The Business Judgment Rule in Japan

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I. INTRODUCTION

The business judgment rule (hereinafter "BJR")[1] is one of the most well-known corporate law principles. Although it originated in American state law, it has now been adopted into corporate governance systems worldwide, including German and Japanese law, and has developed within each system while maintaining common ground. It is reasonable to say that each of these three countries now has a BJR based on case law. In Germany, the BJR was codified by the UMAG in 2005, but ever since there remains a substantive interpretive debate about just what constitutes business judgment (*die unternehmerische Entscheidung*), and the codification does not seem to have fundamentally changed the situation as compared to earlier years.

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I am grateful to Prof. Dr. Gregor BACHMANN for accepting me as a visiting scholar at the Humboldt Universität zu Berlin and for having helpful discussions about comparative corporate governance.

1 Leading academics distinguish the Japanese BJR from the American BJR and call the former *"Nihon-ban keiei handan gensoku"* [Japanese Version of BJR]. See H. KANDA, *Kaisha-hō* [Company Law] (22nd ed., 2020) 238–239, note 1; K. EGASHIRA, *Kabushiki kaisha-hō* [Law of the Stock Corporation] (7th ed., 2017) 473.

In this paper, I would like to focus on the following issues. The first task is to examine the formation process of the BJR in Japan and the current situation based on this process. In Japanese law, the BJR was initially introduced by scholars as an American theory that had been developed by the courts. Starting with the Japan Sunrise case in 1993, it has formed over a long period of time as a court doctrine that has amassed a large number of lower court rulings. The second task is to discuss the nature of the judicial review of the BJR (extent of court intervention and burden of proof) in light of the characteristics of the civil justice system in Japan. The third task is to introduce the recent debate on the BJR in Japan, including the debate on the rationale of the BJR and the status of the debate over its legislative implementation. The reason for such a discussion is to illustrate the uniqueness and universality of the BJR in Japan. The BJR as found in the EU Member States' law and the law of England has been introduced in a variety of literature.[2] But probably because of language barriers, the Japanese BJR has hardly been introduced in English until now.[3] Professor NAKAHIGASHI has written a precedent commentary on the Apamanshop case, which is considered to be the leading BJR Supreme Court decision in Japan.[4] Recently, Professor RAMSEYER has also written an essay offering his views on the Apamanshop case.[5] Professor TAKAHASHI has published many contributions on the Japanese and German BJRs. They are very worthwhile achievements, but the language problem makes it difficult to reach non-Japanese speaking readers. In this paper, I would like to share with a broad audience the state of the BJR in Japan and the current status of the debate.

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2 See A. GUERRA-MARTÍNEZ, Re-examining the law and economics of the business judgment rule: notes for its implementation in non-US jurisdictions, Journal of Corporate Law Studies 18-2 (2018) 417–438; A. PONTA/R. N. CATANĀ, The Business Judgment Rule and its Reception in EU Countries, The Macrotheme Review (Winter 2015) 125.

3 T. FUJITA, Revising the managerial liability regime in Japan, in: Kanda/Kim/Milhaupt (eds.), Transforming Corporate Governance in East Asia (2008) 15, 28–30.

4 D. W. PUCHNIAK/M. NAKAHIGASHI, Corporate Law – Business Judgment Rule – Derivative Action, in: Bälz et al. (eds.), Business Law in Japan: Cases and Comments (2012) 215–226. A working paper version is available online, D. W. PUCHNIAK/M. NAKAHIGASHI, A New Era for the Business Judgment Rule in Japan? Domestic and Comparative Lessons from the Apamanshop Case, available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257827*.

5 M. RAMSEYER, Apamanshop Derivative Litigation, in: Ramseyer (ed.), *Amerika kara mita Nihon-hō* [An American Perspective on Japanese Law] (2019) 233–242. In order to supplement his position, this essay is accompanied by a commentary by Professor Hideki KANDA.

II. The Business Judgment Rule under Japanese Corporate Law

1. The Framework of Directors' Liability under the Japanese Corporate Law

Under the Japanese Companies Act,[6] directors' responsibilities are classified into two broad categories. That is the directors' liability towards the company and the director's liability to third parties, which mainly means the creditors to the company. On the one hand, Art. 423 para. 1 of the Companies Act determines the liability of directors to the company. The liability under this clause is called negligence of duty liability *(ninmu ketai sekinin)*. On the other hand, Article 429 para. 1 provides for the liability of directors to third parties. The former provision is of crucial significance in examining the BJR with respect to the liability for failure to perform duties. The *ninmu ketai sekinin* is a unique concept even in Japanese law that is used only in this article. The article states, "If (a director…) neglects his/her duties […]." This concept indicates an intentional or negligent breach of the duty of due care *(zenkan chūi gimu)*.[7]

