

# **‘Reception’ and ‘Convergence’ of Japanese and German Corporate Law**

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## I. INTRODUCTION

The traditional relationship between Japanese and German corporate law has been characterized as the ‘reception’ by the former of the latter. However, in recent years the development of both Japanese and German corporate law has been modelled on US law. In this paper, I term the phenomenon in which the content of the two corporate laws grows increasingly similar to US law ‘convergence’, and aim to identify and address some issues concerning this new phenomenon.

In Part II, I shed light on the Japanese reception of German corporate law by identifying the issues involved. In Part III, I use the examples of the shareholder’s derivative action and the business judgment rule in elaborating on the new relationship of ‘convergence’ between the two nations’ corporate laws, and discuss the problems caused by this new phenomenon. I then close with a conclusion.

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## II. 'RECEPTION' OF GERMAN CORPORATE LAW BY JAPAN

### 1. *The Traditional Relationship Between Japanese and German Corporate Law: Systems Reception and Theory Reception*

The influence of German law on Japanese civil law is often described as 'theory reception' by the latter of the former.<sup>1</sup> However, the system's aspect has drawn more attention than the theory aspect when it comes to the influence of German law on the Japanese Commercial Code. For example, the old Japanese Commercial Code (*Shōhō*) draft was prepared by Hermann Roesler, and much of the content his draft was drawn from the provisions of the German General Commercial Code of 1861 (ADHGB).<sup>2</sup> The influence of German law on the content of the old Limited Liability Company Act (*Yūgen kaisha-hō*) enacted in 1938 was also striking.<sup>3</sup> German law continues to exert great influence on the theoretical aspects of Japanese corporate law even today.

### 2. *Japanese Corporate Law Concepts of German Origin*

#### a) *The Fundamental Nature of the Stock Corporation*

Since the ADHGB of 1861, German law has had a conceptual definition of the stock corporation. The definition in Article 207 of the ADHGB is as follows:

- A commercial corporation is a stock corporation if its members participate only through contributing capital, and bear no liability for corporate obligations.
- Corporate capital is divided into shares or share interests.<sup>4</sup>
- The Imperial German Commercial Code (HGB) of 1897 only replaced the term 'corporate capital' with 'paid-in capital' or 'share capital', and continued using the ADHGB definition almost word for word (HGB of 1897, Art. 207(1)–(2)).

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1 Z. KITAGAWA, *Rezeption und Fortbildung des europäischen Zivilrechts in Japan* [Reception of and Further Development European Civil Law in Japan] (Frankfurt a. M. 1970) 67 ff.

2 A. BARTELS-ISHIKAWA (ed.), *Hermann Roesler: Dokumente zu seinem Leben und Werk* [Hermann Roesler: Materials on his Life and Work] (Berlin 2007) 62.

3 T. SAKAMAKI, *Heisateki kaisha no hōri to rippō* [Principles and Legislation of Closed Companies] (Tōkyō 1973) 238; T. ŌTORI, *Yūgen kaisha-hō no kenkyū* [Studies in Limited Liability Company Law] (Tōkyō 1965) 70; H. BAUM/E. TAKAHASHI, *Commercial and Corporate Law in Japan, Legal and Economic Developments after 1868*, in: W. Röhl (ed.), *A History of Law in Japan since 1868* (Leiden 2005), at 343.

4 The definition of a stock corporation under the *Aktiengesetz* currently in force is more refined. As defined by Art. 1(1), "The company is a stock corporation that constitutes a separate legal entity. Liability to creditors with respect to obligations of the company shall be limited to the company's assets". Art. 1(2), "The company shall have a capital divided into shares". *Aktiengesetz* [AktG] [Stock Corporation Act], 6 September 1965, BGBl. I at 1089, last amended by *Gesetz* [G], 23 July 2013, BGBl. I at 2586, Art. 1 (Ger.), translated in Norton Rose Fulbright, *German Stock Corporation Act (Aktengesetz): English translation as of 18 September 2013*, NORTON ROSE FULBRIGHT (last visited 1 September 2014), <http://www.nortonrosefulbright.com/files/german-stock-corporation-act-109100.pdf>.

The founder of Japanese corporate law studies, Dr. Keijirō Okano, who studied under Otto von Gierke in Berlin, adopted the 1861 General Commercial Code definition of the stock corporation as an academic concept for Japan’s stock corporation. He also elaborated the following three features of Japan’s stock corporation in 1929. First, ‘the fixed fund created by the capital contribution of the members’. Second, ‘the capital is divided into a certain number of shares’. Third, ‘the liability of each member is limited’.<sup>5</sup>

Dr. Takeo Suzuki embraced Dr. Okano’s ideas, and following Karl Lehmann,<sup>6</sup> characterized the stock corporation’s distinctive features as shares, limited liability, and capital.<sup>7</sup> This remains accepted as the traditional doctrine.<sup>8</sup>

b) *The Three Principles of Capital*

German legal science placed emphasis on two principles concerning the capital of stock corporations. In 1898, Karl Lehmann argued that the ‘principle of fixed share capital’ (*Prinzip des festen Grundkapitals*) should apply to the capital of a stock corporation, and that the defined value of assets to be contributed as capital should be clearly stated.<sup>9</sup> Lehmann also argued that the ‘principle of stability of share capital’ (*Prinzip der Beständigkeit des Grundkapitals*) should apply, and that, once decided, the share capital amount should not be arbitrarily changed.<sup>10</sup>

Initially, Japanese doctrine simply followed Lehmann. Dr. Jōji Matsumoto in 1916 argued in support of the principles of fixed share capital and maintenance of capital. On the principle of maintenance of capital, Dr. Matsumoto accepted Lehmann’s ‘*Prinzip der Beständigkeit des Grundkapitals*’ (principle of stability of share capital), arguing that this ‘means that capital cannot be arbitrarily changed’.<sup>11</sup>

5 K. OKANO, *Corporate Law* (Tōkyō 1929) 207 ff.

6 K. LEHMANN, *Das Recht der Aktiengesellschaften* (Aalen 1898) 158 ff.

7 However, Suzuki saw capital as a creation of legal policy that takes into consideration the consequences of the regime of shareholders’ limited liability. Therefore, according to Suzuki, the features of the stock corporation are in that sense secondary characteristics. T SUZUKI, *Kaisha-hō* [Corporate Law] (rev. ed., Tōkyō 1956) 19.

8 S. MORIMOTO, *Kaisha-hō shōkōi-hō tegata-hō kōgi* [Lectures on Corporate Law, Business Transactions, and Bills] (2nd. ed., Tōkyō 2011) 28 ff.; H. MAEDA, *Kaisha-hō Nyūmon* [Introduction to Corporate Law] (12th ed. 2009) 18 ff.; K. ŌSUMI/H. IMAI/R. KOBAYASHI, *Shin-kaisha-hō gaisetsu* [An Outline of the New Companies Act] (2nd. ed., Tōkyō 2010) 19 ff.; E. TAKAHASHI, *Kaisha-hō gaisetsu* [An Outline of Corporate Law] (Tōkyō 2010) 37. In contrast, Professors Kenjirō Egashira and Hideki Kanda argue that among shares, limited liability, and capital, only limited liability is a fundamental distinguishing feature of the stock corporation. K. EGASHIRA, *Kabushiki kaisha-hō* [Stock Corporations Law] (4th ed., Tōkyō 2011) 32 ff.; H. KANDA, *Kaisha-hō* [Corporate Law] (16th ed., Tōkyō 2012) 26.

