

RECHTSPRECHUNG / CASE LAW

Japanese Corporate Law: Important Cases in 2009

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I. INTRODUCTION

Trouble in the Japanese economy was apparent in 2009 with reports that investment in industrial plants and equipment declined across a wide range of industries.¹ More positively, however, reports also showed that the average profits of listed corporations² and average share prices of the Nikkei index both rose in 2009.³ Further, GDP in the July – September quarter increased 1.2% over the previous period, at a 4.8% annual rate.⁴ However, those same reports attributed the rise in profits and GDP to the stimulative measures adopted by the Japanese government.⁵

The Japanese economy is still in a relatively uncomfortable position. However, if we take corporate legal activity to be one indicator of corporate activity, some confidence can be taken from the fact that many important corporate law cases were decided in 2009.⁶ This paper will deal with four selected Supreme Court cases.

1 Nihon Keizai Shimbun, 29 November 2009, 1, 7.

2 Nihon Keizai Shimbun, 1 November 2009, 1.

3 Nihon Keizai Shimbun, 31 December 2009, 1.

4 Nihon Keizai Shimbun Evening Issue, 16 November 2009, 1, 3.

5 Nihon Keizai Shimbun, 1 November 2009, 1; Nihon Keizai Shimbun Evening Issue, 16 November 2009, 3.

6 For reference to trends in cases concerning the Commercial Code for the fiscal year of 2008, see E. KURONUMA, *Shôhō hanrei no ugoki* [Trends in Commercial Code Cases], in: Jurisuto

In the first case (Part II) the Supreme Court decided whether certain acts of a corporation could be assumed to be “commercial acts” and thus subject to extinctive prescription under the Commercial Code before the 2005 amendment⁷ (hereinafter: the “Commercial Code”). The second case in this paper (Part III) involves shareholders of a company demanding to inspect and transcribe the account books and other records of a subsidiary of that company. The issue before the court was whether, as a reason for refusing this demand, a subjective intention of the shareholders to use these records for a competing business needed to be shown, or whether the objective fact that the shareholders were involved in competing businesses was sufficient.

The third case in this paper (Part IV) concerns the liabilities for which directors are subject to shareholders’ derivative suits. Specifically, the court in this case determined whether in addition to normal duties and liabilities inherent in the position of directors, liabilities for debts arising from transactions between directors and their corporations are subject to derivative suits. In the fourth case (Part V), the issue was whether persons other than corporations party to the relevant transaction could claim actions by a representative director to be void, where the actions constituted the exercise of an important management decision which required a board resolution, and no board resolution existed. These four Supreme Court cases are analysed in detail below.

II. THE ASSUMPTION THAT ACTS OF CORPORATIONS ARE COMMERCIAL ACTS⁸

1. *Facts*

Y Corporation was a limited liability corporation (*yûgen-gaisha*) established for the purpose of mining and selling sand. It was a stock corporation under Art. 2 para. 1 of the Law Concerning the Preparation for Relevant Legal Consequences of the Operation of the Company Code. A was a representative director of Y Corporation, and went to the same elementary and junior high school as X. A and X had a continuing friendship facilitated by their activities in the Chamber of Commerce and Industry, to which they both belonged. B owned real property (hereinafter: the “Property”), and a mortgage (hereinafter: the “Mortgage”) was registered on this property. The mortgage was established in a loan agreement concluded on 7 May 1991 and executed on 26 July 1994 for the amount of 50 million yen. The debtor was X and the mortgagee was Y Corporation.

X brought a claim against Y Corporation seeking proceedings for the cancellation of the registration of the Mortgage, on the grounds of ownership of the Property. Y Corporation then brought a counterclaim against X, arguing that Y Corporation had loaned X

1376 (2009) 99; G. GOTÔ, *Heisei 20 nendo kaisha-hô kankei jûyô hanrei no bunseki (jô)(ge)* [Analysing Important Corporate Law Cases in the Fiscal Year of 2008 (1)(2)], in: *Shôji Hômu* 1872 (2009) 4, and 1873 (2009) 35.

7 *Shôhō*, Law No. 48/1899.

8 Supreme Court, 22 February 2008, *Hanrei Jihô* 2003, 144.

100 million yen on 7 May 1991, and demanded payment of the outstanding principal of 94,984,440 yen. Y Corporation also claimed that it had loaned B, a third party, 100 million yen on the same day and that X owed joint and several liability as a guarantor of B's debt. Y Corporation claimed payment of the outstanding amount of this debt from X, which was the same amount as in the first loan.