> Art. 423 para. 1: "If a director, accounting advisor, company auditor, executive officer or accounting auditor (hereinafter in this Section referred to as "Officers, etc.") neglects his/her duties, he/she shall be liable to such Stock Company for damages arising as a result thereof."[8]

Legislative history explains why the article uses the concept of *ninmu ketai* instead of *kōi kashitsu* [intention or negligence]. Under the Pre-Amendment Commercial Code, most of the liability of directors was a no-fault liability (Art. 266 paras. 1 to 4 of the 2005 *Kaisei-mae Shōhō* [Pre-Amendment Commercial Code]). The Companies Act 2005, however, made directors' liability in principle negligence liability. In accordance with the shift to negligence liability and the modernization of the Companies Act, the wording on the liability of directors has been changed from "when a director commits an act that violates a law or the articles of the corporation" (Art. 266 para. 5 of the Commercial Code before the amendment) to "when a director neglects his

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6 *Kaisha-hō,* Law No. 86/2005. All provisions cited in this article without reference to a law are those of the Companies Act.

7 Hereinafter referred to merely as "duty of care". Usually, in the translation to the Japanese legal concept from that of Anglo-American law, *zenkan chūi gimu* is simply referred to as "duty of care", in contrast to "duty of loyalty".

8 This is from a semi-official translation of Japanese laws, available at: *http://www.japaneselawtranslation.go.jp/law/detail_main?re=02&vm=04&id=2035*. I might add that Art. 423 para. 1 covers the responsibilities of not only directors but also "officers and others *(yakuin-tō)*", i.e. accounting advisors, company auditors, executive officers or accounting auditors. The definition of "officers *(yakuin)*" is defined by Art. 330, which provides for the election of officers.

duties" (Art. 423 para. 1). This rephrasing is merely in line with the wording of Art. 21-17 para. 1 of the 2005 *Kaisei-mae Shōhō tokurei-hō* [Special Law on the Pre-Amendment Commercial Law]. Thus, the substantive meaning has not changed in rephrasing from negligence to failure to perform a duty.[9]

The elements of negligence of duty liability are as follows:

(i) A director is negligent in performing duties for which he or she is responsible, i.e., a breach of the duty of care caused by intentional conduct or negligence,
(ii) damages to the company, and
(iii) a substantial causal relationship between (i) and (ii).

Under Japanese law, the BJR problem arises in the context of whether a director owes a duty of care when the director has failed to make certain business decisions and has caused damage to the company as a result. Art. 423 para. 1 addresses (i) the action of the directors and (ii) the inaction of the directors; the BJR issues are usually addressed in (i). At issue in (ii) are the duty of directors to monitor each other and the duty to implement the internal control system. All of these issues are regarded as a subcategory of the duty of care issue, i.e., the issues that arise when the duty of care is made concrete. The BJR tends to not impose a duty of care on directors, even if they exercise business judgment under specific requirements and cause damage to the company.[10]

Thus, in Japan, the BJR is an issue regarding a breach of the duty of care by directors, which is the basis of liability for the negligence of duty.

2. Characteristics of the BJR in Japan

a) Form

The BJR in Japan is case law doctrine formed by the accumulation of a vast number of lower court rulings. Although there is no direct statutory basis for the provision, i.e., the BJR is not codified, it is indirectly positioned as relating to the interpretation of Art. 423 para. 1. When the directors have violated the duty of care[11] (Art. 330 of the Companies Act and Art. 644 of the Civil Code), there arises liability for negligence in connection with a duty under Art. 423 para. 1. Directors are not given discretion in making business judgments that violate laws and regulations or the company's articles of

9 T. AIZAWA/Y. ISHII, *Kabunushi sōkai igai no kikan* [The Organs Besides the Shareholder Meeting], in: Aizawa (ed.), *Shin-kaisha-hō no kaisetsu* [Commentary on the New Company Law], Bessatsu Shōji Hōmū 295 (2006) 117.

10 In Japan, this effect of the BJR is not referred to or discussed as a "safe harbor".

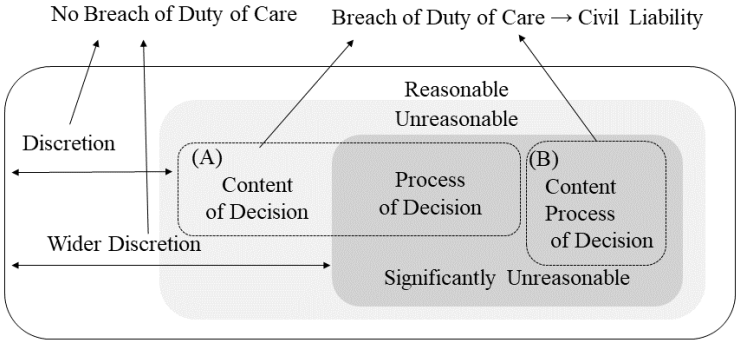
11 In Japan, where there is a duty of loyalty between the director and the company – for example, regarding a conflict of interest – the BJR is not applied. That is common with the US and Germany.