9 LEHMANN, *supra* note 6, at 167.

10 LEHMANN, *supra* note 6, at 168.

11 J. MATSUMOTO, *Kaisha-hō kōgi* [Lectures on Corporate Law] (Tōkyō 1916) 208 ff. Matsumoto’s ‘principle of maintenance of capital’ (*shihon iji no gensoku*) was what Lehmann called ‘the principle of stability of capital’, and corresponds to today’s ‘principle of constant capital’ (*shihon fuhen no gensoku*).

Subsequently, Müller-Erbach in 1928 emphasized the ‘sufficiency of the capital fund (*die Aufbringung des Grundkapitals*)’<sup>12</sup> and the ‘continuous maintenance of the capital fund (*die dauernde Erhaltung des Grundkapitals*)’<sup>13</sup> as the distinctive features of stock corporation capital. He also elaborated upon the obligation to contribute the equivalent of the full capital sum from the perspective of capital sufficiency, and the prohibition on the return of contributed capital and corporate purchase of its own stock from the perspective of capital maintenance.

Based on Lehmann’s theory and taking into account Müller-Erbach’s opinion, Dr. Okano explained the necessity for the entirety of a corporation’s share capital to be subscribed as the principle of fixed share capital. According to him, the principles of constant capital and of capital maintenance are derived from this principle. Regarding the principle of capital maintenance, Okano reasoned that ‘property equivalent to the share capital amount must be kept as the economic foundation of the corporation’.<sup>14</sup> The foundations of the three principles of capital in Japanese corporate law were thus laid. The three principles of capital became established doctrine through the efforts of Dr. Suzuki,<sup>15</sup> and remained the leading doctrine until the 2005 amendments.<sup>16</sup>

The legislative draftsman of the Companies Act of 2005 took the view that the new statute did not incorporate the duty to ensure capital sufficiency in its traditional sense. This view was based on the abolishment of the promoters’ duty of warranty of subscription (Art. 192(1), pre-2005 Commercial Code) and duty of warranty of contribution (Art. 192(2), pre-2005 Commercial Code).<sup>17</sup> Since then, academic opinion has been divided on the question of whether the three principles of capital remain applicable to the regime under the Companies Act 2005. Although the majority opinion is that the three principles remain apropos the Companies Act,<sup>18</sup> Professor Hideki Kanda argues that of the three principles, only the principle of capital maintenance survives, as members are disenfranchised if they fail to discharge their duty to pay in share capital.<sup>19</sup>

The three principles of capital that Japanese law acquired from German law were useful conceptual tools for explaining the principles of corporate finance. However, with

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12 R. MÜLLER-ERZBACH, *Deutsches Handelsrecht* [German Commercial Law] (2nd. And 3rd. eds., Tübingen 1928) 247 ff.

13 *Id.* at 249 ff.

14 OKANO, *supra* note 5, at 208ff.

15 SUZUKI, *supra* note 7, at 24ff.

16 K. NISHIHARA, *Kaisha-hō (Shōhō kōgi II)* [Corporate Law (Lectures on Commercial Law 2)] (Tōkyō 1969) 76 ff.

17 D. KōRIYA/T. IWASAKI, *Kaisha-hō ni okeru saiken-sha hogo (jō)* [Creditor Protection in the Companies Act (Part 1)] in: *Shōji Hōmu* 1764 (2005) 52. Previously, promoters and the directors at the formation of the stock corporation were liable to subscribe for any shares left unsubscribed, and to pay in any capital contribution not paid in by subscribing members.

18 EGASHIRA, *supra* note 8, at 35 ff.; MAEDA, *supra* note 8, at 21 ff.; TAKAHASHI, *supra* note 8, at 38 ff.

19 KANDA, *supra* note 8, at 268.

the enactment of the Companies Act 2005, the field to which the three principles of capital are applicable has narrowed. Japanese corporate legal studies now face the challenge of returning to the founding spirit of the field, and of discovering and developing a coherent theory inherent within the structure of corporate finance.

*c) Corporation-in-formation*

In early German doctrine, the leading theory described the pre-incorporation legal relationships as of a partnership of promoters. In 1864, Paul Laband explained the relationship of share subscribers by arguing that before the incorporation there existed at least a partnership of promoters, and it is to this partnership that subscribers of shares owe the duty to pay in capital.<sup>20</sup>

In contrast, Otto von Gierke argued in 1887 that

“if the law recognizes an established association, then the law cannot refuse to recognize an association undergoing the establishment process. The fixed realm of legal principles that govern life within the public body also covers its life during the infancy of the public body.”<sup>21</sup>

In doing so, Gierke had in mind the stock corporation as an example of such an association.

Building on the work of scholars like Otto von Gierke,<sup>22</sup> Dr. Kōtarō Tanaka drew a parallel with the fetal stage before an infant's birth, and argued that corporations too had a fetal stage which he called the 'corporation-in-formation', and structured his theory of the legal relationships involved around that concept.<sup>23</sup> As to the motive behind the concept of the 'corporation-in-formation', he later reflected:

“The birth of an organizational body such as the stock corporation is not a single act, nor would a single act suffice to make it happen. First the promoters must create the articles of incorporation, followed by a subscription for shares, issuance, paying-in of capital, holding of the meeting of formation [...] Thus it is by going through the stages that a corporation is born, a process strikingly similar to how a fetus grows in stages in the mother's body, and becomes a complete person upon birth. Accordingly, I conceptualized the promoters as an organ of the fetal corporation, and attempted to ground the basis of promoters' obligations in their status as such.”<sup>24</sup>

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- 20 P. LABAND, *Rezension: Renaud, Das Recht der Actiengesellschaften* [Review of Renaud, The Law of Stock Corporations] in: *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* [ZHR] 7 (1864) 617, 620.
- 21 O. V. GIERKE, *Die Genossenschaftstheorie und die deutsche Rechtsprechung* [The Theory of Associations and German Administration of Justice] (Berlin 1887) 135 ff.
- 22 O. V. GIERKE, *Deutsches Privatrecht: Allgemeiner Teil und Personenrecht* [German Private Law: General Part and the Law of Persons] (Berlin 1895) 486 ff.; GIERKE, *supra* note 21, at 135 ff.
- 23 K. TANAKA, *Gōmei kaisha sekinin-ron* [On Liability in Unlimited Companies] (Tōkyō 1919) 376 ff.
- 24 T. YANAGISAWA, *Ikite kita michi (Tanaka Kōtarō)* [The Path I Have Lived (Memoirs of Tanaka Kōtarō)] (Tōkyō 1950, reprinted 1997) 121.

