority but also (in parallel with the board of directors) the business auditing authority; thus they seem more appropriate.

Because the board of directors is a supervisory organ with the business auditing authority under common law, it is inherently difficult to translate *kansa-yaku* into English (terms such as "inspectors" (Ministry of Justice, Commercial Code (Tōkyō 1892) 57; L. LÖNHOLM, The Commercial Code of Japan, (5th ed., Tōkyō 1911) 52 and "auditors" (The Codes Translation Committee, the League of Nations Association of Japan, The Commercial Code of Japan annotated Vol. 1 (Tōkyō 1931) 315 reflect the same problem). Given the background of the Draft, terms used in civil law seem rather to fit in the Japanese *kansa-yaku* system. In France, there are cases where *kansa-yaku* was translated into "*commissaires de surveillance*" (L. LÖNHOLM, *Code de commerce de l'Empire du Japon* [Commercial Code of Imperial Japan] (Tōkyō 1898) 49) and "*conseil de surveillance*" (S. KOMACHIYA, *Code de commerce du Japon, révisé en 1951* [Commercial Code of Japan, revised in 1951] (Paris 1954) 9 (though they were de facto accounting auditors after the 1950 Amendment). In this aricle, *kansa-yaku* is trans-

common law corporate systems, usually the board of directors audits business execution and a professional auditor audits corporate accounts; unlike Japan, there is no auditor that audits business execution apart from the board of directors. Common law systems traditionally provide that the business execution audit must be conducted within the board of directors autonomously, a policy which can be seen today in the creation of an audit committee within the board of directors.

The 1950 Amendment abolished auditors as a business auditing organ in accordance with the above described trend in common law and instead tried to create accounting auditors as an accounting auditing organ. The title of accounting auditors, however, was changed back to *"kansa-yaku"* during deliberations in the Upper House,[98] so that upon a casual reading of the 1950 Amendment it does not appear that *"kansa-yaku" (*auditors) were abolished, when in fact they were.

The first edition of a leading textbook, "*Kaisha-hō* (Corporate Law)" by Takeo Suzuki, describes the background of the 1950 Amendment as follows:

"Auditors under the old Commercial Code conducted [in addition to an accounting audit] supervision of business execution by directors generally, but because it is basically impossible for outsiders to supervise business execution, the new Commercial Code created the board of directors system and limited the duty of auditors to an accounting audit with an expectation that directors, including representative directors who assume business execution, will be checked and supervised by other directors within the board of directors."[99]

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lated into "auditors" unless otherwise noted. See H. KANSAKU/K. TAKEI, Background and Goals – New Recommended English Translation of "*Kansayaku*" and *"Kansayaku-kai" (http://www.kansa.or.jp/en/New_Recommended_English_translation_of_Kansayaku_and_Kansayaku-kai.pdf)*.

98 The Seventh Legal Committee of the Upper House (No. 37) on 2 May 1950. The reason for reviving the "*kansa-yaku*" title is that they can conduct a business execution audit *through an accounting audit*. In other words, they cannot conduct a business execution audit without an accounting audit.

99 T. SUZUKI, *Kaisha-hō* [Company Law] (1st ed., second part, Tōkyō 1952) 144. Suzuki repeated his understanding that the 1950 Amendment "limited *kansa-yaku*'s authority" as follows:

"*Kansa-yaku* under the old Commercial Code had the supervising authority over business execution in general, and therefore […] was given the authority in relation to the business to some extent. Because a *kansa-yaku* is elected by majority vote at the general meeting of shareholders without any qualification requirement, however, there is a tendency to usually select a second-class person from the same candidates for directors and make supervision by *kansa-yaku* a sham. The new Commercial Code considered this point, but because it did not set any qualification requirement, it merely limited *kansa-yaku*'s authority and did not change the past practice." *Id.* at 145.