Y Corporation claimed that the lien attached to the Mortgage should be dealt with in the counterclaim. X sought extinctive prescription, arguing that an extinctive prescription of five years should be applied to the lien in the counterclaim, and that this extinctive prescription came to term on the day of the first oral pleadings in the case in the first instance, on 1 November 2005.

The original court found that A, a representative director of Y Corporation, received a request from X for a loan to fund the adjustment and resale of land by B, and decided to go ahead and "just give the loan in an impressive way". A emphasized that X was his childhood friend, and told the head of accounting at Y Corporation to arrange a loan for Y Corporation from its regular bank. Y Corporation then lent the 100 million yen it received as a loan from its bank to X or B (hereinafter, the lending from Y Corporation to X or B is referred to as the "Lending"). On these facts, there is room for an interpretation that the Lending was undertaken on the basis of A and X's friendship and had no relation to the business of Y Corporation. Accepting this interpretation, the lien did not arise from a commercial act, and Art. 522 Commercial Code (extinctive prescriptions) did not apply. X's argument for extinctive prescription thus lost its legislative basis, and the original court rejected X's arguments.

2. *Held by the Supreme Court*

Acts of corporations are assumed to be commercial acts. The burden of proof is on the person opposing this assumption to show that the acts concerned have no relation with the business of the corporation. The first reason the court decided thus is that any acts which are a part of a corporation's business, or further its business, are treated as commercial acts (Art. 5 Company Code). Further, corporations are a type of commercial person under the Commercial Code, as they are persons who conduct commercial acts under their own name (Art. 4 para. 1 Commercial Code). Finally, a corporation's acts are assumed to be conducted for their business (Art. 503 para. 2 Commercial Code).⁹

According to the facts accepted by the court, the Lending was an act done by Y Corporation, so the Lending is assumed to be a commercial act of Y Corporation. Even though there is room to interpret the Lending as having been based on A's friendship to X as the original court held, the facts in this case are not enough to prove that the 100 million yen Lending had no relation with the business of Y Corporation.

⁹ In this paragraph in the legislation, "business in relation to commercial persons" has the same meaning as "business of corporations" does in relation to corporations.

Therefore, the Supreme Court found that the lien arising from the Lending was a right arising from a commercial act, and such rights are subject to prescriptive extinction pursuant to Art. 522 Commercial Code.

3. *Comment*

According to the decision in the present case, acts of corporations are assumed to be commercial acts. To overturn this assumption, one will have to prove that there is no relation between the acts concerned and the business of the relevant corporation. One issue in this case was whether the rights arising from the Lending would be subject to the Commercial Code. The Supreme Court held that the fact that the Lending was given on the basis of the friendship was not sufficient to overturn the assumption that the act was a commercial act. Accordingly, the present case took as a premise that there may be acts of corporations which are not commercial acts.¹⁰

It is broadly accepted that corporations “conduct commercial acts as their business” as according to Art. 5 Company Code,¹¹ and that because of this corporations are commercial persons pursuant to Art. 4 para. 1 Commercial Code.¹² In order for the provisions regarding commercial acts (Art. 507 etc. Commercial Code) to apply, corporations must be defined as commercial persons.¹³ In this case, the Supreme Court held that corporations were commercial persons.

In the Commercial Code, there is a provision stating that the acts of commercial persons are assumed to be conducted for their business (Art. 503 para. 2). The commonly accepted interpretation of this provision holds that it does not apply to corporations. The reasons for this are that corporations are commercial persons since their inception, that they have no sense of private life, and that if acts of corporations fall within the scope of their corporate purpose (as per the articles of association) then those acts will be deemed to be conducted for their business.¹⁴ However, there is a dissenting view that, since corporations have a social existence, and some of their acts are within this social existence, they exist not just as commercial persons but also as general persons in

10 M. YANAGA, *Kabushiki kaisha no kô-i to sono fuzoku-teki shô-kô-i-sei* [Acts of Stock Corporations and the Nature of their Ancillary Commercial Acts], in: *Jurisuto* 1364 (2008) 50.

11 *Kaisha-hô*, Law No. 86/2005.

12 K. EGASHIRA (ed.), *Kaisha-hô kommentâru 1* [Company Code Commentary 1] (2008) 131; S. MORIMOTO, *Chikujô kaisetsu Kaisha-hô dai 1 kan* [Corporate Law Comprehensive Commentary Volume 1] (T. SAKAMAKI, and M. TATSUTA (eds.), (2008) 103.