He characterizes this approach as “[one from] a sociological perspective. It is by observing legal persons in a biological, organic way. In other words, its theoretical foundation is not that of a Romanistic, individualistic theory of private law, but rather of Germanistic collectivism.”<sup>25</sup> The theory of ‘corporation-in-formation’ first introduced into Japanese law by Dr. Tanaka today still receives support from lower court judgments<sup>26</sup> and prevailing doctrinal thought.<sup>27</sup>

However, the concept of the ‘corporation-in-formation’ in prevailing Japanese legal thought differs from its German counterpart in one distinctive respect. Under German law, there is an initial agreement between the promoters to form the corporation (‘the partnership of promoters’ (*Vorgründungsgesellschaft*)). By accomplishing the purpose of this partnership, which is to determine the Articles of incorporation (Art. 726, German Civil Code), the partnership is dissolved.<sup>28</sup> Subsequently, the rights and duties of the partnership of promoters are succeeded to by the ‘corporation-in-formation’ (*Vorgesellschaft*), and the corporation in turn succeeds to the rights and duties of the corporation-in-formation with the registration of formation. The German theory, therefore, is that of the growth of the corporation in stages.<sup>29</sup> In contrast, in Japanese law, the corporation-in-formation and the partnership of promoters are competing concepts. In other words, in prevailing Japanese doctrine,

“the partnership of promoters, which is a partnership formed under the civil law [...] does not develop into a corporation-in-formation, but rather co-exists separately from the corporation-in-formation. It is just that the promoters, who are both members and an organ of the corporation-in-formation, and the members of the partnership of promoters are, as explained above, the same insofar as the personal aspect is involved. Also, the corporation-in-formation and the partnership of promoters are closely connected. That is to say, the creation of the articles of incorporation, subscription of shares and the performance of duties necessary for the formation of the corporation and the like by the promoters are, to the corporation-in-formation, the creation of its constitution, formation and the operations of its organ. However, to the partnership of promoters, such acts are the performance of the partnership agreement.”<sup>30</sup>

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25 YANAGISAWA, *supra* note 24, at 122.

26 Tokyo High Court, 26 July 1976, in: Hanrei Jihō 831 (1976) 94; Tokyo High Court, 23 May 1989, in: Kin’yū Hōmu Jijō 1252 (1990) 24.

27 EGASHIRA, *supra* note 8, at 105 n. 2; KANDA, *supra* note 8, at 55 ff.

28 Article 726 of the German Civil Code states that a partnership formed under civil law is dissolved by accomplishing its stated purpose.

29 F. KÜBLER/H.-D. ASSMANN, *Gesellschaftsrecht* [Company Law] (6th ed., Heidelberg 2006) 377 ff.

30 M. KITAZAWA, *Setsuritsu-chū no kaisha to hokki-nin kumi'ai* [The Corporation-in-formation and the Partnership of Promoters], in: Keiyaku-hō Taikei Kankō I'inkai [Commission of Editors of the Compendium of Contract Law] (ed.), *Keiyaku-hō taikei (Tokushu no keiyaku 1)*

The jurisprudence of the lower courts in Japan also takes the view that the partnership of promoters and the corporation-in-formation co-exist.<sup>31</sup>

After 1970, Flume argued that the fundamental nature of a partnership at civil law is that of '*Gesamthand*' (collective ownership), and that it is to the partners as a collective that the rights and duties of the partnership belong.<sup>32</sup> This became prevailing doctrine.<sup>33</sup> It was a result of characterizing the civil law partnership as a type of collective originating in Germanic law.

The 1994 Reorganization Act made possible changes from an organization of persons to an organization of capital (Art. 214(1)). With this change, the position that partnerships in civil law have legal personality came to be strongly argued.<sup>34</sup> In addition, on 29 January 2001, the Federal Court of Justice handed down a decision recognizing the legal capacity of the external partnership in civil law.<sup>35</sup> At Flume's centenary memorial symposium, Professor Karsten Schmidt said, "I am beginning to wonder if the *Körperschaft* and the external organization of persons are but just separately regulated legal persons."<sup>36</sup> The legal nature of the partnership of promoters is thought to be that of a partnership in civil law, but consider the possibility of introducing the new idea recognized by German judicial precedent that a partnership in civil law has legal capacity into Japanese law. If so introduced, legal relationships created while a corporation is in formation would belong to the partnership of promoters, and it would suffice to say that these relationships would simply be succeeded to by a corporation formally brought into existence with registration. It is necessary to consider in this case whether the competing concept of 'corporation-in-formation' is truly necessary.<sup>37</sup>

*d) The Dualism of the Act of Electing A Director and the Contract of Appointment*

German law distinguishes between the election (*Bestellung*) and appointment (*Anstellung*) of directors. This is called the 'separation principle' (*Trennungstheorie*) (see Art. 84(1)(5) AktG). In German law, 'election' is an act under corporate law, and refers to

- [Compendium of Contract Law (Specific Contracts 1)] (Tōkyō 1963) 116. For a similar view, see T. SUZUKI/A. TAKEUCHI, *Kaisha-hō* [Corporate Law] (3rd ed., Tōkyō 1994) 56.
- 31 Tokyo District Court, 21 April 1992, Hanrei Jihō 1434 (1992) 54.
- 32 W. FLUME, *Allgemeiner Teil des Bürgerlichen Rechts: Teil 1, Die Personengesellschaft* [The General Part of Civil Law: Part 1, The Association of Persons] (2nd ed., Berlin 1977) 56.
- 33 According to Professor Schmidt, an external partnership under civil law is a *Gesamthandsgesellschaft*. K. SCHMIDT, *Gesellschaftsrecht* [Company Law] (4th ed., Köln 2002) 1697.
- 34 T. RAISER, *Gesamthand und juristische Person im Licht des neuen Umwandlungsrechts* [Collective Ownership and the Legal Person in Light of the New Reorganization Act], in: *Archiv für die civilistische Praxis* 194 (1994) 505, 511.
- 35 BGHZ 146, 341.
- 36 K. SCHMIDT, *Die Personengesellschaft als Rechtsfigur des 'Allgemeinen Teil'* [The Organization of Persons as a Legal Construct of the 'General Part'], in: *Archiv für die civilistische Praxis* 209 (2009)181, 202.
- 37 TAKAHASHI, *supra* note 8, at 44.

the act of the relevant party (the would-be director) of becoming the corporate organ or 'director' by his acceptance. 'Appointment' on the other hand refers to the creation of contractual relationships between the corporation and each individual director. In order to end a relationship of appointment, the appointment contract must be terminated.<sup>38</sup> In such a case, in order to terminate an employment relationship without a fixed term, there must be one or more important grounds for termination as pursuant to Article 626 of the Civil Code.

The consensus in Japanese law is that the election of directors is a unilateral act that has as its condition the acceptance of the elected person, and becomes effective with the shareholder resolution electing the director and the elected person's acceptance.<sup>39</sup> On the other hand, influenced by the separation principle from German law, Dr. Kenichirō Ōsumi and Dr. Hiroshi Imai argue that the election of directors has, on top of its organizational law aspect (in the sense of making the elected persons part of a corporate law organ), a personal law aspect in the sense that the elected person has to bear the personal duty of providing labor as a director. According to Ōsumi and Imai, therefore, the consensus understanding of election as a unilateral act cannot explain the personal law aspect.<sup>40</sup>

Japanese corporate law contains rules based on the consensus opinion that 'the removal of directors constitutes a unilateral act'. Specifically, under corporate law, a corporation may remove a director at any time. In contrast with German law, which is premised on the separation principle, the contract of appointment loses effect at the same time as termination of the director. A removed director has right to claim damages for 'remuneration that should have been received' (Art. 339(2) Companies Act). However, where the removal was for proper grounds the removed director loses the right to damages (Art. 339(2) Companies Act).<sup>41</sup>

The German-influenced separation principle as put forth is effective in the protection of directors in their role as employees. Under German law, even if a director is removed, as long as there are no grounds for the termination of the appointment contract, the appointment contract continues to be in effect, and the director does not lose his right to claim remuneration. Japanese law on the other hand, in the context of removal of a director, aims to safeguard the right to remuneration within a tort framework through framing the right to remuneration as the right to claim 'loss of benefits that should have

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38 BGHZ 79, 38, 41.