incorporation, or in regards of judgments that allow directors to make private gains at the expense of the company's interests. In such cases, therefore, the directors are liable based on a breach of the duty of care. However, the BJR in Japan holds that if a director has discretion in making business judgments, he is not liable for breach of duty of care if the company incurred damage as a result of actions taken under those judgments and the company carefully collected, analyzed, and examined the information and made those judgments for the benefit of the company. In this way, under Japanese law, the BJR can be regarded as a question of whether a director breaches his duty of care at the stage when he makes business judgments.

b) Judgment Framework

Traditionally, the BJR in the Japanese lower court cases has provided for judicial review not only of the directors' business decision-making process but also of the content of their decision. This framework of judicial review contrasts sharply with the US law, which provides only for judicial review of the decision-making process but not the content of the judgment. The Japanese BJR has traditionally held that a director does not violate a duty of care if the director has made a decision that constitutes a "not unreasonable mistake" in the decision-making process. On the other hand, the content of the decision has to be "not significantly unreasonable." However, a recent Supreme Court precedent (Apamanshop case) requires that not only the decision-making process but also the content of the decision has to be "not significantly unreasonable" in order for a director not to be liable for a breach of the duty of care.

Figure 1: Evolution of the BJR Criteria in Japan – Pre/Post Apamanshop Case



(A) Traditional Criteria of Lower Court Decision
(B) Apamanshop Case Criteria of the Supreme Court

III. JUDICIAL REVIEW UNDER THE JAPANESE BUSINESS JUDGMENT RULE

1. The History of the BJR in Japan

After World War II, Japanese scholars introduced the BJR in the context of an introduction to the case law in the United States, especially after the Commercial Code Amendment of 1950,[12] which largely adopted American law instead of Continental law. The second wave of attempts to introduce the BJR in Japan came in the early 1980s.[13] The discussion of this period did not merely stop at an introduction to Japanese law. Instead, commentators were fully aware of the differences between the judicial systems in Japan and the United States and the systems regarding the duties and responsibilities of directors. Based on these considerations, they were aware of how to implement the BJR into Japanese law, an issue that is still relevant today. However, long after World War II, there were few lawsuits, particularly derivative suits, filed to pursue director liability, which is a prerequisite to applying the BJR. However, an amendment to the Civil Procedure Rules by the 1993 Commercial Code Amendment in response to a series of corporate scandals set the fee for derivative suits at a flat rate of 8,200 yen, regardless of the amount in controversy. This amendment made it easier for derivative suits to be filed, which led to a sharp increase in the number and monetary value of lawsuits against directors. Vast amounts of damages were granted in successive cases. As a result, directors have been subjected to very severe liability, and there has been an enormous increase in the number of lower courts that found themselves having to apply the BJR. Since then, Japan's BJR has been formed exclusively by an accumulation of lower court rulings. This way of forming the BJR in Japan seems to be due to the following background: Firstly, under the Japanese judicial system, which has a three-instances system, the Supreme Court deals with legal questions. For

12 For example, see K. YAMAGUCHI, *Amerika kaisha-hō ni okeru torishimari-yaku no sekinin* [Liability of Directors under American Corporate Law], Hōgaku Ronsō 58-3 (1953) 60; E. YOSHINAGA, *Torishimari-yaku no ippanteki gimu* [General Duties of Directors], Hitotsubashi Ronsō 29-4 (1953) 300.

13 For example, *see* K. KANZAKI, *Beikoku ni okeru keiei handan gensoku no tenkai* [Development of the Business Judgment Rule in the United States], in: Okuda (ed.), *Gendai shihō-gaku no kadai to tenbō, Chū-kan* [Issues and Prospects of Contemporary Private Law Studies, Middle-Issue] (1982) 255; M. KONDŌ, *Torishimari-yaku no sekinin-tō sono kyūsai (4)* [Directors' Liability and its Remedies], Hōgaku Kyōkai Zasshi 99-12 (1982) 1763; N. KAWAHAMA, *Beikoku ni okeru keiei handan gensoku no kentō (1)(2)* [Consideration of the Business Judgment Rule in the United States (1)(2)], Hōgaku Ronsō 114-2 (1983) 79 and 114-5 (1984) 36; N. TOZUKA, *Keiei handan no hōsoku (1)(2)* [The Law of the Business Judgment Rule (1)(2)], Handai Hōgaku 126 (1983) 1 and 127 (1983) 1.

this reason, cases involving the BJR, in which fact findings are the primary issue, are unlikely to be challenged in the Supreme Court. Secondly, derivative suits are often massive in terms of damages and may be settled without waiting for the conclusion of oral arguments at an appellate hearing. Consequently, these conditions might be behind the development of the BJR as a compilation of lower court cases in Japan.

