Japanese Corporate Law: Important Cases in 2002 and 2003

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INTRODUCTION

Corporate law cases from 2002 and 2003 show that the Japanese economy is still in a depression. In those years there were a number of cases seeking directors' liabilities for damages to their companies under derivative actions. There were 135 pending cases at district courts at the end of the 2002 fiscal year.[1] For example, one case involves directors' liabilities for a company's financial support by its debt forgiveness to another company in a group of companies.[2] Another case concerning directors' liabilities illustrates the infamous problem of bad loans in relation to an insolvent financial institution.[3] In addition to these cases, there are some other important cases arising from other areas of Japanese corporate law. This paper reports on some of these remarkable cases.

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1 Shôji Hômu 1666 (2002) 41.
2 See, *infra* at III.
3 Osaka Court of Appeals, March 29, 2002, in: Kinyû Shôji Hanrei 1143 (2002) 16.

I. THE ABUSE OF DISCRETION BY A REPRESENTATIVE DIRECTOR IN DECIDING ALLOWANCES FOR RESIGNING DIRECTORS [4]

1. Facts:

Plaintiff X was virtually a founder of Company Y. X had been a director and a representative director[5] since 1980, but was not appointed as a director at a meeting of shareholders in 1997. At this meeting, a resolution was adopted that Company Y would give resigning directors including X allowances to reward them for their contribution to the company during their appointment. By a resolution of that meeting, the board of directors was authorized to decide the amounts of the allowances and when and how to pay them. Following this resolution, the board in turn resolved to authorize President A, who was a representative director, to decide those matters. Company Y's articles of incorporation prescribed that "a shareholders' meeting shall, by its resolution, fix an amount of remuneration and of allowance for resignation." Company Y had its own company rules for officers [hereinafter cited as "Y's rules"] that showed how to calculate the allowance and also contained a clause that "if the contribution to the company is found to be remarkable, a special addition for such a contribution can be made to the allowance and the addition can be calculated within a limit of up to 200% of the allowance."

President A fixed X's allowance at 292,053,000 yen. This was calculated on the basis that, at the time of X's resignation, his monthly remuneration as a full-time officer was 27,500,000 yen, X had been a full-time officer for 17 years, X's monthly remuneration as a part-time officer was 300,000 yen, and X had been a part-time officer for one year. The allowance was decided in accordance with Y's rules, but a special addition for a contribution was not given.[6] X brought an action for payment of the allowance that A fixed, and also for payment of 584,106,000 yen as a special addition, which was 200% of the allowance.

The court allowed the payment to X of the allowance of 292,053,000 yen. It also held that A deviated from or abused his discretion in deciding to decrease X's remuneration from 13,750,000 yen to 300,000 with respect to X's part-time office because A

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4 Nagoya District Court, January 17, 2002, in: Kinyû Shôji Hanrei 1151, 45. For a commentary, see T. SHIMABUKURO, *Torishimari-yaku no taishoku irôkin shiharai ni tsuki saiin-in wo uketa daihyô torishimari-yaku no kettei ga sairyô-ken no ranyô itsudatsu no utagai ari to sareta rei* [A case related to an allowance for resigning directors in which a decision made by an authorized representative director was found to be a deviation from or abuse of discretion], in: Shihô Hanrei Rimâkusu 27 (2003 II) 92.

5 A representative director is a director who represents the company and is appointed by a resolution of the board of directors (Art. 261 ComC).

6 In general, an allowance for a resigning director is calculated on the basis of the type of office, length of appointment, the last monthly amount of remuneration, and a certain amount of special addition to reward the director's contribution. M. TATSUTA, *Kaisha-hô* [Company Law] (9th Tokyo 2003) 83.

did not make a decision on any basis of a resolution of meetings of the shareholders, a resolution of the board of directors, or Y's rules. After a calculation was made, the court ordered Company Y to pay X 16,705,034 yen for X's part-time office. However, the court did not allow the payment of the special addition that X claimed.

