

AKTUELLE RECHTSENTWICKLUNG

Forthcoming Legislation

Hiroshi Oda

I. INTERIM DRAFT ON THE AMENDMENT TO THE COMMERCIAL CODE

The Ministry of Justice prepared an interim draft on the amendment to the Commercial Code in March which is to be submitted to the Legislative Advisory Council.

The interim draft covers three areas; shares, corporate bodies, accounting/disclosure¹.

In the part dealing with corporate bodies, there is some streamlining and simplification. For examples, the quorum for a qualified majority vote at the shareholders' meeting can be reduced to one third from one half of the current law. With the possible increase of individual shareholders, companies are expecting it to become harder to meet the quorum. A simplified procedure for convening the shareholders' meeting will be available. In large companies, i.e. companies with either a capital of half a billion yen or more, or with a debt of 20 billion yen or more, the proposal for the disposal of profits, which currently requires the approval of the shareholders' meeting, can be decided by the board only, provided that a chartered accountant and the auditors endorsed it. There are around 10,000 such large companies. Incidentally, chartered accountants may now be sued by a shareholder's action.

A new body called management committee (*keiei iinkai*) may be optionally introduced. At present, many companies have an unofficial 'inner cabinet' which comprises senior managing directors and above. The interim draft made this official, and subordinated it to the board.

In order to ensure the independence of the board and to strengthen its supervisory role, the interim draft mandate above-mentioned large companies to have at least one external director. Only those who have never been an employee, manager, or director of the given company or its group companies qualify as external directors.

One of the obstacles to having an external director was the potential liability of directors. The draft limits the liability of external directors as compared with internals.

If a company meets the following conditions, it is not required to have auditors:

1. independent committees which cover a) selection of candidates for directorship (nomination committee), b) determination of remuneration of directors (remuneration committee) and c) audit (audit committee).

1 <www.moj.go.jp>.

2. Each committee comprises more than three directors; a majority of them must be externals.
3. Introduces key management positions called *shikkô-yaku* and separates the function of business execution from directors.

The interim draft is based upon the view that in order to strengthen the supervisory function of the board, there has to be a separation of supervision and implementation. Decisions on issuing of new shares, flotation of bonds, and splitting of shares are to be shifted from the board to these executive officers.

At present, more than 200 listed companies have introduced the system of executive officers (*shikkô yakuin*). The amendment is intended to provide a legal basis for these officers². *Shikkô-yaku* and independent committees are optional. Provisions on the liability of directors are to be applicable to *shikkô-yaku* with some modifications.

Keidanren has expressed concern on part of this interim draft. Currently, strengthening of the system of auditors is also being contemplated, and *Keidanren* argues that the interim draft is not in harmony with this initiative by introducing external directors. *Keidanren* is against mandatory introduction of external directors³.

II. CARTELS UNDER THE AUSPICES OF THE GOVERNMENT/LOCAL GOVERNMENT

Cartels are prohibited under the Anti-Monopoly Law. The implementation of the Anti-Monopoly Law has been enforced over the years. Every year, various types of cartels, not the least, bid-rigging, are exposed. The problem is that in some cases, government/local government agencies are involved. This happens particularly in bid-rigging i.e. in public procurement, the procuring officer 'arranges' and 'encourages' a deal with the bidders. In 2000, the Fair Trade Commission issued a recommendation against more than 300 construction and surveillance companies, which were all involved in a single bid-rigging for public work. In this case, the prefectural government determined the target amount of annual allocated work for each company and suggested a particular company to be the successful bidder in each tender. There have been 9 such cases in the past five years⁴.

Under the current Anti-Monopoly Law, entrepreneurs and trade associations are covered, but whether these procurement officials are covered is not clear. The ruling coalition parties are now contemplating a bill on the Prevention of Bid-Rigging with the Participation of Government Agencies. The Fair Trade Commission will be given the power to make recommendations to the procuring agency.

2 *Nikkei*, March 28, 2001.

3 *Asahi Daily*, April 28, 2001

4 *Nikkei*, May 10, 2001