Learning from Toyota's Troubles: The Debate on Board Oversight, Board Structure, and Director Independence in Japan

Bruce E. Aronson *

I. Introduction
II. Director's Duty of Oversight in Japan
  1. The Daiwa Bank Case
  2. The Companies Act
  3. Duty of Oversight and Internal Controls in the Toyota Case
III. Board Structure and Function in Japan
  1. The Ongoing Debate on Competing Board Structures and Director Independence
  2. Possible Impact of the Toyota Case
IV. Conclusion

I. INTRODUCTION

In February 2010 Toyota Motor Corporation, one of the most highly respected corporations in the United States and throughout the world, plunged into a full-blown crisis over car quality and safety. Problems with sudden unintended acceleration and other issues resulted in a recall of over six million vehicles in the United States and over eight million worldwide within a two-week period. The continuing fallout has included additional recalls,[1] a dramatic drop in car sales, halts in vehicle production, a significant decline in

* I thank participants in a conference at Harvard Law School entitled "Chinese Legal History and Japanese Law: A Conference in Honor of Jerome Alan Cohen" (18-19 June 2010) for comments on an earlier draft, and the students in Professor Daniel Foote's class at the University of Tokyo School of Law on 'Japanese Law as Viewed from Abroad' for an interesting discussion on Toyota and corporate governance issues when I presented a guest lecture on 1 July 2010.

1 Toyota's problems both increased NHTSA enforcement and raised sensitivities on the part of automakers, thereby resulting in an increase in voluntary recalls. Toyota's recall of 1.13 million Corolla sedans and Matix hatchbacks for engines stalling or failing to start, announced on 26 August 2010, was its 15th recall of the year. the recalls covered 11 million vehicles worldwide since November 2009. NICK BUNKLEY, 1.1 Million Toyota's Recalled to Correct Engine Problems, in: New York Times, 26 August 2010.

perceived quality,[2] a Moody's downgrade of Toyota's credit rating,[3] ongoing investigations and enforcement actions by the National Highway Traffic Safety Administration ("NHTSA") and other agencies,[4] including the largest civil fine in NHTSA history (US $16.375 million),[5] a spate of private lawsuits,[6] and frantic efforts by Toyota to deal with the sudden crisis.

In a public appearance in Washington, D.C. before the House Committee on Oversight and Government Reform on February 24,[7] the President of Toyota Motor Corporation, Akio Toyoda, attributed the mounting problems to the company's excessive emphasis on growth and profits in recent years at the expense of its traditional focus on quality and product safety.[8] Others have cited cultural factors to help explain Toyota's sudden and startling troubles, including a culture dominated by deliberate engineers who

---

2 In the 2010 annual J.D. Power & Associates Initial Quality Study, Toyota was 21st out of 33 brands, falling from 6th place in the 2009 survey. Toyota fell below the average for the industry for the first time. An article in the New York Times noted that "Toyota has paid dearly among car owners for its recalls over accelerator pedal problems." C. JENSEN, Toyota's Image Falls in J.D. Power Survey, in: New York Times, 17 June 2010.

3 On 22 April 2010 Moody's Investors Service downgraded Toyota's credit rating on senior, unsecured long-term debt from Aa1 to Aa2, which is equal to Toyota's lowest historical rating, with a negative outlook. It cited a low level of profitability, "product quality and recall challenges," and "sluggish recovery in global car sales" as factors in its decision. See MOODY'S INVESTORS SERVICE, Rating Action: Moody's Downgrades Toyota to Aa2; Outlook Negative, available at *www.moodys.com.*

4 As of early May 2010, government investigations included NHTSA inquiries on Toyota's delay in reporting sudden acceleration problems, a Securities and Exchange Commission investigation of investor disclosures, a grand jury probe in the Southern District of New York, and a consumer protection suit filed by the California Orange County district attorney alleging that Toyota knowingly sold defective vehicles in violation of California's Unfair Business Practices Act.

5 The amount of the fine is the maximum allowed by law. If not for this limit, NHTSA claimed that the fine could have amounted to $6,000 for each of 2.3 million vehicles sold with defective accelerator pedals for an astronomical total of $13.8 billion. See N. BUNKLEY/ M. MAYNARD, Toyota Agrees to Pay $16.4 Million Fine in: Recall, in New York Times 19 April, 2010.

6 As of early May 2010, some two hundred lawsuits have been consolidated into federal multidistrict litigation under Judge James Selna in the US District Court for the Central District of California. These consist of personal injury suits, class actions for economic damage (refunds for loss of value in recalled vehicles), and a number of securities class actions. For a list of these federal actions, see Suing Toyota, in: National Law Journal, 3 May 2010, 10. There are also a smaller number of state lawsuits, many of them personal injury cases filed before Toyota's crisis. To date there have been no shareholder derivative suits alleging director's breach of fiduciary duty, which is the topic of the first part of this article.