2. Held:

Art. 269 of the Commercial Code [hereinafter cited as the "ComC"] does not exclude a decision made for an allowance in the circumstances where a shareholders' meeting does not fix a specific amount but authorizes the board of directors to fix and pay for the allowance in accordance with its company's rules, and then the board authorizes a representative director to fix the allowance. But such circumstances would foster the dictatorship of a leading member of the board of directors or a representative director, because if the company's rules have unclear standards for fixing the allowance, the board of directors or a representative director would get considerable discretion in relation to allowances for resigning officers. In this context, it is insufficient for the company's rules to merely show the upper limit of the allowance. The company's rules have to have a prescription to fix the allowance at a certain amount, or to very narrowly limit the discretion of a decision-maker. If the company's rules accept considerable discretion such as mentioned above, and a decision-maker unfairly decides the allowance at a low amount by deviating from or abusing the discretion given by the company's rules, then such a decision is unlawful and constitutes a wrongful act to a resigning director, who by a resolution of a shareholders' meeting has a right to receive the allowance that complies with the company's rules.

Y's rules in this case give its decision-maker a considerable discretion of 200% without any specific standards to calculate. Deciding on the allowance with such latitude has to be considered a decision made on unclear standards. Also, a decision with such discretion is one of the factors that imply that the discretion was deviated from or abused when the allowance was being decided on the basis of Y's rules.

However, where a company's rules such as those in this case have certain standards for calculating an allowance, and the standards have elements of a monthly amount of remuneration and a period of office, then it is clear that such elements are important for calculating a proper allowance that is consistent with the contribution to the company as well as any special addition. Therefore, where the monthly amount of remuneration is so high that an allowance will be substantially high without any special addition, it is not unfair to fix such an allowance without adding any special addition. Such a case leads to an inference that the deviation or abuse should be denied.

In the end, the court looked at Company Y's record of past allowances and found that X's allowance without a special addition was ten times as high as those of other officers. Taking this finding into consideration, the court held that A did not deviate from or abuse his discretion in fixing X's allowance without adding any special addi-

tion, and therefore that there was no wrongful act in terms of A's decision of the special addition.

3. Comment:

According to Art. 269 ComC, a resolution of a general meeting of shareholders fixes remuneration of directors unless articles of incorporation fix the remuneration. If the amounts are fixed, the meeting of shareholders resolves such amounts (Art. 269 para. 1 ComC). If the amounts such as stock options are not fixed, it resolves the concrete methods for calculating (Art. 269 para. 2 ComC). Art. 269 ComC also applies to an allowance for resigning directors because it is also remuneration.[7] An issue of the allowance arises because there is a customary practice: the board of directors is authorized to decide the amounts, dates, and methods of payments.[8] Cases require that a shareholders' meeting should not adopt a resolution to simply authorize the board of directors to fix amounts without any conditions, but that a shareholders' meeting should adopt a resolution in the circumstances where the shareholders implicitly understand the standards for calculating the amounts.[9] The authorized board of directors can then authorize a representative director, as in this case.[10]

The purpose of Art. 269 ComC is to prevent the board of directors from deciding their own remuneration. It protects a company from being damaged by the board of directors deciding their remuneration at an excessively high level. From this point of view, cases concerning the allowance require that the standards of calculation be established and that the shareholders implicitly understand the standards.[11]

The significance of this case is that when a company unfairly decides the allowance at a low amount by deviating from or abusing discretion given to the company in accordance with its company's rules, its decision can constitute an unlawful act (Art. 709 Civil Code).

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7 K. EGASHIRA, *Kabushiki kaisha yûgen kaisha-hô* [Regulation of Stock Corporations and Limited Liability Companies] (2nd Tokyo 2002) 353.

8 TATSUTA, *supra* note 6, at 82, EGASHIRA, *supra* note 7, at 352.

9 The Supreme Court, December 11, 1964. The Supreme Court, October 28, 1969, in: Hanrei Jihô No. 577, 92. The Supreme Court, November 26, 1973, in: Hanrei Jihô No. 722, 94. The Supreme Court, February 22, 1983, in: Hanrei Jihô No. 1076, 140.