13 H. MAEDA, *Kaisha-hô nyûmon, dai 12 han* [Handbook to Corporate Law, 12th edition] (2009) 2; Y. ITÔ, *Kaisha no kô-i ni tsuite no shôkô-i-sei no suitei* [The Assumption that Acts of Corporations are Commercial Acts], in: *NBL* 822 (2008) 31.

14 K. TANAKA, *Shôhō Sôsoku gairon* [Outline of General Rules in the Commercial Code] (1932) 243; K. NISHIHARA, *Shôkô-i-hô* [Law on Commercial Acts], (1973) 92; Y. HIRAIDE, *Shôkô-i-hô, dai 2 han* [Law on Commercial Acts, 2nd edition] (1989) 77, 89.

society. This view holds that the assumption in Art. 503 para. 2 that the acts of commercial persons are for their business applies to corporations.¹⁵

There is one precedent that excluded the application of Art. 503 para. 2 Commercial Code,¹⁶ but general precedent does not categorically exclude the application of this assumption to corporations.¹⁷ There have also been a number of relevant Supreme Court cases since WW II. In one, a contractual promise between a corporation and a labour union concerning retirement benefits was held to be a commercial act under Art. 503.¹⁸ In another case, an employment contract entered into between a commercial person and its employees was assumed to be conducted for the business of that commercial person, unless proven otherwise. In this latter case, Art. 503 para. 2 Commercial Code applied even when the corporation was found to be a commercial person.¹⁹

As seen in the above examples, the courts generally take an active approach in applying Art. 503 para. 2 to corporations. However, no past cases, including those of the Supreme Court, have clearly stated that Art. 503 para. 2 applies to the acts of corporations. This present case is thus important in that the Supreme Court was explicit in stating that Art. 503 para. 2 applies to the acts of corporations.²⁰

III. REASONS TO REFUSE SHAREHOLDERS INSPECTING AND TRANSCRIBING A SUBSIDIARY'S ACCOUNTING RECORDS²¹

1. *Facts*

Three companies were involved in this case. Y Corporation was a company established for the purpose of brokering fruit and vegetables. It had 5,000 issued shares, all of which were held by A Corporation. A Corporation was also a company established for the purpose of fruit and vegetable brokerage. In practice, both A Corporation and Y Corporation dealt exclusively with vegetables, and had no intention of dealing with fruit in the future. B Corporation was a company established to broker fruits and vegetables, but unlike A Corporation and Y Corporation, it dealt exclusively in fruit. B Corporation had no plans to deal with vegetables.

X held 5,840 shares (about 3.6% of voting rights) in A Corporation and no shares in B Corporation. C, who was X's son, held 34,320 shares (about 21.5% of voting rights)

15 K. ÔSUMI, *Shôkô-i-hô* [Law on Commercial Acts] (1962) 23.,

16 For cases, see M. YANAGA, *supra* note 10, 51; J. YAMADA, *Kaisha no kô-i ga shôkô-i ni gaitô suru koto no shuchô risshô sekinin* [The Burden of Argument and Proof that Acts of Corporations Are Commercial Acts], in: *Jurisuto* 1376 (2009) 128; Y. ITÔ, *supra* note 13, 32.

17 M. YANAGA, *supra* note 10, 51.

18 Supreme Court, 10 September 1954, Saikô Saibansho Minji Hanrei-shû 8 (9), 1581.

19 Supreme Court, 9 July 1976, Hanrei Jihô 819, 91.

20 Y. ITÔ, *supra* note 13, 33; J. YAMADA, *supra* note 16, 128.

21 Supreme Court, 15 January 2009, Hanrei Jihô 2031, 159.

in A Corporation, held at least 30% of issued shares in B Corporation, and was also an audit officer in that company. X and C jointly sought permission to inspect and transcribe the accounting records of Y Corporation (hereinafter: the "Permission"), under Art. 293-8 para. 1 Commercial Code.

The court at the first instance found that reasons stipulated in Art. 293-7 no. 2 Commercial Code, which provide grounds to refuse permission, applied to C. It thus dismissed the Permission requested by X and C.