Japan's BJR has developed in this way, but since around 2008 there have been several Supreme Court decisions referring to the BJR. The first such Supreme Court decision was a case that pursued the criminal liability of a bank director who had failed to run the business appropriately. This was a case judgment in which the bank directors found themselves in breach of their duty of care in a case where they failed to make a loan decision. The first Supreme Court decision to apply the BJR in a civil case was the Apamanshop Case.[14]

In that case, the BJR was applied as regards the determination of the purchase price of a subsidiary's shares in a corporate group reorganization, and the Court held that the directors could not be found to have breached their duty of care. This decision is characterized by the fact that the Supreme Court, for the first time in a civil case, examined whether there was "a significantly unreasonable aspect of both the process and the content of the decision" in light of the above-mentioned BJR in Japan, and they rejected the directors' liability.[15]

Table: Significance of the Pressure from Derivative Suits in Japan. Main Definitive Judgment/Post-trial Settlements of Derivative Suits Alleging Art. 423 para. 1 Liability

Corporate Name	Content of Cases	Allowed Damages (Billions of Yen)	Court
Janome Mishin	Illegal profit-sharing	58.3	Supreme Court
Yakult	Losses from failed derivative trading	6.7	Supreme Court
Duskin	Covering up the addition of substances that violate the Food Sanitation Act	5.3	Supreme Court

14 For the details of this case in English, *see* PUCHNIAK/NAKAHIGASHI, *supra* note 4.

15 M. KITAMURA, *Hi-jōjō kaisha no kabushiki no kaitori to keiei handan gensoku* [Stock Purchase from a Non-listed Company and the Application of the Business Judgment Rule], Jurisuto, Special Edition, 1420 (2011) 138; H. MATSUI, *Jigyō saihen keikaku no sakutei ni okeru torishimari-yaku no zenkan chūi gimu* [Directors' Duty of Care on Planning a Business Reorganization], Minshōhō Zasshi 143-6 (2011) 711; K. YOSHIHARA, *Torishimari-yaku no chūi gimu to keiei handan gensoku* [Directors' Duty of Care and the Business Judgment Rule], Bessatsu Jurisuto 229 (2016) 104.

Daiwa Bank (currently *Risona Bank*)	Rogue trading by a bank employee	84.7 Settlement 0.25	Ōsaka District Court Ōsaka High Court
Ishihara Sangyō	Illegal disposal of industrial waste	48.5 Settlement 0.05	Ōsaka District Court Ōsaka High Court

2. *The Function of the BJR in the US and a Comparison with its Function Elsewhere*

The BJR concept, which is now accepted almost all around the world, derives from state case law in the United States. However, in the United States, corporate law falls under the jurisdiction of state laws, with the result that court precedents on directors' liability are not always in accord.[16] The ALI's principles of Corporate Governance, which summarize the contents of the BJR in each state, provide the following concerning the directors' duty of care:[17]

"(c) A director or officer who makes a business judgment in good faith fulfills the duty under this Section if the director or officer:
(1) is not interested [§ 1.23] in the subject of the business judgment;
(2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and
(3) rationally believes that the business judgment is in the best interests of the corporation."

According to this approach, if a director made a rational decision in making a business judgment, judicial review of the content of the decision is not required. In most cases, when the BJR is applied in the United States, the plaintiff's complaint is dismissed or rejected by means of a summary judgment without being brought to a formal trial on the facts, primarily before the case goes to a jury trial, on account of the claim not stating a cause of action.[18] Although this concept is unique to American law, which adopts the jury system, this screening function of the BJR has great significance considering the uncertainties of the jury's decision and the cost of the litigation.[19] We can point out that although the BJR is a system derived from American law, it has been transformed to conform to the civil justice system

16 See KAWAHAMA, *supra* note 13.

17 AMERICAN LAW INSTITUTE, Principles of Corporate Governance: Analysis and Recommendations, Section 4.01(c) (1992).

18 KAWAHAMA, *supra* note 13, 114-2, 88; M. YOSHIGAKI, *Kaisha soshō no kenkyū* [A Study of Corporate Litigation] (2003) 104–111.

19 H. KATAGI, *Keiei handan gensoku ni okeru jijitsu no ninshiki katei* [The Process of Recognition of Facts Regarding the Business Judgment Rule], Hiroshima Hōka Daigakuin Ronshū (2015) 196.

of each country – Japan and Germany – while maintaining its purpose upon being accepted in each country.