The above textbook suggests that auditors were not abolished but rather that the duty was "limited to an accounting audit". On the surface, it may seem that both abolishing the position and limiting the duty ultimately have the same effect. From a comparative law perspective, however, we should see that the 1950 Amendment changed a traditional civil law type of auditing organ to a U.K. law type of "accounting auditor"[100] (the new Commercial Code, however, did not require any qualification for *kansa-yaku* even though an audit under the Securities and Exchange Act must be conducted by a certified public accountant)[101].

We should not overlook the point that a reason for abolishing the business execution audit by auditors was the "expectation" of internal supervision by the board of directors. In other words, under the inherent logic behind the 1950 Amendment, if the board of directors did not meet the expectation, legislators would have no choice but to revive business execution audit by auditors in addition to internal supervision by the board of directors.

Not surprisingly, after many accounting fraud cases, such as the Sanyo Special Steel Co. Ltd. bankruptcy case, an Amendment of the Commercial Code in 1974 revived the business execution audit by *kansa-yaku*.[102] Repeated Amendments of the Commercial Code have strengthened the *kansa-yaku* system. Under an amendment in 1974, under the Special Law on the Commercial Act a large corporation was required to undergo an accounting audit by a certified public accountant. Under an Amendment in 1981, a multiple auditor system and a full-time auditor system were introduced. Under an Amendment in 1993, the board of auditors system and an outside auditor system were introduced. Further, under an Amendment in 2001, more than half of the auditors were required to be "outside", with introduc-

100 At the Seventh Legal Committee of the Lower House (No. 2) on 11 April 1950, Joichi Okazaki, the Director-General of the First Legal Opinion Division, explicitly stated that "we thought it would be appropriate to have an accounting auditor conduct an accounting audit in emulation of the United Kingdom system."

101 *Shōken torihiki-hō* (Securities and Exchange Act), Law No. 25/1948 requires an audit of financial statements of certain corporations to be done by a certified public accountant. Suzuki described the situation at that time as follows: Even an accounting audit required under the Commercial Code "needs to be done by a party independent from the directors, such as a certified public accountant, to guarantee an effective and accurate audit. Because such a requirement was not implemented given that not all corporations have such a capacity, however, an audit by *kansa-yaku* is still a sham." SUZUKI, *supra* note 99, 145.

102 After amendment in 1974, Art. 274(1) of the Commercial Code explicitly provides for the first time that "*kansa-yaku* shall audit business execution by directors". MARUYAMA, *supra* note 1, 287; K. EGASHIRA, Commercial Law, Law in Japan 26 (2000), 52–53.

tion of stricter qualifications for designation as an outside auditor. It has been said that "a history of Amendments regarding the organization of listed corporations and others after World War II equals a history of strengthening the *kansa-yaku* system."[103] The idea of the board of auditors, however, was already provided in the Draft by Roesler, in consideration of the check and balance relationship with the board of directors, so we may as well conclude that Roesler's idea has been unintentionally "revived" and refined as a system under the current law.

VI. Ancestry and Progeny ("Vorfahren und Nachkommen") – Can Japan Depart from the Roesler Model?

The Draft is the origin of the current Japanese Commercial Code, and the origin of the draft goes back to Europe. By way of the Draft, Japan is connected to 19th century European commercial law, and Roesler was an excellent middleman between Japan and this body of law. From a Japanese perspective, the Draft presented a kaleidoscopic documentation of Europe's dazzling commercial law. On the other hand, from a European perspective, the Draft was an embodiment of European commercial law, drawn in a Far East island country.

The "revival" of the board of directors system is a predictable phenomenon since the Draft has strong characteristics of U.K. law (because European commercial law in the late 19th century was heavily influenced by the 1862 Companies Act) and since the 1950 Amendment was directed by the United States. As for the actual operation of boards of directors, however, the pendulum swung toward Japanese "*mugi no shūkan* (custom of no discussion)" as described in Yukichi Fukuzawa's *Bunmei-ron no gairyaku* (An Outline of a Theory of Civilization)[104] or "a culture of unanimity." The board of directors could not sufficiently supervise itself, and the Amendment in 1974 revived *kansa-yaku* with the Roesler Model's authority to supervise business execution.