7 For the full text of Mr. Toyoda's testimony, see, e.g., *http://uk.reuters.com/article/idUKTOE61N04I20100224.*

8 Although Toyota's seemingly sudden crisis was a shock to the public, a few observers had previously reported that Toyota's rapid expansion during the past decade was straining its quality control system. See A Wobble on the Road to the Top, in: The Economist, 10 November 2007, 3.

are good at the gradual development and incorporation of improvements but who fear public recalls and are poor at crisis management,[9] a sense of complacency after years of outstanding results, poor information flows (particularly involving bad news), and corporate secrecy. These factors combined to create a situation where Toyota repeatedly underestimated the seriousness of quality issues, alienated the NHTSA, and finally was forced to make unprecedented recalls in the United States.

In an opinion published in the Washington Post prior to his congressional testimony,[10] Mr. Toyoda outlined steps he is taking to address Toyota's crisis and repair its public image, including internal and external reviews of operations and quality controls, more vigorous investigation of consumer complaints, more effective internal sharing of information, and better communications with regulators. In March 2010 Toyota named Rodney Slater, former US Transportation Secretary in the Clinton Administration, to lead a new panel of independent experts to advise Toyota on quality issues. It has also promoted non-Japanese executives to head regional operations in Europe and elsewhere for the first time and promised to give them greater autonomy to respond to quality issues.

Japan has been shaken by Toyota's crisis. Toyota is emblematic of Japanese quality, with practices such as "just in time" and "lean" manufacturing being rendered in Japanese simply as the "Toyota Production System" (*Toyota kanban hoshiki*). Toyota is also Japan's largest company by revenue, and is a substantial employer. The economic impact of any decline in Toyota's fortunes will be significant. There was initially no major recall of vehicles in Japan.[11] To the contrary, there have been accusations that the American press has exaggerated issues common to all automobile manufacturers. The Japanese popular press has speculated about possible political motivations in the United States behind attacks on Toyota, including the US government's support for American car manufacturers and their unions.[12]

---

9 K. BELSON, Toyota's Wrecked Image Needs the Right Bodywork, in: New York Times, 12 February 2010.

10 A. TOYODA, Toyota's Plan to Repair Its Public Image, in: Washington. Post, 9 February 2010, *available at* *http://www.washingtonpost.com/wpdyn/content/article/2010/02/08/AR2010020803078.html*

11 In early July 2010 Toyota announced a recall of 90,000 Lexus and Crown vehicles in Japan as part of a worldwide recall of some 270,000 cars for possible flaws in valve springs. ASSOCIATED PRESS, Toyota Recalls 90,000 Cars in Japan, in: Wall Street Journal, 4 July 2010. Although this is a substantial recall, the number of cars covered by recalls in Japan remains very small compared to that in the United States and Europe.

12 For a discussion in English of Toyota's crisis and the Japanese popular press, see, e.g., D. MCNEILL, Somewhere Over the Rainbow: Toyota and the Consequences of the Drive to Be the World's No. 1, in: The Asia-Pacific Journal, No. 9-2-10, 1 March 2010, available at *http://www.japanfocus.org/-David-McNeill/3311*. Similar arguments have been put forward by some conservative commentators in the US. See, e.g., H. JENKINS, JR., Toyota and the Complaint Bandwagon, in: Wall Street Journal, 26 March 2010; K. HASSETT, Toyota Gets Wrecked by Labor's Runaway President, in: Bloomberg.Com, 21 March 2010, available at *www.bloomberg.com.* *(cont.)*

It appears that Toyota has limited the short-term financial impact of the recall issue, as in May 2010 it reported a rebound in sales beginning in March and substantial net profits for the 2009 fiscal year despite cost estimates of a billion dollars related to recalls.[13] However, Toyota is not yet out of the woods. Recent sales have depended heavily on unprecedented financial incentives by the company in the US and by the government in Japan, there is substantial potential exposure to ongoing government investigations and lawsuits[14] in the US, and concern remains over the long-term impact on Toyota's reputation and performance.

Conspicuously absent in the discussion of Toyota's problems to date is the role of governance institutions, particularly the role of Toyota's board of directors.[15] Toyota's response to its current troubles is striking because it has continued a rather narrow emphasis on manufacturing quality and production issues in the face of a full-fledged crisis. If an American company were in a similar situation, we might expect a public discussion of a host of governance-related issues, such as the company's information and reporting systems and its decision-making procedures, the role and actions of the board of directors, and possible replacement of top management and improvements in firm governance to prevent any future recurrence. As discussed *infra*, the structure and functions of a typical Japanese corporate board reinforce the penchant for corporate secrecy in Japan and other factors which are often cited as a cause of Toyota's problems.

This article considers the potential significance of Toyota's troubles for Japanese corporate governance by examining two issues. First, it looks at the relevant fiduciary duty of directors, i.e., the general duty of oversight set forth in case law in the Daiwa

---

However, despite some allegations in the Japanese press of Japan bashing, there was little evidence that in the United States Toyota was treated differently from an American corporation. Having built large manufacturing plants in a number of American states, Toyota was able to mobilize both its US workers and local politicians to help present its defense.