On appeal, the court found that if, as an objective fact, the shareholders requesting the Permission were shareholders of competing corporations, then as a general rule the Permission could be refused by the company under Art. 293-7 no. 2 Commercial Code. However, if the relevant shareholders could prove that they did not have a subjective intention to use the information for competing businesses, then Art. 293-7 no. 2 did not apply, and the court could permit inspection and transcription. With this reasoning, the mere fact that the shareholders requesting the Permission were also shareholders of a competing company was not sufficient to enliven Art. 293-7 to allow refusal of the Permission.

All three companies were brokers of fruits and vegetables. However, whereas A Corporation and Y Corporation dealt only in vegetables, B Corporation dealt only in fruit. There was no possibility of direct competition in the near future between A Corporation and Y Corporation, and B Corporation. It was therefore unlikely that B Corporation would use confidential business information related to Y Corporation that it might gain from inspecting and transcribing the accounting records. This was sufficient to show that there was no subjective intention, and thus the appellate court partially approved the Permission on the grounds that there were no reasons provided for under Art. 293-7 no. 2 that allowed refusal of the Permission. Y Corporation then appealed to the Supreme Court.

2. *Held by the Supreme Court*

The denial of permission to allow shareholders to inspect and transcribe accounting records under Art. 293-7 no. 2 Commercial Code is dependent on one of two major conditions being fulfilled: that the shareholders requesting inspection and transcription are (1) persons conducting a business competing with the corporation; or (2) members, shareholders, directors or executive officers of such competing businesses. These conditions differ from those in no. 1 of the same article, which requires a subjective intention on the part of the requesting shareholder "to harm the management of the affairs of the corporation or the common interests of shareholders". Contrary to no. 1, the wording of no. 2 does not require a subjective intention to use the information for competing businesses.

It is difficult to prove a subjective intention as required by no. 1, and since both numbers presume the existence of a competing business relation, even where shareholders

do not have such an intention at the time of requesting access to accounting records, there will always be a risk that information obtained through the inspection will be used for competitive business activities in the future. No. 2 thus allows corporations to uniformly refuse permission to inspect accounting records for shareholders who are related to competing businesses, irrespective of subjective intent, in an attempt to protect corporations against the risk of possible misuse of information in the future.

This case shows that the objective fact that a shareholder requesting access to accounting records is involved in a competing business is sufficient, under the Commercial Code, to allow a corporation to refuse the inspection and transcription of these accounting records. A finding that the relevant shareholder has a subjective intent to use information for competing businesses is not required. Art. 293-8 para. 2, which provides for requests to inspect and transcribe accounting records, and allows for exceptions in Art. 293-7 no. 2, should be interpreted in accordance with this case.

3. *Comment*

In the present case, X, a shareholder of A Corporation which was a 100% parent corporation of Y Corporation, requested permission to inspect and transcribe the accounting records of Y Corporation. At issue was whether reasons for refusal, as laid down in Art. 293-7 no. 2 Commercial Code, applied, and if the answer was affirmative then the permission would be dismissed under Art. 293-8 para. 2. Art. 293-7 no. 2 provides that a corporation may refuse a request for access to accounting records if the shareholder is a person involved in a competing business. Scholars have three opinions regarding the construction of this provision: (1) if the shareholders requesting inspection are persons involved in a business that competes with the corporation, the corporation may refuse access (this view has no subjective elements); (2) to refuse access, a corporation must prove that the relevant shareholders have a subjective intention to use the information obtained from accounting records for their own or another competing business (this view has a subjective element); and (3) if the shareholders are involved in a competing business, but prove that they have no subjective intentions to use information for competitive purposes, then they can exercise the right to inspect the records (this view has a rebuttable assumption that a subjective intention exists.²² The majority of interpretations do not incorporate a subjective element.²³

22 E. TAKAHASHI, *Oya-gaisha no kabunushi ga ko-gaisha no kaikei chôbo nado no etsuran tôsha kyoka shinsei wo shita baai ni okeru fu-kyoka jiyû to seikyû-sha no shukan-teki ito no yôhi* [Reasons for Refusal and the Requirement for the Subjective Intention of Claimants where Shareholders of a Parent Corporation Claim Permission for Inspection and Transcription of Accounting Records of a Subsidiary Corporation], in: *Hôgaku Kyôshitsu* 354, *Hanrei Select* 2009 [II] 22. For academic theories, see M. YANAGA, *Kaikei chôbo nado no fu-kyoka jiyû to seikyû-sha no shukan-teki ito* [Reasons for Refusal of Inspection and Transcription of Accounting Records and the Subjective Intention of Claimants], in: *Jurisuto* 1378 (2009) 169; H. FUKUSHIMA, *Kaikei chôbo nado etsuran seikyû no kyozeitsu jiyû to seikyû-sha no*