10 The Supreme Court, February 22, 1983, in: Hanrei Jihô No. 1076, 140. TATSUTA, *supra* note 6, at 83.

11 The Supreme Court, October 28, 1969, in: Hanrei Jihô No. 577, 92. For other cases, see *supra* note 9.

II. The Participation of Shareholders in Derivative Actions and Undue Delay [12]

1. Facts:

Representative Director B of Company A paid B and other officers remuneration and bonuses while B was the director. After B died, B's son Y, who was a representative director, paid B's heirs an allowance in relation to B's resignation [hereinafter the remuneration, the bonus, and the allowance are cited together as the "remuneration"]. X, the shareholders of Company A, brought a derivative action. X argued that the payment of the remuneration was not resolved at any shareholders' meetings, and that Y was liable to A company for damages equivalent to an already paid amount of the remuneration.

Y maintained that Y had a meeting of the board consisting of Y and two other directors. At this meeting, the board passed a resolution that the payments of the remuneration would be a subject at a following general shareholders' meeting. The shareholders' meeting was held in May 1995, and a resolution to ratify the payments was passed at this meeting [hereinafter this shareholders' meeting is cited as the "shareholders' meeting"].

At the district court there was an issue of whether or not Y and those two directors had been appointed. Y argued that all of these three directors had been appointed at a shareholders' meeting held in 1994; he also argued that on the same day of the shareholders' meeting, Y was appointed as a representative director by a resolution of the board of directors. X made a statement that accepted this argument of Y [hereinafter this is cited as "X's confession"]. The district court found that there was no dispute over the issue; it held that the shareholders meeting was validly held and had passed the resolution to ratify the payments of the remuneration. The district court dismissed X's action.

X appealed. X withdrew its confession and maintained that the shareholders' meeting was held invalidly. After the first oral argument, another shareholder Z filed an application to participate in this case.[13] On appeal the High Court did not allow the withdrawal of X's confession. Under Art. 268 ComC, the court dismissed Z's application on

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12 The Supreme Court, January 22, 2002, in: Hanrei Jihô No. 1777, 151; Hanrei Taimuzu No. 1086, 121; Kinyû Shôji Hanrei No. 1146, 3. For commentary, see H. KANSAKU, *Kabunushi daihyô soshô he no sanka to soshô chien* [The participation in a derivative action and delay of the action], in: Jurisuto 1246 (2003) 96; Y. KIMATA, *Kabunushi daihyô soshô he no sanka to shôhô 268-jô 2-kô tadashigaki no tekiyô* [The participation in a derivative action and the application of the proviso of Art. 268 para. 2 ComC], in: Shihô Hanrei Rimâkusu 26 (2003 I) 102.

13 The oral arguments were held three times: the first was on July 7, 1997; the second was on August 18, 1997; and the third was on September 24, 1997. Z's application was filed on August 4, 1997.

the ground that Z's participation would unduly delay the case. X and Z appealed to the Supreme Court. The Supreme Court allowed Z's participation.

2. Held:

Since X's application was dismissed on the grounds of X's confession at the district court, Z filed for participation in this case at the High Court. Z requested to intervene in this case so as to correct X's improper conduct. Although Z made an application after the first oral argument, it was not too late to accept the application. If Z's application is allowed, X's confession will become ineffective in this case. Despite the consequence of Z's participation and because of the evidence and arguments found in the records, it is not necessary to have the lengthy hearings that the court of appeals considered. Moreover, if the circumstances of this case are considered, X's confession can be understood as improper conduct. Accordingly, if Z's participation is not allowed, shareholders other than X will be faced with a detriment that cannot be overlooked (according to the record, there were shareholders other than X). Therefore, the court of appeals wrongly interpreted and applied the proviso of Art. 268 para. 2 ComC when reaching a decision that Z's participation was not allowed under that proviso.

Consequently, such a wrong interpretation and application have an influence on the conclusion of the High Court.