13 Following Toyota's first annual net loss in 59 years in fiscal year 2008 (of ¥437 billion), net income rebounded to ¥209.4 billion ($2.2 billion) in fiscal year 2009 (which ended 31 March 2010). Toyota forecasted 48% profit growth to ¥310 billion for 2010. Toyota booked recall costs at ¥170-180 billion in its last quarter, and declined to estimate such costs going forward. See Y. TAKAHASHI, Toyota Registers Surprise Profit, in: Wall Street Journal, 11 May 2010. At Toyota's annual general shareholders meeting on 24 June 2010, a senior executive reportedly stated that costs related to recalls for the fiscal year ending in March 2010 totaled ¥380 billion. See Toyota's Chief Apologizes to Shareholders, in: International Herald Tribune 25 June 2010, 21.

14 An Associated Press report cited an unnamed attorney's estimate "that if Toyota were to settle the cases for even a modest payout to affected motorists, it could cost the company at least $3 billion and possibly much more." See, e.g., ASSOCIATED PRESS, Toyota Faces 327 Lawsuits in U.S.; Estimated Cost at Least $3 Billion, in: Japan Times, 3 May 2010, available at *http://search.japantimes.co.jp/cgi-bin/nb20100503a1.html.*

15 There has been no mention in Japan of governance issues and only a few references in the Western press. See infra note 55 and accompanying text.

Bank shareholder derivative litigation (2000)[16] and the related subsequent statutory duty to establish a system of internal controls provided in the Companies Act (2005).[17]

Second, it considers the Toyota case in light of the ongoing debate in Japan during the last decade between competing board structures: the traditional *kansayaku* (company auditor) structure with no required outside directors, and the newer alternative board committee structure with a required majority of outside directors. The potential role of independent directors remains controversial and is currently the hottest topic in Japanese corporate governance. Are Toyota's recent failures likely to affect the tone and outcome of this debate on the importance and effectiveness of board independence?

II. DIRECTOR'S DUTY OF OVERSIGHT IN JAPAN

Directors owe similar fiduciary duties of care and loyalty to the corporation and shareholders under both Japanese and US law. In Japan these duties are provided by code provisions while in Delaware such duties are provided entirely by case law. Japanese code provisions on directors' duties also include a specific duty of compliance with laws and regulations.[18]

In both the United States and Japan, court precedents extend the director's duty of care beyond board decisions by providing for a duty of oversight, i.e., a duty to establish and monitor an information and reporting system designed to prevent and detect wrongdoing by the corporation's employees. In the United States the duty of oversight in Delaware stems from the well-known *Caremark* decision,[19] while in Japan it results from an unprecedented shareholder derivative suit related to the $1.1 billion trading loss scandal in Daiwa Bank's New York branch in 1995.[20] In Japan, the Companies Act of 2005 incorporated the Daiwa Bank decision and requires the board of directors to establish a system of internal controls, including compliance with law.[21] Furthermore, the board may not delegate this duty.[22]

---

16 See *infra* note 20.

17 *Kaisha-hô* (Companies Act,) Law No. 86 of 2005, as amended. An official English translation is available on a Japanese law translation website operated by Japan's Ministry of Justice. See *http://www.japaneselawtranslation.go.jp.*

18 Companies Act, Art. 362 para. 4.

19 *Caremark International Inc. Derivative Litigation*, 698 A. 2d 959 (Del. Ch. 1996). The Chancery Court's finding of a director's duty of oversight was later affirmed by the Delaware Supreme Court in *Stone v. Ritter*, 911 A.2d 362 (Del. 2006), although the Supreme Court re-characterized the duty of oversight as falling within the duty of loyalty (for conscious disregard of a known duty) rather than the duty of care.

20 Osaka District Court, 20 September 2000, in: Hanrei Jihô 1721 (2000) 3.
For an analysis of the case and its significant impact in Japan, see B. ARONSON, Reconsidering the Importance of Law in Japanese Corporate Governance: Evidence from the Daiwa Bank Shareholder Derivative Case, in: Cornell International Law Journal 36 (2003) 11.

21 Companies Act, Art. 362, para. 4.

22 Id.

1. The Daiwa Bank Case

The Daiwa Bank case was an epochal lawsuit for Japanese law and corporate governance since it removed substantial barriers to shareholder derivative suits and expanded the scope of successful lawsuits for enforcement of director's fiduciary duties beyond a narrow range of cases involving bribes or other illegal payments.[23]

Of equal importance, in terms of substance the Osaka District Court found 11 directors and auditors liable for a total of $775 million in damages in two related cases. In the first case, the court found that the Daiwa directors' failure to establish an appropriate internal control system, which could have prevented or discovered the $1.1 billion loss resulting from unauthorized trading in the bank's New York branch over an eleven-year period, was a breach of the oversight component of their duty of care. In the second case, the court found a breach of the directors' duty to comply with law in connection with concealment of losses and failure to report criminal activity to US authorities in the timely manner required by US law. This resulted in a criminal fine in the amount of $340 million, the largest criminal fine levied on a financial institution in US history, and $10 million in legal fees.[24]