Also, in the US, most listed companies now exclude the liability of directors for breach of the duty of care in their articles of incorporation, so that a director's breach of duty of care – and thus the BJR – is limited to those aspects of the breach of duty of care that cannot be excluded by the articles of incorporation.[20] This has resulted in a situation in which directors are less likely to be liable for damages without even considering the application of the BJR.[21]

3. Burden of Proof

Under Japanese law, as the position of the BJR is unclear, there are various legislative and interpretative arguments regarding how the BJR impacts on the burden of proof for directors accused of breaching their duty of care. Professor TAKAHASHI argues that a director is presumed not to have breached a duty of care if it is shown that there was no unreasonable aspect in the factual recognition process.[22] In other words, he argues that "the case law should establish a rule that if there is no conflict of interest in a director's business judgment and he has taken such measures based on information gathered as were deemed appropriate at the time that the judgment was made, the business judgment is reasonable and there is a presumption that the director has not breached his duty of care."[23] Also, Professor Akira MORITA refers to the American ALI Principles and the German legislation based on them. His position is based on the ALI Principles – but excludes a concept specific to Germany ("*die unternehmerische Entscheidung*") – and he has adapted the idea to the Japanese civil justice system. The provision he proposes is that the director is deemed to have faithfully discharged his or her duties if the director meets specific requirements, i.e., he proposes to legislate the provision. The reason why he proposes a rule of regard rather than pre-

20 However, even in the US there have been numerous bankruptcy cases involving financial institutions in which civil and criminal liability was imposed on the directors who caused the failure, and where also liability for damages was found for directors who failed to monitor. See K. ŌSUGI, *Yakuin no sekinin keiei handan gensoku no igi to sono shatei* [Officers' Liability – The Role of the Business Judgment Rule and its Scope] in: Egashira (ed.), *Kabushiki kaisha-hō taikei* [Collection of Articles on Stock Corporation Law] (2013) 309.

21 M. A. EISENBERG, *Amerika kaisha-hō ni okeru chūi gimu II* [Duty of Care in American Corporate Law II] (translated by K. MATSUO), Shōji-Hōmu 1713 (2004) 5.

22 E. TAKAHASHI, *Doitsu tō Nihon ni okeru keiei handan gensoku no hatten to kadai (Ge)* [Development and Problems with the Business Judgment Rule in Germany and Japan (Second Part)], Shōji Hōmu 2048 (2014) 47.

23 TAKAHASHI, *supra* note 22.

sumption, unlike the ALI Principles and the German legislation, is that, unlike American law, Japanese law does not have a procedure of demurrer.[24]

The substantive legal part of the first part of the argument by Professor TAKAHASHI is an accurate restatement of the rules that are common worldwide, including US law, German law, and Japanese law. I can also, from a substantive perspective, understand the argument that the effect of a "presumption" should be recognized. However, in giving effect to a "presumption" based on an accumulation of case law on the BJR – which itself has no codified legal basis in Japan – it has to be seen as a legislative argument that deviates from the framework of interpretive argument. Furthermore, the actual legal basis for a "presumption" is not clear. If we were to recognize the efficacy of the "presumption," we would have to legislate somehow on the BJR, but no argument has been made in this regard.

The majority view as to the interpretation of Japanese law is as follows. Regarding the burden of proof when asserting a breach of duty of care based on neglect of duty, Professor EGASHIRA has argued that although the liability under Art. 423 para. 1 of the Companies Act was not the same as the liability for default stipulated in Article 415 of the Civil Code, the liability under Art. 423 para. 1 was a particular aspect of the liability for default, its sharing the basic structure with liability for default. Considering this, a person seeking to impose liability on a director for a failure to serve must establish the facts on which the director's breach of duty of care is based. On the other hand, even if the existence of negligence is proved, a director can be discharged from any liability for a breach of the duty of care by proving that there is no cause on which liability can be based, that is, by proving that he was not negligent. However, where a breach of law or a conflict of interest is not at stake, but rather liability for a genuine error of business judgment, proving the existence of an alleged breach of the director's duty of care almost overlaps with the facts on which the director's negligence is assessed. If we consider it this way, when a director's breach of his duty of care is proven, there is, in principle (i.e., unless it is a breach of law or a conflict of interest), no room for the director to disprove negligence.[25]

Considering the structure of proof for a claim alleging a director's liability for a failure to serve in this way, it follows that both the unreasonableness of the recognition process and the unreasonableness of the judgment in terms of content must be proved by the party pursuing the director's liability. Taken

24 A. MORITA, *Torishimari-yaku no zenkan chūi gimu* [Duty of Care of a Director] (2019) 228.

25 See EGASHIRA, *supra* note 1, at 473, S. MORIMOTO, *Torishimari-yaku no gimu to sekinin* [Director's Duties and Liabilities] (2017) 72–74.

this way, it is not necessary to give effect to the presumption that there is "no" breach of the duty of care.[26]

IV. The Situation and the Discussion of the BJR in Japan After the Apamanshop Case

1. Discussion on the Scope of Application of the Apamanshop Case

The standard for the BJR in lower court cases after the Apamanshop case has not yet achieved uniformity. That is, (1) many cases follow the standard set out in the Apamanshop decision,[27] but (2) some still follow the criteria of traditional lower court cases,[28] and (3) some adopt a hybrid of the Apamanshop and traditional criteria.[29] Despite the Supreme Court's position expressed in the Apamanshop decision, the reason for the lack of uniformity in the standards of the lower court cases is that there is a divergent understanding of the scope of the Apamanshop decision. How to determine the scope of application of the Apamanshop standard is a challenging task, and a definitive view has yet to be established.[30]