3. Comment:

Shareholders or the company can intervene in an action to enforce the liability of directors (Art. 268 para. 2 ComC). The purpose of allowing such an intervention is to prevent collusion, settlements, or voluntary dismissal that will end up with advantageous outcomes to directors.[14] But shareholders or the company cannot intervene in cases where such an intervention would unduly delay the case or be an undue burden on the court (the proviso of Art. 268 para. 2 ComC). For example, it is pointed out that this proviso covers a case where a number of shareholders intervene in the case. It is not necessary to require an intention of shareholders or the company filing for the intervention, but it is sufficient from an objective view to show that such an intervention unduly delays the case or becomes an undue burden on the court.[15]

An issue in this case is X's confession. X admitted that Y and the other directors were validly appointed at the shareholders' meeting. Because of this confession, the district court and the High Court dismissed X's application. These courts found that the remuneration was ratified at the shareholders' meeting on the premise of X's confession. If Z intervenes in this case, because of the resulting concurrence, X's con-

14 EGASHIRA, *supra* note 7, at 378.

15 K. OSHUMI / H. IMAI, *Kaisha-hô ron (chûkan)* [Company Law, Volume 2] (3rd Tokyo 1992) 276.

fession will not become effective unless Z makes the same confession.[16] The Supreme Court cited three grounds for holding that Z's intervention was not too late. The first ground was that the intervention was requested to correct X's improper conduct. The second ground was that the intervention would not cause lengthy hearings. The third ground was that if Z's intervention were not allowed, there would be a detriment to shareholders other than X, and therefore the intervention would not unduly delay the case. An important point is that the Supreme Court put the emphasis on the interest or the purpose of intervention to correct another shareholder's conduct. Therefore, as a result of this case, shareholders will have an opportunity to correct the improper conduct of another shareholder in an action.[17]

III. A Director's Liability for Conflict of Interests and Financial Support to a Company in a Group of Companies[18]

1. Facts:

Company A had a group consisting of five companies in the hotel industry. Company A had 36.6 percent of the outstanding shares of Company B. Y was a representative for directors of Companies A and B.

Company A had lended money to Company B. The group was making a considerable loss. Financial institutions requested Company A to make a plan to reconstruct the group, such as a plan to forgive debts within the group. Company A made a three-year plan. At the completion of this plan, Y, representing Companies A and B, entered into a contract for debt forgiveness [hereinafter cited as "debt forgiveness"].

X, the shareholders of Company A, maintained that Company A was damaged under the plan and brought a derivative action to seek damages from directors of Company A. The issue in this case was whether or not the debt forgiveness was a conflict of interests under Art. 265 para. 1 ComC, and whether or not Y was liable under subparagraph 4 of Art. 266 para. 1 ComC. The court held that the former provision would apply to the debt forgiveness, but Y was not liable under the latter provision.

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16 KANSAKU, *supra* note 12, at 97.

17 KANSAKU, *supra* note 12, at 97.

18 Osaka District Court 30 January 2002, in: Hanrei Taimuzu No. 1108, 248, Kinyû Shôji Hanrei No. 1144, 21. For commentary, see E. KURONUMA, *Gurûpu kaisha he no kinyû shien to shôhô 266-jô 1-kô 4-gô ni motozuku torishimari-yaku no sekinin* [The financial support to a group company and a liability of directors on the ground of the subparagraph 4 of Art. 266 para. 1 ComC], in: Shihô Hanrei Rimâkusu 27 (2003 II) 84; K. TORIYAMA, *Daihyô torishimari-yaku ga kennin kankei ni aru kogaisha he no kinyû shien to torishimari-yaku no sekinin* [The financial support to a subsidiary and liability of an interlocking director], in: Jurisuto 1246 (2003) 98.

2. Held:

Art. 265 para. 1 ComC requires a director to obtain approval of the board of directors when the director enters into a transaction with the company. It functions in advance to keep the company from being damaged by transactions involving conflict of interests, since the director could sacrifice interests of the company to gain interests on behalf of the director or the third party. On the other hand, subparagraph 4 of Art. 266 para. 1 ComC requires directors to be jointly and severally liable for damages arising from transactions involving conflict of interests, and also requires such liability to be strict. Because the latter provision functions in this way, it is expected that each director will be careful in examining the transactions.[19] There is a transaction to which Art. 265 para. 1 ComC formally applies, but first it is possible to find substantially that such a transaction is entered into in the interests of a company, and second that no conflict of interests arises between the company and the director or the third party in the light of the objective nature of the transaction, such as the substance or effect of the transaction. For the purpose of subparagraph 4 of Art. 265 para. 1 ComC, directors are not expected to be liable for damages to the company in relation to that transaction. Therefore, in that case, such a transaction is not a "transaction of paragraph 1 of the preceding article"[20] mentioned in subparagraph 4 of Art. 266 para. 1 ComC.