Roesler came up with an idea to intentionally place the board of auditors in parallel with the one-tier board of directors because of the malfunction of auditing organs in Germany – mainly the board of auditors becoming a business execution organ. Roesler may have also considered the way direc-

103 Egashira, *supra* note 72, 476.

104 Y. Fukuzawa, An Outline of a Theory of Civilization, translated by D. Dilworth/G. Hurst III (New York 2009) 96 ("[I am dismayed] at the way Japanese are hindered by custom from discussing things publicly, accepting passively what they should take exception to, not opening their mouths when they should, not speaking out on matters which should be discussed.").

tors would actually function in Japan, where they had difficulty in expressing an opinion different from that of the head of a corporation, given Japan's hierarchical society. In either case, a "tradition" was eventually born in Japan whereby the board of auditors was separated from the board of directors and put outside of the business execution process. As accurately summarized by Takeo Suzuki in his discussion of the 1950 Amendment, "because *kansa-yaku* is elected by majority vote at the general meeting of shareholders without any qualification requirement […] there is a tendency to usually select a second-class person from the same candidates for directors and make supervision by *kansa-yaku* a sham".[105] Such a result can be said to have occurred naturally, given that *kansa-yaku* were easily detached from managerial information and decision-making processes.

Since 1974, the *kansa-yaku* system has been repeatedly improved.[106] Today, even though *kansa-yaku* have no voting right on decisions of the board of directors, *kansa-yaku* are regular members of the board of directors (Art. 383 Companies Act), and the guarantee of independence and the strengthening of authority of *kansa-yaku* can be viewed as being fully developed without any gaps. The fundamental issue, however, lies in whether Japanese corporations themselves become aware of, and overcome, a traditional culture of "difficulty in voicing opposition within the board of directors", which is a cultural issue but which requires strong backup from the legal system in order to overcome. From this standpoint, there should be put in place an institution (outside director) that has access to managerial information, that participates in decision-making processes, and that can express opinions or opposition against pressure to agree, implemented via processes such as "*nemawashi* (consensus-building)".

The issue described above led also to the introduction of a "corporation with committees" under an Amendment of the Special Law on the Commercial Code in 2002 and to calls for a revolution of the board of directors in Japan today. In fact, today the "corporation with committees" model seems to have lost in a "battle between systems" with the Roesler Model.[107] The prospects of achieving meaningful oversight as offered by another model, "a corporation with audit and supervisory committees" that is a short form of the corporation with committees cannot said to be bright. While true that the number of corporations with audit and supervisory committees has as of 2017 increased to more than twenty percent of all

105 SUZUKI *supra* note 99, 144.

106 T. YOSHII, Japan's Corporate Auditor System, ZJapanR/J.Japan.L 17 (2004) 41 ff.

107 According to a survey conducted by the Japan Association of Corporate Directors, only 71 out of 3,560 listed corporations are corporations with committees as of May 2017.

listed corporations, it should be observed that conversion from a board of auditors comprised of two or more outside auditors to a system of audit and supervisory committees is a simple and not necessarily substantive change. In other words, in such conversions the title of "outside auditors" has merely been changed to "outsider directors."

Even with the bleak prospects for the "corporation with committees" structure and the "corporation with audit and supervisory committees" structure, the issue is whether Japan can move toward enhancement of a supervisory function with the authority to elect and remove executive directors (representative directors and representative officers) by revolutionizing the board of directors internally, rather than by changing the *kansa-yaku* system, which seems to have been fully developed. Culture may change law in one respect whereas law may change culture in another respect. For Japan, this is truer now than it was 135 years ago when the Draft was written. If, however, Roesler still lived today, would he choose the Roesler Model again?