39 SUZUKI / TAKEUCHI, *supra* note 30, at 270 n.9.

40 See K. ŌSUMI/H. IMAI, *Kaisha-hō-ron chūkan* [On Corporate Law Part II [out of three]] (3rd ed., Tōkyō 1992) 149 ff.

41 Article 339(2) establishes a form of legal responsibility that is aimed at balancing the guarantee of the freedom of shareholders to remove their directors on the one hand, and on the other protection of the expectation of a director with regards to his term of appointment. See Osaka High Court, 30 January 1981, in: *Kaminshū* 32 No. 1-4 (1981) 17. Therefore, the amount of compensation should be the amount of benefit that a director would have received at the end of his term of office if he had not been removed. See EGASHIRA, *supra* note 8, at 372 n.7.



been received’. However, under this framework, the burden of proof as to the amount of ‘benefits that should have been received’ falls on the director. At this point, as compared with German-school separation doctrine the protection of directors as persons receiving remuneration is weaker. Because a removed director bears the burden of proving her losses (‘benefits that should have been received’), where the director’s remuneration takes the form of stock options (Art. 361(1)(1),(3) Companies Act) varies with corporate performance or is otherwise uncertain,<sup>42</sup> the director’s burden of proof can be difficult depending on how the remuneration is to be determined.

If we follow the German theory-inspired views of Kenichirō Ōsumi and Hiroshi Imai and follow the separation principle to its logical conclusion, we should amend Article 339(2) of the Companies Act. The amendment should make it clear that where a director is removed from his post it does not follow that his appointment contract is automatically terminated, that to terminate the appointment contract special grounds are necessary, and that the director does not lose his right to claim remuneration upon removal.<sup>43</sup>

### 3. Reception of German Legal Doctrine in Japanese Lawmaking

#### a) A Shareholder’s Duty of Loyalty?

The birth of inquiry into the shareholder’s duty of loyalty in Japan was contemporaneous with the beginning of Nazi law research in Japan. At the time, some scholars, influenced by Nazi legal thought, actively advocated the introduction of a shareholder’s duty of loyalty doctrine.<sup>44</sup> However, prevailing legal thought did not recognize such a duty. As Tanaka argued,

“The shareholder’s duty is none other than the duty of capital contribution [...] Once the subscription has been paid in neither that shareholder nor those who acquire those shares bear any obligation. A legal relationship of loss sharing also does not arise as between the members, unlike a general partnership company. This is shareholders’ limited liability, a core principle of stock corporation law first clearly articulated in the commercial codes of France, the Netherlands, and Spain.”<sup>45</sup>

Also drawing on the principle of shareholders’ limited liability, Ōsumi argued that “ordinarily, shareholder rights do not include any obligations”.<sup>46</sup>

42 See E. TAKAHASHI, in: Sakamaki/Tatsuta (eds.), *Chikujō kaisetsu kaisha-hō dai-4-kan kikan I* [Article-by-Article Commentary of the Companies Act, Vol. 4, Organs 1] (Tōkyō 2008) 465 ff.

43 See E. TAKAHASHI, *Doitsu kaisha-hō gaisetsu* [An Outline of German Company Law] (Tōkyō 2012) 150.

44 See E. TAKAHASHI, *Gleichbehandlungsgrundsatz und Treuepflicht im japanischen Gesellschaftsrecht* [Principle of Equal Treatment and Duty of Loyalty], in: Stürmer (ed.), *Die Bedeutung der Rechtsdogmatik für die Rechtsentwicklung* (Tübingen 2010) 261, at 270 ff.

45 K. TANAKA, *Kaisei kaisha-hō gairon* [On the Revised Corporate Law] (Tōkyō 1939) 459 ff.

46 K. ŌSUMI, *Zentei kaisha-hō-ron jō-kan* [On the Completely Revised Corporate Law, Vol. 1] (3rd ed., Tōkyō 1962) 265.

Suzuki, who led the field of corporate law studies in postwar Showa-era Japan, argued that viewed formalistically ‘a stock corporation is not a contractual association of members, but rather is formed from corporation-member relationships with the group as the axis’,<sup>47</sup> drawing a rigid distinction between the civil law partnership and the corporate nature of the stock corporation. He further argued that although shareholders’ collective rights were introduced to protect their individual rights,

“it is difficult to imagine that it would be acceptable for shareholders, in the exercise of their collective rights, to insist on their personal interests only and improperly infringe upon the interests of other shareholders. At the very least, such a level of consideration is to be expected, even if the relationship of trust between shareholders does not rise to the level of that in a real partnership. I am of the view that the shareholder’s duty of loyalty as recognized by recent German doctrine may and should be recognized within the boundaries and upon the grounds as set out above.”<sup>48</sup>

These views of Suzuki bore fruits as the ‘abuse of majority vote doctrine’ introduced by the 1981 revisions to the Commercial Code. Article 247(1)(iii) as enacted that year establishes a ground for setting aside a shareholder resolution at shareholders’ meeting ‘where an extremely improper resolution is passed due to the exercise of voting rights by a shareholder for whom the resolution presents a special conflict of interest’.<sup>49</sup> However, scholars were reluctant to go beyond the abuse of majority vote doctrine to recognize a shareholder’s duty of loyalty.

But when the 1970s were over, the position that a shareholder’s duty of loyalty should be recognized came to prevail in German legal thought.<sup>50</sup> With the recognition of a duty of loyalty between shareholders in the Linotype decision of the German Federal Supreme Court on 1 February 1988,<sup>51</sup> scholars began to argue that such developments in German jurisprudence should also be received into Japanese law.<sup>52</sup>

In the ‘Interim Recommendations on Corporate Law Reform’ issued by the Ministry of Justice Civil Affairs Bureau Counsel’s Office in December 2011, in addition to provi-

47 T. SUZUKI, *Kaisha no shadan hōjin-sei* [The Personal Association Nature of the Corporation], in: *Shōhō Kenkyū: Kaisha-hō (1)* [Studies in Commercial Law: Corporate Law (1)] (Tōkyō 1971) 17.

48 *Id.* at 21.

49 Article 247(1)(iii) of the Commercial Code as amended in 1981 corresponds to Article 831(1)(iii) of the Companies Act. On the latter provision, see H. BAUM/E. TAKAHASHI, *Klagen gegen fehlerhafte Hauptversammlungsbeschlüsse im japanischen Aktienrecht* [Suits against Faulty Resolutions of Shareholder Meetings in Japanese Stock Corporation Law], in: *ZJapanR/J.Japan.L.* 32 (2011) 153, 158 ff.

50 Cf. D. A. VERSE, *Treuepflicht und Gleichbehandlungsgrundsatz* [The Duty of Loyalty and the Principle of Equality of Treatment], in: Bayer/Habersack (eds.), *Aktienrecht im Wandel: Grundsatzfragen des Aktienrechts* [Stock Corporation Law in Transition: Fundamental Questions in Stock Corporation Law] (Tübingen 2007) 579 at 595 ff.