Some lower court precedents did not require subjective intent, but nor did they exclude its use in certain circumstances;²⁴ other precedents simply took the position of not requiring subjective intent.²⁵ The Supreme Court adopted the position of not requiring any subjective element to be satisfied, and stated that the objective fact that the shareholder claimants were involved in competing businesses was sufficient. According to the Supreme Court's ruling, it is not necessary to show that the claimants had any intent to use information, obtained from accessing accounting records, for the purpose of aiding a competing business.

The reasons for refusal that were considered by the Supreme Court are in Art. 293-2 no. 1 Commercial Code. In the Company Code, reasons for refusal are stipulated in Art. 433 para. 2 no. 3. The wording of the provisions in the Company Code and the Commercial Code are different, but the Company Code is the successor to the above Commercial Code provisions, and there are no substantive differences between the provisions of each code.²⁶ The case presented here can be interpreted as not requiring subjective intent to be shown under Art. 433 of the Company Code.²⁷

In the present case, the Supreme Court held that X and C were each entitled to claim inspection and transcription of the accounting records of Y Corporation, and that whether a legitimate reason for refusal exists under Art. 293-7 no. 2 Commercial Code should be considered separately for each claimant. The court further held that even if there was a reason for refusal under Art. 293-7 in relation to either X or C, it would not necessarily follow that the reason for refusal would be applied to the other, even if they were parent and son and jointly requested inspection and transcription of the accounting records. According to this judgment, where multiple claimants have a right to request inspection and transcription of accounting records and the claimants jointly request access to the account records, even if reasons for refusal are found in relation to one or some of the claimants but not in relation to other claimants, then the latter claimants may make the request.²⁸

shukan-teki ito no yôhi [Reasons for Refusal of Requests to Inspect Accounting Records and the Requirement for the Subjective Intention of Claimants], in: Kinyû Shôji Hanrei 1323 (2009) 9.

23 K. ÔSUMI, and H. IMAI, *Kaisha-hôron (chû), dai 3 han* [Corporate Law (2), 3rd edition] (1992) 510.

24 Nagoya High Court, 7 February 1996, Hanrei Taimuzu 938, 221.

25 Tokyo High Court, 27 June 2007, Kinyû Shôji Hanrei 1270, 52.

26 T. AIZAWA, *Ichimon itto shin Kaisha-hô (kaitei ban)* [Questions and Answers for the New Company Code (revised edition)] (2009) 145.

27 E. TAKAHASHI, *supra* note 22; M. YANAGA, *supra* note 22, 169.

28 For this point, see M. YANAGA, *supra* note 22, 169; K. UKEGAWA, *Kaikei chôbo nado no etsuran seikyû no kyozeitsu jiyû to seikyû-kabunushi no shukan-teki ito no yôhi* [Reasons for Refusal of Requests to Inspect Accounting Records and the Requirement for the Subjective Intention of Claimant Shareholders], in: Hanrei Jihô 2051 (2009) 194; H. FUKUSHIMA, *supra* note 22, 10.

IV. THE SCOPE OF DIRECTORS' LIABILITIES SUBJECT TO DERIVATIVE SUITS UNDER ART. 267 PARA. 1 COMMERCIAL CODE²⁹

1. *Facts*

A Corporation received ownership of a number of land plots (hereinafter: the "Land") through a purchase agreement with a third party. X, a shareholder of A Corporation, claimed that the title registration showed that the transfer of title to the Land was not to A Corporation but to Y, a director of A Corporation. X filed a shareholders' derivative suit against Y, pursuant to Art. 267 para. 1 Commercial Code. X demanded that proceedings to transfer the registered title be commenced to recover the title to the Land to A Corporation. X also claimed as an alternative that when it purchased the Land, A Corporation arranged for Y to register a transfer of ownership into Y's name, and A Corporation then entered into an ongoing contract with Y which permitted A Corporation to borrow the land in Y's name indefinitely. However, this contract had been ended by the time Y was notified about the present derivative action. Based on the above arguments and the completion of the lease contract, X demanded the commencement of proceedings to transfer the title to the Land to A Corporation.