In the end, the court found that the debt forgiveness was not entered into on behalf of Y (the director) or Company B (the third party), but it was entered into to further the interests of Company A. The court held that the debt forgiveness was not a transaction under subparagraph 4 of Art. 266 para. 1 ComC.

3. Comment:

There are two kinds of regulation in conflicts of interests between directors and their company: Arts. 265 and 266 ComC. According to Art. 265 ComC, a director has to obtain approval of the board of directors when the director enters into a transaction with the company on behalf of the director or the third party (paragraph 1). On the other hand, according to Art. 266 ComC, when a director enters into a transaction involving conflict of interests, and as a result of the transaction the company gets damaged, the directors of the company are jointly and severally liable for the damages (subparagraph 4, paragraph 1).

If a director enters into a transaction without obtaining approval of the board of directors, and as a result of the transaction the company gets damaged, then the director

19 See decision by the Supreme Court on October 20, 2000, in: Minshû Vol. 54 No. 8 at 2619.

20 The "transaction of paragraph 1 of the preceding article" is a transaction involving conflict of interests mentioned in Art. 265 para. 1 ComC.

has violated Art. 265 ComC. In this case, the director is liable for the damages (subparagraph 5 of Art. 266 para. 1 ComC). When directors have committed an act which violates any law or the articles of incorporation, and such an act causes damages to the company, then the directors who have committed that act are jointly and severally liable to the company for damages (subparagraph 5 of Art. 266 para. 1 ComC). In a case where a director enters into a transaction after the director obtains approval of the board, but the director violates the duty of care[21] or duty to act in good faith as to that transaction,[22] the director is liable to the company for damages because the director has violated the law (subparagraph 5 of Art. 266 para. 1 ComC).[23] In contrast, in a case where a director enters into a transaction involving conflict of interests and the transaction causes damages to the company, the director is liable for damages under subparagraph 4 of Art. 266 para. 1 ComC. In this context, the following interpretation is found in the judgment of the Supreme Court cited in the above judgment of the court in this case.[24] If a director causes damages to the company by entering into a transaction as laid down in Art. 265 para. 1 ComC, the director is liable under subparagraph 4 of Art. 266 para. 1 ComC. If that director violates the duty of care or the duty to act in good faith because the director is intent or negligent with respect to that transaction, then the director is also liable under subparagraph 5 of Art. 266 para. 1 ComC. The Supreme Court held that the liability written in subparagraph 4 is a strict liability, and also that if the director violates the duty of care or duty to act in good faith, the director is liable under subparagraph 5. In short, the Supreme Court held that subparagraphs 4 and 5 of Art. 266 para. 1 ComC coexist.

The significance of this case is this. Although a director enters into a transaction that is formally a transaction under Art. 265 para. 1 ComC, an action for damages will not follow under subparagraph 4 of Art. 266 para. 1 ComC if both of the following conditions are met in substance: first, the transaction is entered into for interests of the company; and second, the conflict of interests does not occur between the company and the director or the third party in light of the objective nature of the transaction, such as the substance or effect of the transaction.

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21 In Japan, according to Art. 254 para. 3 ComC, the relationship between the company and the directors is governed by the provisions relating to mandates. The provision is found in Art. 644 Civil Code. According to this article, directors are bound to manage the affairs entrusted to them with the care of a good manager in accordance with the tenor of the mandate.

22 In Japan, directors are obliged to obey the laws and ordinance, the articles of incorporation, and resolutions adopted at meetings of shareholders and to perform their duties faithfully on behalf of the company (Art. 254-3 ComC).