51 BGHZ 103, 184.

52 Cf. TAKAHASHI, *supra* note 44, at 272.

sion for the liability of parent corporations to subsidiaries, clear language providing for the “liability of natural persons deemed to have similar influence as a parent corporation in view of their voting power” was also proposed.<sup>53</sup>

The shareholder’s duty of loyalty has a flaw in that it fails to provide a legal basis for liability in damages in cases where natural persons at the top of a *Konzern* (group company) structure infringe the interests of a subsidiary or a subsidiary of a subsidiary of the controlling corporation. This is because the natural persons in control at the top are not shareholders of the harmed corporations.<sup>54</sup> To complement group company regulation in Japanese law, therefore, I suggest that there should be a revision modelled on Article 117 of the *Aktiengesetz* establishing liability for persons exercising influence 1) even when there is negligence on their part, as well as 2) even when the harm was pursuant to a shareholder resolution.<sup>55</sup>

*b) Reception of the Duty to Direct in Corporate Group Law?*

In 1982, Hommelhoff argued that since the capital contribution made by a parent to a subsidiary is an asset of the parent, the parent’s directors have the authority and duty to direct the subsidiary, and termed such authority and duty the ‘Konzern duty of direction’.<sup>56</sup> To resolve the conflict between this duty and the authority and duty of the subsidiary’s directors (see Art. 76 AktG), Hommelhoff argued that the allocation of authority between the directors of the parent and those of the subsidiary should be resolved by the shareholders’ meeting of the parent corporation.<sup>57</sup>

Under the influence of this ‘Konzern duty of direction’, there was debate in Japan over whether to introduce a duty of parent directors to supervise the operations of subsidiaries. There is discussion of introducing a rule that ‘the board of directors shall supervise the operations of the corporation’s subsidiaries’ in Supplementary Document 23 of the Corporate Law Subcommittee.

The rule that would have established the Konzern duty of direction was proposed as an alternative in case multiple derivative actions did not make it into the final reform

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53 HÖMUSHŌ MINJIKYOKU SANJIKAN-SHITSU [Ministry of Justice Civil Affairs Bureau Counsel’s Office], *Kaishahō-sei no mina’oshi ni kansuru chūkan shi’an* [Interim Recommendations on Corporate Law Reform] (December 2011) 14.

54 Y. LAKNER, *Der mehrstufige Konzern* [The Multi-level Corporate Group] (Köln 2005) 196, E. TAKAHASHI, *Mochibun kaisha to kigyō ketsugō hōsei* [Membership Companies and Regulation of Corporate Groups], 1969 *Shōji Hōmu* 4, 5 (2012).

55 E. TAKAHASHI, *Doitsu-hō ni okeru eikyōryoku riyōsha no sekinin kisei to Nihon no Kaishahō Kaisei no Kadai* [The Liability Regime for Exercisers of Influence in German Law and Issues in Japanese Corporate Law Reform], in: Kitamura/Takahashi (eds.), *Gurōbaru-ka no naka no kaisha-hō kaisei* [Corporate Law Reform Within Globalization] (Kyōto 2014) 324.

56 P. HOMMELHOFF, *Die Konzernleitungspflicht* [The Konzern Duty of Direction] (Köln 1982) 419.

57 *Id.* at 500.

legislation. As it appears likely that multiple derivative actions will be enacted into law, introduction of the Konzern duty of direction has been shelved. In my personal view, it is commendable that Japan did not receive the German doctrine on Konzern direction.

The problem with the Konzern duty of direction that Japanese corporate law considered introducing lies in its conflict with the subsidiary's directors' duty of loyalty. Duties in corporate law come hand in hand with authority. Directors of subsidiaries bear the duty to operate the subsidiary so as to maximize its gains (Art. 330 Companies Act, Art. 644 Civil Code, Art. 350 Companies Act). On the other hand, since the parent's capital contribution to the subsidiary is part of the parent's assets, the parent's directors have the duty to increase the value of the capital contribution made to the subsidiary as part of their duty of loyalty to the parent. When directors of the parent order that some measure be taken so as to maximize gain to the parent, but the directors of the subsidiary determine in the exercise of their judgment that the measure harms the interests of the subsidiary, what should happen? Should the duty of direction of the parent's board take precedence, and the subsidiary's directors be thereby obligated to execute the measure? Or should the subsidiary's directors be entitled to refuse, in accordance with their duty to maximize benefit to the subsidiary? The duty of direction that Japanese corporate law considered introducing cannot answer this question satisfactorily. Since the conflict of duties arises in the first place because there are no rules specifying the allocation of authority within a corporate group structure, it may be said that the allocation of powers should be left to an organ of the parent corporation, as suggested by Hommelhoff. If, however, the parent's shareholders' meeting would allocate powers, as proposed by Hommelhoff, it would exceed its capacity.<sup>58</sup> A shareholders' meeting is after all akin to a large ship. The shareholders' meeting lacks the information on the basis of which to allocate powers between the various corporate organs within a corporate group. Also, it cannot respond rapidly to the constantly changing needs of the corporate group. Therefore, reception of the *Konzern* duty of direction into Japanese corporate law is not desirable.

### III. 'CONVERGENCE' OF JAPANESE AND GERMAN CORPORATE LAW

#### 1. *The New Relationship Between Japanese and German Law*

In recent years, the contents of Japanese and German corporate law have grown more similar without mutual exchange. Central to the 'convergence' of the corporate laws of these two countries is the law of the United States. In this part, I shall explain this new phenomenon using the business judgment rule and the shareholder's derivative action as case studies.

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58 B. KROPPF, *Zur Konzernleitungspflicht* [On the Konzern Duty of Direction], in: *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 13 (1984) 112, 124 ff.

## 2. Japanese Law

### a) Introduction of the US Business Judgment Rule into Japan

The American business judgment came to be studied in Japan relatively early as a topic in comparative law, but Japanese scholars have long been skeptical of its reception, citing differences between the Japanese and American legal systems. Their argument is roughly as follows. In 1983, stating the principle that “directors bear no liability for honest or sincere mistakes in judgment, and the courts do not intervene in mistakes of judgment”,<sup>59</sup> Professor Noboru Kawahama questioned the appropriateness of introducing the business judgment rule into Japan and of thereby excluding business judgment from judicial review.

He suggested that although the courts have neither the knowledge nor experience in managing corporations, they are able to review the appropriateness of judgments. He also argued that since the suppression of judicial review of business judgment under the American business judgment rule is closely connected with the American system of civil litigation, to it would create unnecessary confusion, if one would call the Japanese rule that merely confirms liability for negligence the ‘business judgement rule’.<sup>60</sup>

By contrast, Professor Mitsuo Kondō in 1989 argued that because management involves risk and requires specialized knowledge and expertise that courts lack, it is inappropriate for courts to pass judgment and impose harsh liability on directors. Therefore, courts should recognize that directors have a certain degree of discretion, and grant deference to their business judgment.<sup>61</sup> Professor Kondo’s position later became the foundation of Japan’s business judgment rule.

### b) Structural Impediments Initiative

In September 1989, the Structural Impediments Initiative, a series of talks aimed at correcting the trade imbalances between Japan and the United States, were held. The United States identified as causes of their trade deficit Japan’s *keiretsu* system, distribution practices, savings patterns and others, and in a bid to improve matters the United States government created a list of suggestions and requested that the Japanese government take action on those points.<sup>62</sup> The American negotiators urged Japan to strengthen shareholder protection by increasing the degree to which shareholders may hold managers liable through shareholder lawsuits.<sup>63</sup>

59 N. KAWAHAMA, *Beikoku ni okeru kei'ei handan gensoku no kentō (1)* [A Study of the Business Judgment Rule in the United States (1)], in: *Hōgaku Ronsō* 114(2) (1984) 79.