In the first case on the duty of oversight, the court found as follows:

> …the overall policy of a risk management system, which relates to the fundamentals of corporate management, requires the board of directors to pass a resolution. The representative director and director in charge (of a business department or function)…bear the responsibility to decide specifically, based on the overall policy, the risk management system for the department(s) for which he is in charge. … [D]irectors, …bear a duty to construct a risk management system, and, in addition, bear a duty to monitor whether or not the representative director and director in charge are performing their duty to establish a risk management system… Auditors…bear a duty to audit whether or not the directors are carrying out the construction of a risk management system.…[25]

With respect to individual liability, the court permitted directors to rely on each "director in charge" of a specific business unit or function. Such reliance was permitted in the absence of "special circumstances" (i.e., "red flags" which would raise doubts about

23 Prior to the Daiwa Bank Case, courts often utilized a security for expenses provision and ordered plaintiffs to post substantial bonds, thus effectively ending the derivative litigation. ARONSON, *supra* note 20, 23-25.

24 Both sides appealed from the judgment of the Osaka district court; however, on 20 December 2001, a settlement was reached to end the dispute. Pursuant to the settlement agreement, the plaintiffs accepted a small fraction of the awarded damage amount (250 million yen or roughly $2 million at the then prevailing exchange rate) in return for payment from each of the original 47 defendants and preservation of the district court's legal findings on directors' liability.

25 See Daiwa court decision, *supra* note 20, at 32-33. In English, see B. ARONSON, Learning from Comparative Law in Teaching U.S. Corporate Law: Director's Liability in Japan and the U.S., in: Penn State International law Review 22 (2003) 213, 227-228.

performance), and as a result only directors (and an auditor) with direct responsibility were found liable under a standard of negligence.[26] This approach allowed the court to adopt the legal concept of individual director liability to the reality of the traditional Japanese board structure in which there is no separation of directors and officers, and in which all directors are employees promoted from within who retain distinct "line" responsibilities for a specific department of the corporation.

In the second case, the court specifically found that US law was included within the scope of the definition of "law" in the code provision on director's duty to comply with law. The fallout from the Daiwa case was significant, and included an amendment to the Commercial Code the following year permitting companies to enact charter amendments to limit director's liability in shareholder derivative suits.[27]

2. *The Companies Act*

The Companies Act incorporated the principle of an internal control system for risk management set forth in the Daiwa Bank case and requires that the boards of all large Japanese companies establish and monitor such a system. It provides as follows:

> [The board] may not delegate…[t]he development of systems necessary to ensure that the execution of duties by directors complies with laws and regulations and the articles of incorporation, and other systems …necessary to ensure the properness of operations of a Stock Company; business activities of the company and shall supervise the performance of the duties of directors.…[28]

The internal control system under the Companies Act is concerned with risk management and is both broader than, and includes within its scope, the internal control system for financial reporting under the Financial Instruments and Exchange Act (the so-called "J-Sox" which was loosely based on internal controls for financial reporting under the Sarbanes-Oxley Act in the United States). As noted above, in the United States there is no statutory equivalent for internal controls related to broader risk management, as the director's duty of oversight on information and reporting systems is left to case law.

Last year the Supreme Court of Japan ruled for the first time on the director's duty to establish a system of internal controls under the Companies Act.[29] In a case involving Japan System Technology Co. ("JSTC"), an investor in JSTC securities made a claim for investment losses due to a decline in stock price following the discovery of fraudulent financial reporting by JSTC employees in its annual securities report (*yûka shôken hôkoku-shô*). The claim was against the corporation to pay damages caused by the representative director's failure to establish an adequate internal control system to prevent

26 See id.*,* at 229.
27 See ARONSON, *supra* note 20, 20-21.
28 Companies Act, Art. 362, para. 4.
29 Supreme Court, 9 July 2009, in: Kinyû Shôji Hanrei 1321 (2009) 36.

and detect such fraudulent employee conduct.[30] The Tokyo High Court had found a violation of the director's duty to develop and implement a system of internal controls, but the Supreme Court reversed and found no violation of fiduciary duty.

The Supreme Court ruled that the directors had implemented an internal control system which was generally adequate to prevent false accounting by common methods but that it failed in this particular case due to a clever conspiracy by several employees. As there were no special circumstances (or "red flags") to alert the directors to the possibility of this uncommon method of fraud, there was no breach of fiduciary duty.[31] Although the Supreme Court overruled the Tokyo High Court with respect to the application of director's fiduciary duties under Article 362 to the facts in this case, it applied the same standard of negligence.[32] Accordingly, the impact of the Supreme Court decision remains uncertain, as any application of fiduciary duties to fraudulent acts of employees will necessarily depend on an evaluation of the fact pattern in each case.