There are two main ways to understand the Apamanshop decision. One way to view it is to hold that the Apamanshop decision has a general scope of application. Another view is that the Apamanshop decision is a case regarding difficult management decisions, such as reorganization, and that the scope of application should be limited. In the immediate aftermath of the decision, the dominant view in academic circles was that the decision had only a case-by-case significance limited to reorganization cases. In addition, because the Court's decision did not directly use the term "BJR", there was even a scholarly opinion that the Court could not be said to be a Supreme Court precedent applying the BJR, arguing instead that it was merely a case that determined a breach of the duty of care.[31] However, today, while finding that the judgment was a case decision regarding reorganization, the dominant view of legal commentators is that the standard outlined in the decision should be applied generally.[32] The following reason supports the latter view,

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26 K. Yoshihara, *Torishimari-yaku no keiei handan gensoku to kabunushi daihyō soshō* [The Business Judgment Rule for Directors and Derivative Suits], in: Kobayashi/Kondo (eds.), *Shinpan kabunushi daihyō soshō taikei* [Collection of Derivative Suits (New Edition)] (2002) 98; Katagi, *supra* note 19, 199.

27 Tōkyō District Court, 28 February 2013, Kinyū Shōji Hanrei 1416 (2013) 38.

28 Tōkyō District Court, 29 September 2011, Hanrei Jihō 2138 (2012) 134.

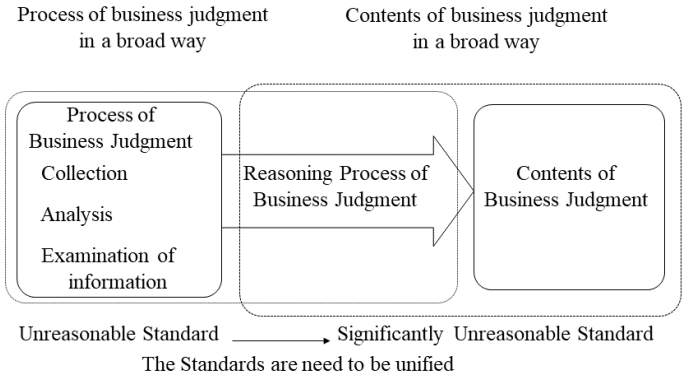
29 Tōkyō District Court, 8 October 2015, Hanrei Jihō 2295 (2016) 124.

30 T. Fujita/M. Sawaguchi, *Taidan: Kore kara no kaisha jitsumu* [Interview: The Future of Corporate Practice]. Prof. Fujita points out that the scope of the Apamanshop judgment needs to be examined more closely.

31 See H. Matsui, *supra* note 15.

namely that it is difficult to distinguish the process of judgment from the content of the judgment. Such a view analyzes the business judgment structure more closely. Professor TANAKA argues that there is a "reasoning process of judgment"[33] that goes on between the collection, analysis, and examination of the information that is the basis of the judgment and the "content of the judgment," which is conventionally called the "judgment process;" yet he contends that this "reasoning process of judgment" in fact, i.e. effectively, considers the same aspects as the "content of judgment".[34] He then argues that applying a different standard of review, distinguishing between the process and the content of the judgment, would be challenging to implement in practice. Thus, an examination of the judgment process often involves an examination of the content of the judgment.[35]

Figure 2: Justification for the Apamanshop Standard



32 S. OCHIAI, *Apamanshopu kabunushi daihyō soshō saikō-sai hanketsu no igi* [On the Significance of the Supreme Court's Decision in the Apamanshop Derivative Suit Case], Shōji Hōmu 1913 (2010) 4; W. TANAKA, *Keiei handan to torishimari-yaku no sekinin* [Business Judgment and Directors' Liability], Jurisuto 1422 (2012) 101; Y. ITŌ, *Apamanshopu kabunushi daihyō soshō jōkoku-shin hanketsu* [The Appeal Decision in the Apamanshop Derivative Suit Case] Shōji Hōmu 2009 (2013) 51; H. KANDA, *supra* note 1, at 239; Y. HORITA, *Keiei handan gensoku to sono handan kijun o megutte* [The Business Judgment Rule and its Criteria for Judgment], in: Iida et al. (eds.), *Shōji-hō no atarashī soseki* [A New Cornerstone of the Business Law] (2014) 279.

33 According to Prof. TANAKA, the "reasoning process" means "to think that, for this reason, one should do an act because it would be in the company's interest to do that act rather than not to do it". This should be distinguished from collecting, analyzing, and examining information; rather, it is integrated with the content of the judgment. See TANAKA, *supra* note 32, at 102.