60 N. KAWAHAMA, *Beikoku ni okeru kei'ei handan gensoku no kentō (2)* [A Study of the Business Judgment Rule in the United States (2)], in: *Hōgaku Ronsō* 114(5) (1984) 59.

61 See M. KONDŌ, *Kaisha kei'eisha no kashitsu* [The Negligence of Corporate Managers] (Tōkyō 1989) 180 ff.

62 A summary of the list of suggestions by the US government is recorded in NIPPON HŌSŌ KYŌKAI SHUZAI-HAN [NHK], *NHK supesharu nichibei no shōtotsu* [NHK Special: US-Japan Conflict] (1990) 305ff.

63 NHK, *supra* note 62, at 315.

c) *1993 Revisions*

The 1993 revisions included clear language deeming shareholder derivative actions to be claims of a non-calculable nature (Art. 267(4) Commercial Code as of 1993 revision), a change that caused the claim amount in a shareholder derivative action to be set as 950,000 JPY and the filing fees as 8,200 JPY (Art. 4(2), Appendix 1(1) Civil Litigation Fee Rules). Dr. Teiichirō Nakano characterized the reform as an exceptional one caused by foreign pressure.<sup>64</sup> Dr. Masahiro Kitazawa also clearly identified the Structural Impediments Initiative as the catalyst that eased the bringing of derivative actions.<sup>65</sup>

As a result of the 1993 revisions to the Commercial Code, filing fees for shareholder derivative actions came to be treated the same way as for non-calculable claims such as administrative litigation against local government authorities, and regardless of the claim amount, all shareholders may file a derivative action at the flat rate of 8,200 JPY (then).<sup>66</sup>

d) *Explosion in Shareholder Derivative Actions and the Development of the Business Judgment Rule*

The flat 8,200 JPY filing fee for bringing a shareholder derivative action caused an explosion in derivative litigation that could not have been anticipated by the legislators. Until 1993, there was an average of one derivative action every two years. However, in 1993, the year of the reform, 39 actions were brought in that year alone. In 1999, the peak year, 220 derivative actions were in the courts.<sup>67</sup>

In addition, there came to be many cases in which directors' liability came to be adjudged in the courts. Contemporaneous with the explosion in derivative litigation, Japanese jurisprudence came to clearly formularize adjudication of the duty of care and the duty of loyalty issues, following American legal thought.

In a 1993 decision, the court did not clearly refer to the business judgment rule, but held that directors have discretion in matters of business judgment, if however, that discretion is exceeded then directors are liable to compensate the corporation.<sup>68</sup>

The lower court decision that established the form of the business judgment rule is the Cemedine decision of the Tokyo District Court of 8 February 1996.<sup>69</sup> The manufacturer of the glue known as 'Cemedine' (A corporation) formed a joint venture (C corpo-

64 T. NAKANO, *Soshōbutsu no kakaku* [The Value of Claims], in: Hanrei Taimuzu 833 (1994) 28.

65 M. KITAZAWA, in: K. Ueyanagi / T. Ōtori / A. Takeuchi (eds.), *Shinpan chūshaku kaisha-hō dai-ni hokan heisei 5-nen kaisei* [New Annotated Corporate Law Second Supplementary Volume Heisei 5 Reforms] (Tōkyō 1996) at 32.

66 The current filing fee is a flat rate of 13,000 JPY.

67 For the figures, see E. TAKAHASHI, *Corporate Governance in Japan: Vorgriff auf künftige Reformen in Deutschland?* [Corporate Governance in Japan: In Anticipation of Future Reforms in Germany?], in: Leipold (ed.), *Verbände und Organisation im japanischen und deutschen Recht* (Köln 2006) 81, at 89.

68 Tokyo District Court, 21 September 1993, in: Hanrei Jihō 1490 (1994) 154.

69 Tokyo District Court, 8 February 1996, in: Shiryōban Shōji Hōmu 144 (1996) 115.

ration) with an American corporation (B corporation) to sell A corporation’s products in the United States. As sales remained sluggish, A corporation acquired all of B corporation’s shares and assumed B’s capital contributions.

In this decision, the Tokyo District Court held that ‘where there is no mistake that is both important and negligent with respect to the underlying facts, and there is nothing in the decision-making process or content that is especially unreasonable or inappropriate for corporate managers’, directors breach neither their duty of care nor their duty of loyalty. This holding came to be known as the ‘Cemedine formula’,<sup>70</sup> and was followed in many lower decisions.<sup>71</sup>

Later, in criminal cases, the Supreme Court came to recognize the business judgment rule directly. In the decision of 9 November 2009,<sup>72</sup> the Court held the defendants (who included directors of a bank) liable for criminal breach of trust where the defendants provided unsecured financing to a client in financial trouble in the knowledge that the loan could not be recovered. The Court said that, in general,

“bank directors owe the same kinds of duties as directors of ordinary corporations, namely, the agent’s duty of care (Art. 644 Civil Code) and the duty of loyalty (Art. 254-3 pre-2005 reform Commercial Code, Art. 355 Companies Act), and there is room for the application of the so-called business judgment rule”.

In the Apamanshop Holdings Supreme Court decision of 15 July 2010,<sup>73</sup> the Supreme Court recognized the application of the business judgment rule also to civil cases. The dispute concerned the liability of the parent corporation relating to the valuation of an acquisition of shares in an unlisted subsidiary. The Supreme Court held that

“the decision about a corporate reorganization [...] is left to specialist’s business judgment [...] When there is nothing ‘remarkably unreasonable’ about the process by which [a business decision] is arrived at or the contents of the decision, the directors do not breach their duty of care as a prudent manager”.

Since the Apamanshop decision, although there have been lower court decisions following the older Cemedine formula,<sup>74</sup> the trend has been to use anew statement of the

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70 E. TAKAHASHI, *Kanren kaisha ni taisuru shi'enkin kyōkyū to kei'ei handan gensoku* [Provision of Financial Support to Related Companies and the Business Judgment Rule], in: *Shōji Hōmu* 1747 (2005) at 56.

71 For example, Osaka District Court, 20 February 2002, in: *Hanrei Taimuzu* 1109 (2003) 226, Tokyo District Court, 9 July 2005, in: *Hanrei Jihō* 1909 (2006) 87.

72 Supreme Court, 9 November 2009, in: *Keishū* 63(6) (2009) 1117.

73 Supreme Court, 15 July 2010, in: *Hanrei Jihō* 2091 (2010) 90. For a case comment, see D. W. PUCHNIAK/M. NAKAHIGASHI, Case No. 21 (Apamanshop Case), in: Bälz et al. (eds.), *Business Law in Japan – Cases and Comments: Intellectual Property, Civil Commercial and International Private Law – Writings in Honour of Harald Baum* (Alphen aan den Rijn 2012) 215–226.

74 For example, Fukuoka District Court Ogura Branch, 14 April 2011, unreported, TKC Document No. 25481284.

business judgment rule, i.e. the ‘when there is nothing ‘remarkably unreasonable’ about the process by which [a business decision] is arrived at’, the formula laid down in the Apamanshop-decision.<sup>75</sup>

*e) Analysis of the Background of the Reception of the Business Judgment Rule*

The explosion of derivative actions may be identified as the catalyst for the introduction of the business judgment rule into Japanese law. In 1996, the filing fees for derivative actions were lowered, and derivative actions exploded in number. Together with this trend, the business judgment rule became progressively formularized in the case law. The business judgment rule is a doctrine that avoids suppressing the entrepreneurial spirit that attempts new businesses without fear of risk, and functions by severing the connection between mistakes in business judgment and civil liability for damages through shareholder’s derivative actions and recognizing the discretion of directors on management matters.