3. Duty of Oversight and Internal Controls in the Toyota Case

Although the facts in the Toyota case are still under investigation, the duty of oversight from the Daiwa Bank case and the related statutory duty to establish a system of internal controls would be the applicable legal duties for directors of Toyota. Some elements from the Daiwa Bank case are present, i.e., a violation of US law, a substantial fine imposed in the United States, and large losses arguably related to a failure in the company's internal control system to prevent and detect such violation of law. However, there is also an important difference. Toyota, like all large Japanese corporations today, has an overall policy and framework for internal controls established by the board in accordance with the requirement of the Companies Act.[33]

---

30 The claim is based on Article 350 of the Companies Act, which provides that "A Stock Company shall be liable for damage caused to third parties by its Representative Directors or other representatives during the course of the performance of their duties." The referenced duty is that of developing and implementing a system of internal controls under Article 362.

31 The Supreme Court stated as follows: "It can be said that the petitioner [JSTC] had established a management system at a level that could prevent wrongful acts, such as the entry of fictitious sales, that are ordinarily anticipated…" See the court's opinion, *supra* note 29, 41. The defendants in the Daiwa Bank case made a similar argument that they had established an adequate system of internal controls but that it had been evaded due to a clever scheme carried out by the rogue trader, Iguchi. In that case, the Osaka District Court rejected that argument and found for the plaintiffs.

32 Id., 42.

33 Since 2006 listed companies have been required to file annual reports on corporate governance with the Tokyo Stock Exchange. An English translation of Toyota's latest report, which includes a section on "Basic Approach to Internal Control System and its Development" is available on its website. See TOYOTA MOTOR CORPORATION, Corporate Governance Report, 10 March, 2010, available at *http://www.toyota.co.jp/en/ir/library/cg/corporate_governance_reports_e.pdf*

Assuming that directors were not negligent in establishing the overall policy on internal controls, the questions would therefore be as follows: (1) whether the representative director and director(s) in charge were negligent in devising and implementing appropriate specific internal controls based on the board's overall policy, and (2) whether other directors were negligent in relying on the representative director and director(s) in charge, due to the existence of special circumstances which rendered such reliance unjustifiable.

III. BOARD STRUCTURE AND FUNCTION IN JAPAN

1. *The Ongoing Debate on Competing Board Structures and Director Independence*

Since 1996 there have been numerous amendments to Japanese corporate laws as part of an ongoing debate on corporate governance reform. The fundamental question is whether the insider-dominated traditional Japanese system of stakeholder corporate governance has failed in the post-bubble era and needs to be replaced by a more shareholder-oriented system. The specific issue which has attracted the most attention and controversy is the question of director independence.

This debate is spurred by the desire to improve firm competitiveness and performance and is complicated by the basic questions of what constitutes "good" corporate governance[34] and director independence,[35] and more specifically, by the lack of empirical evidence linking independent directors to better firm performance.[36] As a result, the Japanese have focused on the twin (and perhaps contradictory) goals of both greater management financial flexibility and greater emphasis on shareholder interests.[37]

---

34 See, e.g., B. ARONSON, What Can We Learn from U.S. Corporate Governance? A Critical Analysis, in: University of Tokyo Journal of Law and Politics 2 (2005), available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=920865*

35 For an analysis of the differences between outside, disinterested, and independent directors in a comparative context, see D. CLARKE, Setting the Record Straight: Three Concepts of the Independent Director, GWU Legal Research Paper no. 199, 17 March 2006, available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892037*

36 See, e.g., S. BHAGAT / B. BLACK, Non-Correlation Between Board Independence and Long-Term Firm Performance, in: Journal of Corporation Law 27 (2002) 231. This type of analysis has also been applied to Japan with a similar result that there is no correlation between outside directors and improved firm performance. Y. MIWA / J.M. RAMSEYER, Who Appoints Them, What Do they Do? Evidence on Outside Directors from Japan, Harvard Law and Economics Discussion Paper No. 374, July 2002, available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=326460*

37 However, I have recently argued that from the time of the postwar occupation there has been a tension in Japanese corporate law reform between "management-friendly" reforms, which allowed both professional management and access to capital markets for the newly public corporations that replaced the *zaibatsu*, and "shareholder friendly" reforms, which sought to balance this strengthening of management by giving shareholders new rights to monitor management. This tension remains today. See B. ARONSON, Postwar Reform of

Accordingly, commentators offer differing evaluations of the significance of these corporate governance reforms.[38]