34 TANAKA, *supra* note 32, at 103.

35 TANAKA, *supra* note 32, at 103.

2. Rationale for the BJR in the Context of Apamanshop

The Apamanshop decision also raises a debate about the grounds justifying the BJR. The main justification of the BJR is: "Judges are not directors". Thus, it is seen as undesirable to allow a judge, who is not a management professional, to intervene and assess whether a business judgment is right or wrong on application of his or her own, non-professional evaluation criteria. Even if a business judgment is rightly acceptable from the standpoint of business common sense, it may appear to be an irrational action that is incomprehensible to a judge who is a general layman without management experience or business sense. Thus, if a judge is allowed to intervene aggressively, the judge may often impose a sanction for damages as a breach of duty of care because he or she does not understand a business judgment that is naturally permissible in terms of business common sense.[36] In short, judges are likely to make errors in their judgment regarding what is a valid business judgment.

Thus, a further question arises as to why legal principles such as the BJR are not allowed in other professional liability cases involving doctors, lawyers, accountants, etc. In Japan, various manners of professional liability have been discussed. However, a "medical judgment rule", for example, is inexistent not only in Japan but also in the rest of the world. This is because the danger of judges making errors in judgment can exist in other types of litigation, such as medical malpractice and defense malpractice litigation. This problem can be explained by (1) the difference in the risk preferences between directors and shareholders, and (2) the BJR's position as one of the systems for disciplining the behavior of directors in the overall corporate governance framework.

a) Difference in risk preferences between directors and shareholders

When a company is in average condition, i.e., the company is not in an insolvent situation, directors are generally likely to avoid risk-taking management. This contrasts with the tendency of shareholders to demand high-risk, high-return management from companies under limited liability. The former attitude of directors is particularly compatible with the corporate ladder in Japanese companies, where the position of director is prepared as the last promotion for the employees, and where the market for managers is under-developed and many directors earn their living as individuals through director remuneration.

36 S. OCHIAI, *Kaisha-hō yōsetsu* [The Principles of Corporate Law] (2016) 104.

b) BJR as one of the means of disciplining the conduct of directors

On the other hand, if the courts take a more reluctant stance towards intervening in business judgments, management discipline may be reduced and inappropriate business judgments might be encouraged. However, director discipline is achieved not solely by way of damages for breach of the duty of care or, conversely, by an adjustment thereof through application of the BJR. Apart from the threat of legal sanctions in the form of damage claims, directors are subject to various manners of legal and social discipline, including product markets, capital markets, reputation as a manager, incentive remuneration agreements, proxy fights, and hostile corporate takeovers. Thus, various disciplinary mechanisms already exist for directors' business judgments, and civil liability based on breach of duty of care as imposed by the courts is just one of these mechanisms. Consequently, even if the court were to take a reluctant stance towards intervening in business judgments, some problems would arise.

c) Summary

As such, the BJR does not exist on its own but is positioned within the overall corporate governance system. From a legal perspective, I consider that the BJR is justified in that it motivates directors to conduct themselves appropriately by protecting them from damages based on a breach of their duty of care so that they can make decisive business judgments when necessary without shrinking away, and in this sense it grants directors broad managerial discretion and renders their responsibilities feasible and balanced.

Considering this general theory of the BJR's justification, the scope of ex post facto intervention (i.e., judicial review) in management decisions by judges should be as small as possible. In this light, I would like to conclude that the discretion of directors in making business judgments should be broadly recognized, whether in terms of procedure or content.

3. Discussion of BJR Legislation in Japan

Finally, I would like to refer to the discussion regarding the incorporation of BJR legislation into Japanese law.

At present, there is little discussion in Japan on the idea that the BJR be legislated.[37] However, in successive amendments made to the Commercial Code initiated in the late 1990s, the LDP had proposed to legislate the BJR upon the request of an economic group, *Keidanren* (Japan Business Federa-

37 As far as I know, only Professor Akira MORITA insists that the BJR should be codified. A. MORITA, *supra* note 24, at 221.

tion).[38] Nevertheless, in the end this proposal was withdrawn in exchange for enactment of a provision reducing the liability of directors.

In Germany, where the BJR was legislated, the debate over the interpretation of the text of § 93 para. 1 no. 2 of the Stock Corporation Act *(Aktiengesetz)* continues to focus on the same substantive issues. Under Japanese law, the BJR remains as case law. However, under Japanese law, the BJR is discussed thoroughly as a duty of care issue. Therefore, under Japanese law, there is no need to legislate the BJR too quickly, and it is desirable that the BJR continue to be developed as case law.

V. Conclusion

In this paper, we have examined the formation process of the BJR in Japan, its characteristics, and recent trends in the debate over the Japanese BJR. It can be said that the basic concept of the BJR in Japan is based on global standards, but the specific manner of developing the BJR depends upon the Japanese civil law system and civil justice system. We should consider the BJR to be one of the critical mechanisms built into the corporate governance system so as to ensure that directors' responsibilities are balanced and feasible. This is also true of Japanese law. In this paper, I have not been able to discuss each of the topics discussed in Japan, such as the application of BJR in conflict-of-interest transactions, the standard for a breach of duty of care by bank directors, and so on. But I think I have been able to offer an overview of the BJR in Japan. I hope this paper can serve as a basis and catalyst for a global discussion of the BJR in Japan.