23 H. MAEDA, *Kaisha-hô nyûmon* [Introduction to Company Law] (9th Tokyo 2003) 320; TATSUTA, *supra* note 6, 79.

24 The Supreme Court, October 20, 2000, in: Hanrei Jihô No. 1731, 125.

IV. SHARES RESTRICTED ON TRANSFER AND THE SHAREHOLDER'S WITHDRAWAL OF REQUEST TO TRANSFER FOR APPROVAL OF THE BOARD OF DIRECTORS [25]

1. Facts:

Shareholder Y of Company A had shares restricted on transfer [hereinafter these shares are cited as the "shares"]. In April 2000, Y requested that Company A approve a transfer of the shares. A's board of directors did not approve the transfer to the party requested by Y. On May 1, 2000, Company A designated another party X and gave notice to Y. Y did not wish to transfer the shares to X. On May 6, 2000, Y expressed to Company A and to X the intention to withdraw Y's request to transfer. On May 9, 2000, X gave Y a notice requesting Y to sell the shares.

X filed for determining the price of the shares. The district court dismissed X's application on the ground that Y expressed the intention to withdraw before X requested Y to sell the shares, and therefore no conclusion was reached for a contract. X appealed. The court of appeals held that Y was unable to withdraw the request after the board of directors designated X, and therefore it allowed X's request. Y applied to the Supreme Court. The Supreme Court did not accept the judgment of the court of appeals, and allowed Y's withdrawal.

2. Held:

The proviso of Art. 204 para. 1 ComC can read that transfer of shares needs an approval of the board of directors as long as the articles of incorporation have so stipulated. The aim of the proviso can be understood to prevent the company from having a shareholder whom the company does not wish to have. But basically, shares of a stock corporation can be transferred freely (Art. 204 para. 1 ComC). In principle, shareholders cannot be forced to sell their shares to those whom they do not wish or at a price which they do not wish. Therefore, although transfer of shares is restricted under the articles of incorporation, the will of shareholders of shares restricted on transfer should be respected as highly as possible unless it is contrary to the aim of the proviso mentioned above. Even when shareholders of restricted shares request the company to designate another party and they withdraw the request, the company is still protected from those whom the company does not wish to become its shareholders. For that reason, the interests of the company which require an approval of the board of directors under the articles of incor-

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25 The Supreme Court, February 27, 2003, in: Hanrei Jihô No. 1815, 157. There is a commentary on the decision of the court of appeals, January 29, 2002, in: Hanrei Jihô No. 1795, 158. For this commentary, see H. KATAGI, *Jôto seigen kabushiki ni tsuki kaisha ga sakigaikensha no shitei wo tsûchi shita nochi ni jôto seikyûsha no suru shitei seikyû tekkai no kahi* [A case commentary about whether or not, in relation to shares restricted on transfer, the shareholders can withdraw their request to transfer after the company gives them notice that the company designates parties to transfer], in: Shihô Hanrei Rimâkusu 27 (2003 (II)).

poration are not prejudiced. Therefore, it is not contrary to the aim of shares restricted on transfer to allow the withdrawal of the shareholders.

Shareholders who wish to transfer restricted shares have only two options if the board of directors does not approve the transfer to those whom the shareholders wish to have. The first is for the shareholders to decide not to transfer the shares. The second is that they decide to transfer the shares to those whom the board designates. The shareholders do not offer a price of the shares. The shareholders stand in different circumstances from when a party makes an offer in relation to usual contracts. Further, those whom the company designates are not those whom the shareholders choose and offer, and also those whom the company designates are in a different position from the position of those whom the shareholders trust and offer. The view that the withdrawal of the shareholders is not allowed because the interests of the designated party could be prejudiced is emphasized as company reasoning, resulting in a detriment to the interests of the holders of the shares that are restricted on transfer. Therefore, such a view is not acceptable.

The reasonable and acceptable view is this: In a case where the shareholders request the board of directors to approve transfer of shares but the board does not approve it and designates another party, the shareholders can withdraw their request to transfer until the party designated by the board requests the shareholders to transfer the shares.

3. Comment:

In principle, shares of companies limited by shares can be transferred freely (Art. 204 para. 1 ComC). Companies can require an approval of the board of directors for the transfer of shares if the articles of incorporation so require (Art. 204 para. 1 ComC). Shareholders of the restricted shares have to request the board of directors to approve the transfer with a document revealing the other party and the class and number of the shares (Art. 204-2 para. 1 ComC). If the board of directors does not approve the shareholders' request to transfer, the shareholders can request the board of directors to designate another party (Art. 204-2 para. 1 ComC). If no agreement is reached as to the buying and selling price, the party concerned can apply to the court for determining the price (Art. 204-4ComC).