On the background behind the formularization of the business judgment rule in Japanese law, Professor Mitsuo Kondō argued that

“as the Heisei era wore on, cases in which derivative actions are brought against directors grew in number, and as awareness of the derivative action as a threat grew, awareness of the business judgment rule amongst the general public grew also. In response, the courts progressively formularized the business judgment rule. An example is the decision holding that where there is no mistake that is both important and negligent with respect to the underlying facts, and there is nothing in the decision-making process or content that is especially unreasonable or inappropriate, the duty of care is not breached.”<sup>76</sup>

*3. German Law: The Introduction of the Derivative Action and Legislative Enactment of the Business Judgment Rule*

The Act on Corporate Integrity and Modernisation of Avoidance and Rescission Rights (UMAG)<sup>77</sup> passed in 2005 not only legislatively introduced the shareholder’s derivative action long-advocated in academic circles, but also enacted the business judgment rule long recognized in court jurisprudence.

The shareholder’s derivative action as introduced by the UMAG permits only shareholders holding over one percent or over 100,000 EUR par value of shares to bring suit (Art. 148(1) AktG). A shareholder derivative suit may only be brought with leave of court. The court grants permission only if four criteria are satisfied. They are, 1) the

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75 Tokyo District Court, 27 January 2011, unreported, LEX/DB: 25470380; Tokyo District Court, 24 November 2011, in: Hanrei Jihō 2153 (2012) 109.

76 M. KONDŌ (ed.), *Hanrei hōri kei’ei handan gensoku* [Doctrine in Case Precedent: The Business Judgment Rule] (Tōkyō 2012) 12.

77 *Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts* [UMAG] 22 September 2005, BGBl. at 2802.



plaintiff shareholder must prove that her shares are acquired prior to when the breach of duty or loss claimed becomes publicly known; 2) the plaintiff must prove that her demand, with the appropriate time period, on the corporation to bring suit had no effect; 3) the plaintiff must plead facts giving rise to a suspicion that there has been dishonesty or a serious violation of the law or the corporate constitution causing loss to the corporation, and 4) there exists no social welfare policy grounds that trump the bringing of the suit.

The shareholder plaintiff may bring the derivative action if the court grants permission (Art. 148(3)(1) AktG), and it is this action pursuant to Article 148(3)(1) of the *Aktiengesetz* that is the shareholder's derivative action.

The UMAG also establishes the business judgment rule as follows: "where the directors reasonably believe that at the time they made the entrepreneurial decision they were acting on appropriate information and for the benefit of the corporation, they do not breach their duty" (Art. 93(1)(2) AktG).<sup>78</sup> Writing on the background of the enactment of the business judgment rule, Professors Klaus J. Hopt and Markus Roth explained that "the purpose of the business judgment rule is to balance the increased ease with which directors may be sued pursuant to Articles 147–149 by establishing a legally-recognized safe harbor and space with freedom from liability for directors".<sup>79</sup>

As with Japanese law, under German law the formularization of the business judgment rule is functionally linked to the shareholder's derivative action. With the introduction of the shareholder's derivative action, cases in which shareholders bring suit against directors for managerial mistakes have increased, and the legislators' fears that this would lead to atrophy of corporate management or even stagnation of the economy took legislative form as the business judgment rule.

#### 4. *Issues Arising from the 'Convergence' of German and Japanese Corporate Law*

In general, the 'convergence' of corporate law can be classified into three types depending on their causes.

The first type of convergence is that which is caused by competition amongst the corporate laws of different jurisdictions. This is convergence in its original sense. The example given is that of the competition that has arisen amongst EU member states sparked by the abandonment of the real seat doctrine. This convergence led to the abolishment of minimum capital in limited liability company<sup>80</sup> legislation in the member states.<sup>81</sup> This

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78 For the development of the business judgment rule in German law, see E. TAKAHASHI, *Doitsu to nihon ni okeru kabushiki kaisha-hō no kaikaku: Kōpōreeto gabanansu to kigyō ketsugō hōsei* [Stock Corporation Law Reform in Germany and Japan: Corporate Governance and the Regulation of Corporate Groups] (Tōkyō 2007) 212ff.

79 K. J. HOPT/M. ROTH, in: Wiedemann/Hopt (eds.), *Großkommentar AktG* (4th ed., 26th Supplement, Berlin 2006) § 93 Abs. 1 Satz 2, 4 n.F. AktG, at Rdnr. 8.

80 In other words, forms such as the GmbH (as opposed to the AG).

type of convergence has been criticized for the lowering of the quality of corporate laws as a whole (the phenomenon called ‘race to the bottom’), which results from countries going overboard in their attempt to make their corporate laws attractive to entrepreneurs with the purpose of attracting incorporations. However, where corporate laws appropriately provide for investor and creditor protection, their respective capital markets become more attractive, and create the benefit of raising the credit of a corporation incorporated in such jurisdictions internationally. Therefore, the competition to deregulate corporate laws will not continue indefinitely, but will rather reach – and stop – at a level where the disadvantages of deregulation begin to outweigh the advantages.

The second type is where an organ created by an international treaty or a supranational entity adjusts the corporate laws of the member states and leads to the harmonization of the contents of corporate laws. For example, the Directives or Recommendations of the European Commission have led to the abolishment of the ultra vires doctrine in the UK<sup>82</sup> and the compulsory disclosure of individual director’s compensation in Germany.<sup>83</sup> This type of ‘managed’ convergence differs from that caused by competition in that it occurs under [strict] planning and careful consideration with a view of the [region] which the convergence will be applicable to by the directive-issuing organ. There are also examples such as the EU Action Plan,<sup>84</sup> which occurs in response to suggestions by leaders and experts (such the High Level Group of Company Law Experts).

The third type is similar to the first in that it can occur as the result of an attempt by each jurisdiction’s corporate law legislators to raise the economic competitiveness of their own respective jurisdictions. However, it can also occur as a result of many jurisdictions imitating jurisdictions that have been successful in the world economy. Two jurisdictions receiving their corporate laws from the same target jurisdiction will come to have the same content in their corporate law. The convergence of Japanese and German corporate law falls into the third type, as the content of the law of these countries became similar despite the absence of mutual exchange by the two countries, because of their reception of corporate law from the US, a country considered as a model because of their economic success.

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81 D. ZIMMER, Corporate Law Competition in Europe, in: *Journal of Interdisciplinary Economics* 22 (2010) 29, 33 ff.

82 P. L. DAVIES, *Gower and Davies’ Principles of Modern Company Law* (8th ed., London 2008) 153.

83 E. TAKAHASHI/S. YAMAGUCHI, *EU ni okeru kigyō hōsei kaikaku no saishin dōkō (ka): kōdō keikaku no jitsugen katei oyobi doitsu no kaikaku jōkyō* [Latest Developments in EU Company Law Reform (Part 2): The Process of Implementation of the EU Action Plan and the State of Reforms in Germany], in: *Kokusai Shōji Hōmu* 34(4) (2006) 448.

84 EUROPEAN COMMISSION, *Communication from the Commission to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward* (adopted 21 May 2003), COM (2003) 284.