The court at the first instance held that the range of directors' liabilities which could be the object of derivative actions was limited to the strict liabilities imposed by the Commercial Code as inherent to the position of directors, such as those under each Number of Art. 266 para. 1. This definition did not include liabilities which did not arise from the position of being a director. The court at the first instance dismissed X's claim on the above grounds.

2. *Held by the Supreme Court*

Shareholders' derivative actions exist to allow shareholders to file actions where corporations fail to do so, so as to protect the interests of the corporation and its shareholders. This system is put in place to address the fear that due to the relationship between officers of a company, the company may not pursue directors when they have breached their duties to the company. The Supreme Court took a number of factors into consideration in making their decision. The first is that the fear that corporations will fail to pursue directors for breaches is not limited to cases where the duties are those inherent to the position of the director. Second, when directors representing corporations lend other directors money and performance is not completed or the loan not repaid, all directors representing the corporation owe the corporation through joint and several liability under Art. 266 para. 1 no. 3 Commercial Code. Third, if derivative actions were only permitted to pursue those duties inherent to the position of directors, directors representing corporations might be held liable for their actions, but directors who receive loans

29 Supreme Court, 10 March 2009, Hanrei Jihô 2041, 139.

might not be held liable in a derivative action for the corporation's debts that arise from the loan. The liabilities of directors who receive loans should be as strictly enforced as those of directors representing corporations, or the system will lack balance. Fourth, directors owe corporations a duty to perform in good faith debts accruing from the aforementioned kind of loan transactions. Taking the above matters into consideration, the liabilities of directors subject to derivative actions should include not only duties inherent to the position of directors, but also liabilities arising from loan transactions between companies and their directors.

3. *Comment*

This case is the first reported Supreme Court case to consider the reasons behind certain duties being the object of shareholders' derivative actions.³⁰ The Supreme Court held that the scope of directors' duties subject to derivative actions includes both those inherent to the position of director, and those arising from loan transactions between directors and companies.

The majority of academic theories hold that derivative suits can be initiated for any liabilities owed by directors to corporations, including for debts arising from transactions between directors and corporations and for any tort obligations owed to corporations by directors as third parties.³¹ However, another influential theory argues that derivative suits are allowed only for liabilities specified in Art. 266 of the Commercial Code and Art. 21-17 of the Law on Special Exceptions to the Commercial Code³² (before the abolishment of that law), as well as liabilities which cannot be exempted (Art. 192, 192-2, 280-13, 280-13-2 Commercial Code). This conflict in interpreting the statute can also be seen in the decisions of the lower courts.³³ The Osaka High Court held that the scope of directors' duties or liabilities that can be pursued by derivative suits includes not only liabilities for damage to corporations caused by contravening the law or the corporation's articles of association, and liabilities for breaching the capital maintenance rule, but also liability for recovering registered title for ownership of real property.³⁴

The Tokyo District Court, however, held in another case that the liabilities subject to derivative actions included only liabilities for damage to corporations resulting from acts contravening laws or articles of association, and duties regarding the maintenance of capital.³⁵ Where shareholders, who were also creditors, etc., exercised their rights in

30 M. YANAGA, *Kabunushi daihyô soshô no taishô to naru torishimariyaku no sekinin no han'i* [The Extent of Directors' Liabilities Falling within the Scope of Shareholders' Derivative Suits], in: *Jurisuto* 1380 (2009) 64.

31 For academic theories, see M. YANAGA, *supra* note 30, 64.

32 Law No. 22/1974.

33 For cases, see M. YANAGA, *supra* note 30, at 64.

34 Osaka High Court, 30 October 1979, *Kôtô Saiban-sho Minji Hanrei-shû* 32 (2) 214.

35 Tokyo District Court, 19 October 1956, *Kakyû Saiban-sho Minji Saibanrei-shû* 7 (10) 2931.

place of the relevant corporation and demanded a director, who was a debtor, to cancel the registration for ownership of a building, this action was held not to fall within the scope of derivative suits.

In another case, the Tokyo District Court held that the legislative framework allowing derivative suits was introduced through the 1950 amendment of the Commercial Code in an effort to make liabilities of directors stricter and strengthen the position of shareholders.³⁶ The District Court found that derivative suits could only be initiated for liabilities as written down in Art. 266 of the Commercial Code, which was made stricter and clarified by the 1950 amendment, and liabilities in Art. 280-13 Commercial Code, which was considered a separate source of directors' duties. Thus the Tokyo District Court rejected the idea that all liabilities which directors owed corporations fall within the scope of derivative actions. From the above examples it becomes apparent that in the lower court cases the judgments of the courts were as divided as the theories of academics.