An issue in this case relates to the deadline for shareholders to withdraw their request that they had submitted to the board of directors for approval. In this point, there is a point of view that the shareholder cannot withdraw the request after the designated party requests the shareholders to transfer because the contract is concluded when the designated party requests the shareholder.[26] In contrast, there is another point of view which holds that the shareholders cannot withdraw their request after the board desig-

26 OSUMI / IMAI, *supra* note 15, 429. S. TANAKA, *San-zentei kaisha-hô sôron (jôkan)* [General Discussion/Theory of Company Law, 3rd revised edition, Vol. 1] (Tokyo 1993) 374.

nates a party because the designated party gains a position to conclude a contract when the board designates the party.[27]

If the board of directors does not approve the transfer that the shareholders wish and the board designates another party, the designated party has to request the shareholders to transfer within 10 days from the day that the shareholder receives a written notice (Art. 204-3 para. 1 ComC). Regarding these 10 days as a period for consideration (a period of acceptance), the High Court held that the shareholder cannot withdraw the request during this period. The decision of the High Court means that the shareholder cannot withdraw the request even before the designated party requests the shareholder to transfer. But the Supreme Court held that the shareholder can withdraw the request until the designated party requests that the shareholder transfer.[28] The Supreme Court decision emphasized the protection of the interests of shareholders by maintaining the principle of the free transferability of shares.

CONCLUSION

This paper has mainly dealt with Japanese corporate law cases arising from the recession with which Japan is confronted. A typical case involves financial support in a group of companies (as seen in Part III). There are also cases concerning customary practice in Japanese companies. In these cases, the meaning of the customary practice is questioned. Examples are cases in which an allowance for resigning directors is involved (Parts I and II). It is reported that the number of companies that have abolished the customary practice of the allowance has been on the increase recently because of changing economic situations such as globalization and the abolition of the "pay-by-age system".[29] In Japan most stock corporations have shares restricted on transfer under the articles of incorporation.[30] The Supreme Court addressed the case concerning the restricted shares by emphasizing the interests of the shareholders (as seen in Part IV), thus protecting the interests of the shareholders. Cases in corporate law are the crystallization of economic problems that a society faces, and also the characteristics of corporate culture that are built up in that society.

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27 H. IMAI, *Shinpan chûshaku kaisha-hô (3)* [Commentary on company law, new edition (3)] (Tokyo 1987) 103.

28 There is a dissenting opinion supporting the decision of the court of appeals in this case.

29 *Nikkei Shinbun*, 29 June 2003, at 17.

30 EGASHIRA, *supra* note 7, at 174.

ZUSAMMENFASSUNG

Der Beitrag gibt einen Überblick über die vier wichtigsten Entscheidungen zum japanischen Gesellschaftsrecht in den Jahren 2002 und 2003.

Als erstes wird eine Entscheidung des Distriktgerichts Nagoya vorgestellt, in der es um den Ermessensmißbrauch eines vertretungsberechtigten Verwaltungsratsmitglieds bei der Festlegung von Sonderbezügen für zurückgetretene Verwaltungsratsmitglieder geht.

Als zweites analysiert der Beitrag eine Entscheidung des Obersten Gerichtshofs, in deren Zentrum Fragen der Beteiligung an einer Aktionärsklage stehen. Drittens wird eine Entscheidung des Distriktsgerichts Osaka zur Haftung von Verwaltungsmitgliedern bei Interessenkonflikten nach Art. 265 und 266 HG kommentiert. In der abschließend vorgestellten Entscheidung des Obersten Gerichtshofs geht es um die Übertragung von vinkulierten Aktien einer geschlossenen Aktiengesellschaft.

Die vier Entscheidungen zum Gesellschaftsrecht lassen zum einen viele der ökonomischen Probleme deutlich erkennen, mit denen Japan sich zur Zeit konfrontiert sieht, und zum zweiten machen sie zentrale Elemente der japanischen Unternehmenskultur sichtbar.

(Die Redaktion)