Japanese corporate law and corporate law scholarship are moving from a reception of German law towards convergence on the US model. This last type of convergence causes a problem: Japan and Germany, in separately receiving the same norms without mutual exchange, do not share the experience garnered by their legal systems.

By comparing Japanese and German corporate law, the following may be observed. In Japanese law, the business judgment rule remains case law, stopping at the level of development Germany was at as of 21 April 1997, the date of the ARAG/Gamenbeck<sup>85</sup> decision. From the perspective of predictability and certainty of the law, and to formalize the business judgment rule, a doctrine important to the management of legal risk in a corporation, clearly, enactment of the business judgment (as was done in Germany) should be considered.

The problem with German shareholder derivative actions is that they are extremely rare compared to Japan.<sup>86</sup> As the shareholder derivative action has a positive function in improving corporate governance, it should be used more often. In future, for better corporate governance in German enterprises, from the legal policy perspective of making directors operate under an appropriate degree of tension caused by the possibility of liability for unlawful management, relaxing the conditions for bringing shareholder derivative suits or abolishing the leave procedure should be considered.<sup>87</sup>

#### IV. CONCLUSION

Based on findings from this study, I make the following suggestions.

1. As shown in the process of reception of principles of capital, the reception of German corporate law theory has had the effect of making clear the logic underlying the Japanese stock corporation. Japan has made sense of the complicated fundamental principles of the stock corporation and corporate finance theory by calling on the strength of German law concepts. However, postwar Japan has introduced into her corporate law many systems that cannot be explained by received German legal doc-

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85 BGHZ 135, 244 ("ARAG/Gamenbeck").

86 For an analysis of the reasons, see K. U. SCHMOLKE, *Die Aktionärsklage nach § 148 AktG* [The Shareholder Derivative Action under Article 148 of the Aktiengesetz], in: *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 40 (2011) 398, 406 ff.

87 M. HABERSACK, *Staatliche und halbstaatliche Eingriffe in die Unternehmensführung, Gutachten E zum 69. Deutschen Juristentag* [State and Semi-state Interventions in Business Management, Expert's Report E for the 69th German Conference of Jurists] (München 2012) at E. 106. The resolution by the Commercial Law Section of the German Conference of Jurists on 21 September 2102 rejected Habersack's proposal to abolish minority shareholder conditions and leave procedures for shareholder derivative actions in German law by an overwhelming vote. The proposal for the abolishment of minority shareholder conditions received 14 votes in favor, 51 against, and 15 abstentions, whereas the proposal for abolishment of leave proceedings received 8 votes in favor, 57 against and 11 abstentions.

- trine. The new problem for Japanese corporate law scholarship will be to discover and make clear a coherent theory that furthers the goals of her own corporate law.
2. From a director protection perspective, Japan should receive the separation doctrine from German law and amend Article 339(2) of the Japanese Companies Act to clarify that when the director is removed from his position it does not mean that his employment contract is automatically terminated, and therefore the director does not lose his right to claim compensation.
  3. The shareholder's duty of loyalty is receiving attention as the latest example of the reception of German corporate law theory in Japan. However, the shareholder's duty of loyalty runs into problems when applied in the multi-level type corporate group context. Instead, the protection of minority shareholders in a dependent subsidiary corporation in a company group should be accomplished through modification and reception of Article 117 of the *Aktiengesetz*.
  4. Considering that there is a possibility of conflict between the Konzern duty of direction and the subsidiary's directors' duty of loyalty, reception of the doctrine of the Konzern duty of direction into Japanese corporate law is not desirable.
  5. To increase predictability in the law, Japan should consider enacting the business judgment rule, as it is something important to the management of legal risk in corporations.
  6. To encourage suits and improve corporate governance, Germany should consider relaxing the minority shareholder criteria for bringing shareholder derivative actions and re-examining the leave procedure.

#### SUMMARY

*The more recent developments of Corporate law in both Japan and Germany have seen strong influence from the US-model, causing the content of both laws to become increasingly similar. This assimilation of the laws is a phenomenon that may be called a 'convergence' of the two laws. The article first examines the development of Japanese Corporate law under German influence, together with the issues arising from this, and then turns to the question of how both Japanese and German Corporate law were in turn influenced by US law. Finally, issues arising from this 'convergence' are addressed.*

*Initially, the relationship between Japanese and German law was one in which the former received from the latter; an influence that began with the first codifications in Japanese Commercial and Corporate law. This contribution first traces the degree of reception of German legal theory in the area of Corporate law. Two concepts that were adopted by Japanese law are the principles of capital and the concept of the partnership of promoters ('Vorgründungsgesellschaft'). Nevertheless, other parts of German legal doctrine were not imported, like the shareholder's duty of loyalty and the 'Konzern duty*

*of direction'. This partial reception has caused some discrepancies in Japanese law, that remain unresolved to some degree.*

*The 'convergence' of the two laws is shown by using the examples of how the business judgment rule was introduced into and how the derivative action developed in Japanese and German Corporate law. Lastly, one problem of this type of 'convergence' is explained, namely how the separate reception of US law in Japan and Germany with no exchange between the two countries hinders them from benefitting from the legal experiences gained by the other country with the same imported law.*

*(The Editors)*

#### ZUSAMMENFASSUNG

*Die neueren Entwicklungen des Gesellschaftsrechts in Japan und Deutschland haben starke Einflüsse durch das US-amerikanische Modell erfahren, wodurch der Inhalt der beiden Rechte zunehmend ähnlicher wurde. Diese Assimilation der Rechte ist ein Phänomen, das als eine ‚Konvergenz‘ bezeichnet werden kann. Der Artikel untersucht zunächst die Entwicklung des japanischen Gesellschaftsrechts unter deutschem Einfluss, zusammen mit den dadurch auftretenden Problemen und wendet sich dann der Frage zu wie das japanische und deutsche Gesellschaftsrecht wiederum durch das US-amerikanische Recht beeinflusst wurden.*

*Das Verhältnis zwischen dem japanischen und dem deutschen Recht war zunächst eines, in dem das Erstere von Letzterem rezipierte; ein Einfluss, der mit den ersten Kodifizierungen des japanischen Handels- und Gesellschaftsrechts begann. Dieser Beitrag geht zunächst dem Grad der Rezeption von deutschen Rechtstheorien auf dem Gebiet des Gesellschaftsrechts nach. Zwei in das japanische Recht importierte Konzepte sind die Prinzipien des Grundkapitals und die Vorgründungsgesellschaft. Allerdings wurden andere Aspekte der deutschen Rechtsdogmatik nicht übernommen, wie die Treuepflicht der Aktionäre und die Konzernleistungspflicht. Diese Teilrezeption hat Divergenzen entstehen lassen, die zu einem gewissen Grad weiter bestehen.*

*Die neuere ‚Konvergenz‘ der beiden Rechte wird anhand von den Beispielen dafür aufgezeigt, wie die Regel für unternehmerische Entscheidungen („Business Judgment Rule“) in das japanische und das deutsche Recht eingeführt wurde, und wie und sich die Aktionärsklage entwickelt hat. Zuletzt wird ein Problem dieser ‚Konvergenz‘ diskutiert, nämlich wie die separate Rezeption des US-amerikanischen Rechts in Japan und Deutschland ohne einen Austausch beide Länder davon abhält, von den rechtlichen Erfahrungen des jeweils anderen Landes mit dem importierten Recht zu profitieren.*

*(Die Redaktion)*