Summary

As the business judgment rule (BJR) has developed in various countries, it has been significantly influenced by the civil legal system and civil justice system of the respective jurisdictions. This article considers the development of the BJR in Japan. The paper examines the development, the current status, and the current discussion of the BJR in Japan. First, the BJR in Japan relates to the interpretation of Art. 423 para. 1 of the Companies Act. The breach of the duty of care is a critical factor as regards director liability, this being distinct from situations involving a breach of law or a duty of loyalty. Second, Japan had followed a strict decision-making framework for the judgment process and a broad and

38 Liberal Democratic Party, *Kōporēto gabananansu ni kansuru Shōhō-tō kaisei-an kosshi* [Summary of Proposed Amendments to the Commercial Code Concerning Corporate Governance], 8 September 1997, *see* Shōji Hōmu 1468 (1997) 30.

loose standard regarding the content of decisions. While lower court cases have established this framework, the Supreme Court's decision in the Apamanshop case has prescribed that the decision-making framework should respect the discretion of directors, with a reasonable standard in terms of both process and content. This standard outlined in the Apamanshop decision is theoretically supportable. Third, concerning the burden of proof, we do not presume that the directors are not negligent, but rather that they are liable for a failure to perform their duties. The framework is the same as the general rule on default under the Civil Code. It is based on a determination of whether there was a breach of the duty of care, which overlaps with the decision whether the director was negligent. There is broad agreement that the party who claims that there is no negligence must prove it. Fourth, there is currently little positive support for legislation adopting the BJR in Japan. Regardless of these characteristics of the BJR in Japan, the purpose and the justification for it are debated from an international perspective. Hopefully, this paper can serve to catalyse a global discussion of the BJR in Japan.

ZUSAMMENFASSUNG

Die Entwicklung der „Business Judgment Rule" (BJR) ist in den verschiedenen Jurisdiktionen wesentlich von deren jeweiligem rechtlichem Rahmen geprägt worden. Der Beitrag stellt die BJR in Japan vor. Er gibt einen Überblick über deren Entwicklung, den Stand der Rechtsprechung und die dortige aktuelle Diskussion. Als erstes hält er fest, dass die BJR in Japan auf einer Interpretation des Art. 423 Abs. 1 des Gesellschaftsgesetzes beruht. Eine Verletzung der „duty of care" ist die entscheidende Voraussetzung für die Haftung eines unternehmerischen Leitungsorgans. Diese ist von einer Verletzung rechtlicher Vorgaben oder der „duty of loyalty" zu unterscheiden. Als zweites ist festzuhalten, dass die japanischen Instanzgerichte strikte Vorgaben für den Ablauf des unternehmerischen Entscheidungsprozesses entwickelt haben, dessen inhaltliche Maßstäbe aber vergleichsweise weit und flexibel gefasst haben. Der Oberste Gerichtshof hat demgegenüber in der Apamanshop-Entscheidung betont, dass das unternehmerische Ermessen der Leitungsorgane nicht lediglich bezogen auf den Inhalt der beanstandeten Entscheidung, sondern auch bezüglich der Vorgaben für den Entscheidungsprozess als solchen in einem angemessenen Umfang zu berücksichtigen ist. Dieser in der Apamanshop-Entscheidung entwickelte Standard ist theoretisch vertretbar. Als drittes ist zu betonen, dass man mit Blick auf die Beweislast nicht davon ausgehen sollte, dass die Leitungsorgane fahrlässig gehandelt haben, sondern dass sie dafür haften, dass sie die ihnen obliegenden Pflichten verletzt haben. Dies entspricht der generellen Haftungsregel nach dem Zivilgesetz. Entscheidend ist mithin, ob eine Verletzung der „duty of care" gegeben ist, wobei sich deren Feststellung mit der Frage überschneiden kann, ob

das betreffende Leitungsorgan fahrlässig gehandelt hat. Es herrscht eine große Übereinstimmung darüber, dass diejenigen, die sich darauf berufen, dass sie sich nicht fahrlässig verhalten hätten, dieses beweisen müssen. Als viertes ist darauf hinzuweisen, dass in Japan gegenwärtig nur eine geringe Neigung besteht, die BJR in Gesetzesform zu fassen. Unabhängig von den vorstehend umrissenen Charakteristika der japanischen BJR werden deren Zweck und deren Rechtfertigung dort vorwiegend aus einer internationalen Perspektive heraus diskutiert. Der Beitrag hofft, Informationen über die BJR in Japan für die internationale Diskussion aufbereitet zu haben.

(Die Redaktion)