Considering the inconsistent state of academic theory and lower court precedent, the case analyzed above is significant in that in it the Supreme Court makes clear its position on the justification for determining which directors' duties can be the object of derivative actions.

The Supreme Court followed the lower courts in dismissing X's first claim, but upheld X's second claim, finding that a derivative suit was permissible. The lower court decision was reversed in respect of the second claim and the case remanded back to the court of first hearing. For the former claim, the Supreme Court found that it sought to rely neither on duties inherent to the position of directors nor on duties arising from transactions with the director's corporation. The Supreme Court held that X's latter claim related to directors' duties that arose due to transactions between the director and the corporation. The Supreme Court position in this case is essentially that derivative actions can be initiated in regard to two types of directors' duties: those inherent to the position of directors, and duties and liabilities arising from transactions between directors and their companies.

The Supreme Court took a more permissive position than the strictly limited approach taken by the Tokyo courts mentioned above. However, by rejecting X's main argument it also did not support the Osaka High Court position mentioned above, which allowed derivative actions for any debts. The Supreme Court considered Art. 267 Commercial Code in this case as the provision which authorizes derivative actions. This has since been succeeded by Art. 847 Company Code, and the Supreme Court's decision is considered to be applicable to the newer provisions.³⁷

36 Tokyo District Court, 7 December 1998, Hanrei Jihô 1701, 161.

37 M. YANAGA, *supra* note 29, 65.

V. THE VALIDITY OF A TRANSACTION ENTERED INTO BY A REPRESENTATIVE DIRECTOR WITHOUT A REQUIRED BOARD RESOLUTION, AND STANDING FOR PARTIES OTHER THAN THE CORPORATION TO SEEK VOIDANCE³⁸

1. *Facts*

Y provided a loan to A Corporation, which regularly paid interest on the loan back to Y. The interest was above the limit provided for in Art. 1 para. 1 of the Interest Limitation Law,³⁹ and so a part of the interest payment was instead appropriated to pay off the principal. Overpayment of A Corporation's debts to Y then became apparent. In a separate transaction, X Corporation lent A Corporation money. A Corporation became effectively insolvent, at which time representative directors of both A Corporation and X Corporation reached an agreement whereby A Corporation's rights against Y, to claim repayment of the overpayment on the grounds of unjust enrichment (hereinafter: the "Repayment Rights"), were transferred to X Corporation (hereinafter: the "Transfer"). At the time of the Transfer, A Corporation had almost no valuable assets other than the Repayment Rights. However, there was no resolution by the board of directors authorizing the Transfer. Regardless of this, X Corporation proceeded to demand repayment from Y on the basis of the Repayment Rights obtained by the Transfer.

In the first instance, the court held that the Repayment Rights were the only assets A Corporation possessed, and that the Transfer had the effect of disposing of A Corporation's substantial assets. As such, a board resolution was necessary, but no such resolution was given, and X knew of this. The court at first instance held that the Transfer was therefore void.

2. *Held by the Supreme Court*

Important management decisions require a resolution of the board of directors, as stipulated in Art. 362 para. 4 Company Code. This prescription is in place to protect the interests of corporations by ensuring power is not overly concentrated in the hands of representative directors. Important management decisions must be undertaken in accordance with the conclusions of the directors as a whole. As a general rule, if a transaction which is within the definition of an important management decision, is entered into by a representative director without the required resolution, the transaction will be void. However, this argument can only be made by the corporation party to the transaction; persons other than the corporation cannot claim avoidance of the transaction except in specified circumstances, such as when the board of directors of the corporation has already reached a resolution to claim avoidance itself.

38 Supreme Court, 17 April 2009, Hanrei Jihô 2044, 142.

39 Law No. 100/1954.

3. *Comment*

In an earlier case heard by the Supreme Court, the court stated that as representative directors hold all powers related to the management of corporations, situations where no resolution is obtained for important management decisions simply lack internal validity and are otherwise generally valid.⁴⁰ However, where a party who has entered into a transaction with the corporation through the representative director acting without a resolution, knows or could have known that there was no required board resolution, then the transaction may be void as against that party.