SUMMARY

In this paper, we will uncover the roots of the unique Japanese corporate governance structure in the first draft of its Commercial Code written by Hermann Roesler at the end of the 19th century. In the draft authored by the law professor from Germany, Japanese commercial law generally accepted European law. From a Japanese perspective, however, provisions of the draft based on an "unknown" philosophy from Europe were too unclear to interpret.

Roesler may have tried to place the board of auditors in parallel with the one-tier board of directors in order to avoid the two-tier system and to avoid the auditing organ (which did not work well in Germany at that time), or in order to create harmony with the role of directors and business practices in Japan. In either case, a "tradition" of Japanese corporate governance was eventually born in Japan where the board of auditors was put outside of the business execution process. Japanese corporate law requires kansa-yaku (auditors) to be present at every board meeting of directors (kansa-yaku, therefore, are sometimes called "regular members of the board of directors"). Japanese corporate law has tried not only to ensure kansa-yaku's independence from directors but also to make kansa-yaku increasingly powerful, though paradoxically it has never given kansa-yaku any voting right on decisions of the board of directors.

The keystone, however, lies in whether Japanese corporations can overcome a traditional culture. It is not easy or almost impossible for anyone to disagree with the majority in the board of directors in Japanese companies. In this paper, we

will argue that the authority of "outside directors", rather than auditors, should be enhanced presently. Japanese corporate law should (i) ensure outside directors' access to business information that corporate officers or managers have, (ii) allow outsider directors to participate actively in decision-making processes of the board of directors, and (iii) remove informal obstacles so as to allow outside directors to "disagree". The corporate governance model which Roesler showed us 135 years ago is still alive in Japanese corporate law. If, however, Roesler still lived today, would he choose the same model again?

Zusammenfassung

In diesem Beitrag zeigen wir, dass die Besonderheit der japanischen Organisationsstruktur der Aktiengesellschaften bereits im ersten Entwurf des Handelsgesetzes auftauchte, den Hermann Roesler im 19. Jahrhundert verfasste. In Roeslers Entwurf wird das japanische Handelsrecht mit dem damaligen europäischen Handelsrecht verknüpft. Die von dem deutschen Wissenschaftler aufgezeichneten rechtlichen Regeln, auf welche die Japaner ihre neuen Ideen stützen sollten, waren aber in Japan nicht klar auszulegen.

Roesler wollte auf einen Aufsichtsrat, wie er das zweistufige Organisationsmodell kennzeichnet, für Japan verzichten, zum einen weil dieser in Deutschland damals seinen Aufgaben nicht gerecht wurde, und zum anderen weil ein solcher nicht an die japanische Praxis anzupassen gewesen wäre. Schließlich entwickelte sich die „Tradition" in Japan, dass der Aufsichts- oder besser Prüferrat (kansa yakkai) nicht in die Geschäftsabläufe einbezogen wurde. Heute sind die kansa-yaku (Prüfer) ordentliche Mitglieder des Verwaltungsrats, obwohl sie kein Stimmrecht im Verwaltungsrat haben, und der Gesetzgeber versucht, ihre Unabhängigkeit und Rechte auszubauen.

Es ist jedoch fraglich, ob man die Übung, in den Verwaltungsräten japanischer Aktiengesellschaften „keine Opposition zu äußern", selbst bei starker Unterstützung durch das Gesellschaftsrecht überwinden kann. Deshalb sollte die Institution des außenstehenden, nicht geschäftsführenden Direktors (outside director), der Zugang zu den Informationen der Unternehmensleitung hat und an Entscheidungsprozessen teilnimmt und Widerspruch ausdrücken kann, eingeführt werden. Für Japan gilt das heute mehr noch als vor 135 Jahren, als der Roesler-Entwurf verfasst wurde. Wenn Roesler heute noch lebte, würde er nochmals dasselbe Modell wählen?