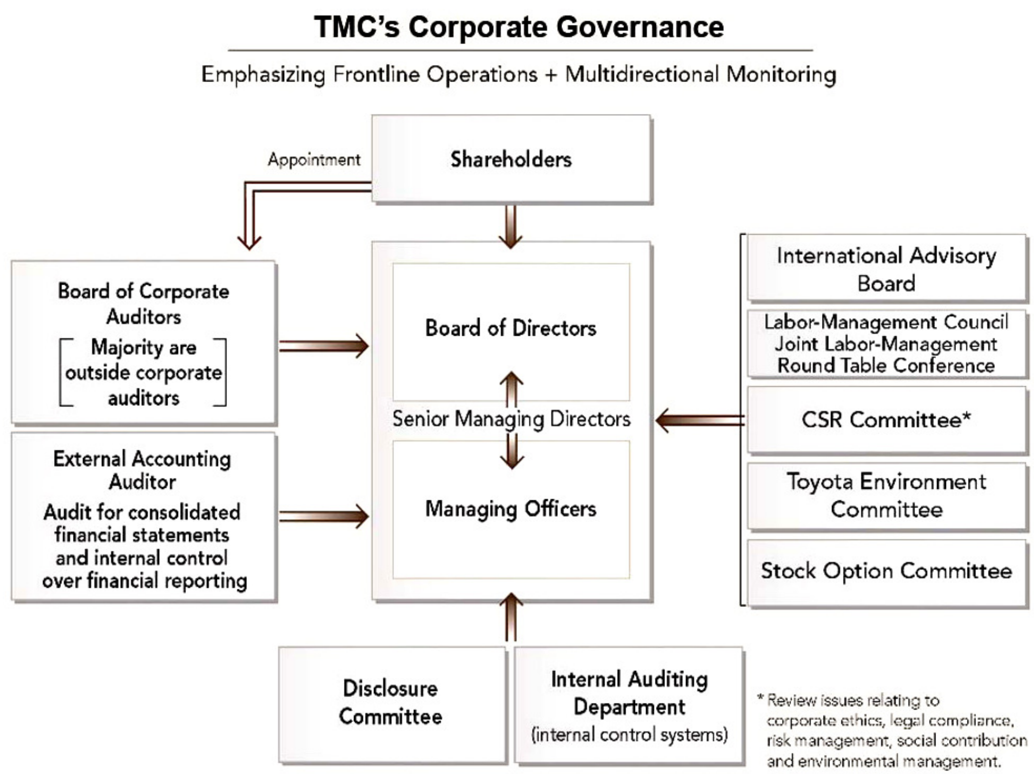
More specifically, Japanese corporate law has both sought to strengthen the traditional *kansa-yaku* system and to develop a new alternative. The Commercial Code reform of 2001, which allowed limits on director liability following the Daiwa Bank case, also attempted to strengthen the traditional form of governance by requiring that half of the company auditors on Boards of Audit of large corporations be outsiders. In the larger Commercial Code overhaul of 2002, a proposal to require every corporation to have at least one outside director was defeated, but the new board committee system (which requires a majority of outside directors on the board) was added as an optional alternative.

The board committee system separates the functions of officers and directors and replaces the traditional German-inspired positions of representative director and company auditor with American-derived positions of representative officer and the audit committee of the board of directors (compare the traditional system of Toyota in *Figure 1* with the board committee system of Sony in *Figure 2*). These two figures highlight differences in monitoring responsibilities: under the traditional system the company auditors have the difficult task of monitoring the performance of directors/managers whom they cannot fire, while under the board committee system the board, and in particular the audit committee of the board, has the responsibility of monitoring officers that are selected by the board.

Corporate Law and Corporate Governance in Japan: Democratization Under the Occupation and the Japanese Reaction, in: The Blakemore Foundation/The International House of Japan, Law and Practice in Postwar Japan: The Postwar Legal Reforms and their Influence (2010) 59. Also available at *http://ssrn.com/abstract=1600868*.