The decision outlined in this paper develops the law of the earlier case.⁴¹ The Supreme Court held that as a general principle only the relevant corporation can seek to make the transaction void and other persons may only seek avoidance of the transaction in specific situations such as when the corporation's board has already agreed to argue that the transaction is void. The present case is significant in that the Supreme Court further clarified who may seek avoidance of improper transactions.⁴² In this case Y, an earlier creditor, argued that the transaction should be made void. A Corporation, who was party to the transaction, did not make this argument and A Corporation's board of directors did not agree to make this argument. Therefore, the court did not recognize Y's standing to seek invalidity of the transaction.

VI. CONCLUSION

This paper presented an overview of four Supreme Court decisions. The first case centered on the issue of whether certain acts of a corporation were classified as commercial acts. The court held that acts of corporations are assumed to be commercial acts, and the burden of proving otherwise is on the party that wishes to rebut this assumption. The second case arose because the shareholders of a company sought permission to inspect the accounting records of their company's subsidiary. The court held that to refuse this permission the company has only to show that the shareholders are involved in a competing business, and does not have to establish the shareholders' subjective intention to misuse obtained information for competitive purposes.

The third case considered the scope of derivative actions, with the court holding that derivative actions could be sought for directors' duties arising inherently from the position of a director, as well as liabilities incurred in transactions between directors and corporations. The fourth case discussed the issue of whether persons other than cor-

40 Supreme Court, 22 September 1965, Saikô Saiban-sho Minji Hanrei-shû 19 (6) 1656.

41 See the decision of the present case, Hanrei Jihô 2044, 144.

42 M. YANAGA, *Daihyô torishimariyaku ga torishimariyaku-kai no ketsugi wo hezu ni shita jûyô na gyômu shikkô ni gaitô suru torihiki no kôryoku* [Validity of Transactions where a Representative Director Enters into a Dealing without the Resolution of a Board of Directors], in: *Jurisuto* 1381 (2009) 66.

porations could seek to void important management decisions which were conducted without the requisite board resolution. The court held that in general only corporations party to the transaction could seek to void transactions lacking internal authorization, and that other parties could only seek avoidance in specific circumstances.

These four Supreme Court decisions cover a wide scope of corporate law, and show that even though 2009 may not have been a good year economically, Japanese corporate law made progress on several fronts.

ZUSAMMENFASSUNG

Der Aufsatz befasst sich mit vier Entscheidungen des Obersten Gerichtshofs im Bereich des Gesellschaftsrechts und zeigt ihren Beitrag zur Weiterentwicklung dieses Rechtsgebietes auf.

Im ersten Fall ging es darum, ob bestimmte Geschäfte von Gesellschaften als Handelsgeschäft nach Art. 522 Handelsgesetz anzusehen sind und somit der erlöschenden Verjährung des Handelsgesetzes unterfallen. Der Oberste Gerichtshof entschied, dass die Vermutung des Art. 503 Abs. 2 Handelsgesetz, wonach grundsätzlich alle Geschäft von Kaufleuten als zum Geschäft gehörig anzusehen sind, auch auf Gesellschaften Anwendung findet, mit dem Ergebnis, dass bewiesen werden muss, dass es kein Handelsgeschäft ist.

Im zweiten Fall ging es um das Einsichtsrecht der Aktionäre in die Bücher einer Tochtergesellschaft. Nach dem Obersten Gerichtshof genügt für die Ablehnung der Bitte um Einsicht in die Bücher nach Art. 293-2 Nr. 1 die bloße Tatsache, dass die entsprechenden Aktionäre in konkurrierenden Geschäften agieren, ein subjektives Element in Form einer Absicht, die gewonnenen Erkenntnisse für konkurrierende Geschäfte zu verwenden, muss nicht nachgewiesen werden.

Der dritte Fall befasste sich mit Handlungen von Verwaltungsratsmitgliedern, die Gegenstand einer Aktionärsklage sein können. Dabei stellte der Oberste Gerichtshof fest, dass nicht nur solche Handlungen, die im Rahmen der Funktion als Verwaltungsratsmitglied erfolgen, Gegenstand einer Aktionärsklage sein können, sondern auch solche aus Geschäften zwischen Verwaltungsratsmitgliedern und ihrer Gesellschaft.

Im letzten Fall entschied der Oberste Gerichtshof, dass die Unwirksamkeit eines Rechtsgeschäfts aufgrund eines fehlenden Beschlusses des Verwaltungsrats grundsätzlich nur von einer der beteiligten Gesellschaften geltend gemacht werden kann.