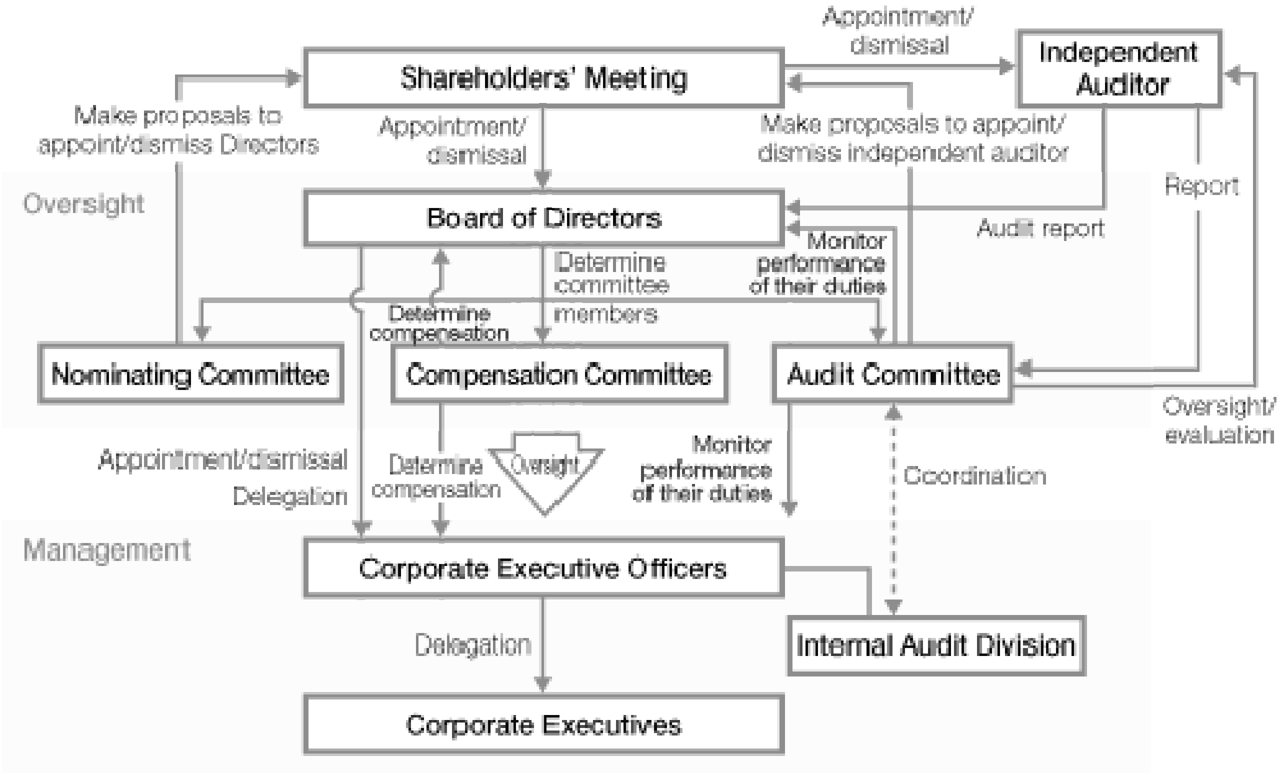
38 The majority view is represented by Curtis Milhaupt who analyzed a decade of corporate law reform in 2003, and found that about two-thirds of the changes were management-friendly ("flexibility enhancing amendments") and about one-third were shareholder-friendly ("monitoring enhancing amendments"). As a result, he concluded, the Japanese corporate governance system had not changed significantly and become more of a shareholder-friendly system. See C. MILHAUPT, A Lost Decade for Japanese Corporate Governance Reform?: What's Changed, What Hasn't, and Why, in: Blomstrom/La Croix (eds.) Institutional Change in Japan (2006) 97. But see Z. SHISHIDO, The Turnaround of 1997: Changes in Japanese Corporate Law and Governance, in: Aoki/Jackson et al. (eds.) Corporate Governance in Japan: Institutional Change and Organizational Diversity (2007) 310. I have argued that the outcome may depend on the criteria utilized to measure the significance of change. See B. ARONSON, Changes in the Role of Lawyers and Corporate Governance in Japan—How Do We Measure Whether Legal Reform Leads to Real Change?, in: Washington University Global Studies Law Review 8 (2009) 223.

Figure 1 **Toyota's Corporate Governance Structure**



Source: Toyota's website at *http://www.toyota.co.jp/en/ir/library/cg/corporate_governance_reports_e.pdf.*

Figure 2 **Sony's Corporate Governance Structure**



Source : Excerpt from corporate governance section of Sony's website (updated Sept. 28, 2009), available at *http://www.sony.net/SonyInfo/csr/governance/index.html*.

Very few Japanese companies (only 2,3%) have adopted the new board committee system.[39] This is far below the expectations of some observers at the time the board committee system was introduced.[40] The question of board independence remains a hotly contested issue.[41]

There has been no clear winner in the ongoing debate on the role and importance of outside directors, as two opposing views have clashed repeatedly: (1) the view of many domestic and foreign institutional investors that their interests are not sufficiently protected under the traditional insider-based system, which may be a factor in lowering the value of the Japanese stock market,[42] and (2) the view of corporate management that each company should determine its own best form of governance without the imposition of uniform rules in areas such as director independence.[43]

Director independence was the main topic of a METI study group in 2009. The report[44] of this group concluded that although it was important for minority shareholders and foreign shareholders to have some independent voice on corporate boards to protect their interests, each corporation should engage in a dialogue with shareholders and pursue the most appropriate governance system for it. Accordingly, there would be no

---

39 As of 2008 there were 55 listed companies that had adopted the committee system out of a total of 2,378 companies listed on the Tokyo Stock Exchange (2.3%). TÔKYÔ SHÔKEN TORIHIKI-JÔ [TOKYO STOCK EXCHANGE, INC.] *Jôjô kaisha koporeto gabanansu hakusho* 2009 [TSE Listed-Companies White Paper on Corporate Governance 2009] 16. With respect to the choice afforded Japanese companies with respect to their board structure, see generally R. GILSON / C. MILHAUPT, Choice as Regulatory Reform: The Case of Japanese Corporate Governance, in: American Journal of Comparative Law 53 (2005) 343.

40 For example, Hiroyuki Yanai, then executive director of the Japan Association of Corporate Directors estimated in June 2003 that 100 firms would adopt the new system by March 2005 and 500-600 firms would do the same "within the next four to five years." H. YANAI, The systemization of Ethical Virtue – the Position of Japan's "Companies with Committees" System, Corporate Governance Japan Column 009, available on the website of The Research Institute of Economy, Trade and Industry (RIETI) at *http://www.rieti.go.jp/cgi/en/columns/text_009.htm*

41 For an overview, see L. NOTTAGE, Corporate Governance in Global Contexts: Germany, Japan, and China, in: du Plessis/McConvill et al. (eds.), Principles of Contemporary Corporate Governance (Melbourne, second edition, 2010) 365-69; A. SHINKAWA / J. EMERSON, Striving for Independence, in: International Financial Law Review – The 2010 Guide to Japan, 17 February 2010.

42 *See, e.g.*, ASIAN CORPORATE GOVERNANCE ASSOCIATION, White Paper on Corporate Governance in Japan (2008), available at *http://www.acga-asia.org/public/files/Japan%20WP_%20May2008.pdf.* This association has consistently demanded a minimum of three independent directors for Japanese companies.

43 See NIPPON KEIDANREN, Towards Better Corporate Governance,14 April 2009, available at *http://www.keidanren.or.jp/english/policy/2009/038.pdf.*

44 See CORPORATE GOVERNANCE STUDY GROUP, MINISTRY OF ECONOMY, TRADE AND INDUSTRY, The Corporate Governance Study Group Report, 17 June 2009, available at *http://www.meti.go.jp/english/report/downloadfiles/200906cgst.pdf.*

uniform requirement in law for independent directors, but stock exchanges should require at least one independent director or company auditor for listed companies.[45]

The Financial Services Agency (FSA) also convened a study group which on the same day issued a broader report with a similar conclusion on the independence of directors and auditors.[46] The FSA committee also called for other measures to strengthen the audit process in traditional companies with company auditors, including adding resources and increasing cooperation between companies' internal audit divisions (which report to the directors) and company auditors.

The FSA report led to the Tokyo Stock Exchange adding a new requirement at the end of 2009 that every listed corporation must have one independent, as opposed to outside, director or corporate auditor.[47] This requirement has already been widely implemented.[48]

---

45 There was considerable debate over whether it was sufficient for companies with the traditional company auditor structure to have an independent company auditor, or whether those companies should also be required to have an independent director. The Report concluded that an independent company auditor was sufficient, as part of its approach that each corporation should develop its own appropriate corporate governance structure. *Id.*

46 FINANCIAL SERVICES AGENCY, Report by the Financial System Council's Study Group on the Internationalization of Japanese Financial and Capital Markets: Toward Stronger Corporate Governance of Publicly Listed Companies, 17 June 2009, available at *http://www.fsa.go.jp/en/news/2009/20090618-1/01.pdf.*

47 The requirement for each listed company to have at least one independent director or auditor was promulgated on 30 December 2009 as an amendment to the TSE's listing regulations. The Rule calls for each listed company to have one outside director or outside auditor (as defined in the Companies Act) "who is unlikely to have conflicts of interest with general investors." See TOKYO STOCK EXCHANGE, INC., SECURITIES LISTING REGULATIONS 436-2 (as of 10 March 2010), available in an English translation at *http://www.tse.or.jp/english/rules/regulations/securities.pdf.* The definition of independent director is contained in an accompanying enforcement rule, which enumerates five categories of individuals who would generally not be independent, such as business managers, individuals from major clients, outside professionals whose organizations are major clients, major shareholders, and close relatives. See TOKYO STOCK EXCHANGE, INC., ENFORCEMENT RULES FOR SECURITIES LISTING REGULATIONS, Rule 211-6-5 (as of 10 March 2010), available in an English translation at *http://www.tse.or.jp/english/rules/regulations/excerpts_from_listing_reg_enforcement_rules.pdf.*

48 The Rule takes effect for the first general shareholders meeting following a corporation's fiscal year which ends on or after 1 March 2010. For most corporations, which have a fiscal year ending March 31, that would mean the 2010 annual shareholders meetings (typically held at the end of June). Most listed corporations (89.8%) had already complied with the new requirement as of 31 March 2010. Compliance was mainly through selection of an independent corporate auditor (75.5%), while some corporations utilized an independent director (24.5%). Most of the independent directors and company auditors did not have a relationship with the corporation which would normally prevent them from being independent (93.7%), while a small number of listed companies disclosed such a relationship but nevertheless explained why these individuals were designated as being independent (6.3%). See TÔKYÔ SHÔKEN TORIHIKI-JÔ [TOKYO STOCK EXCHANGE, INC.] *Dokuritsu yaku'in todoke-sho no shukei kekka ni tsuite* [The Statistical Results of Notifications on Independent Directors], 20 May 2010, available at *http://www.tse.or.jp/news/201005/100520_a1.pdf.*

The Ministry of Justice subsequently formed a new Corporate Legislative Section within its Legislative Council to begin work aimed at revising laws related to corporate governance. This new Section has received a broad mandate to examine the form corporate governance ought to take and regulation of the parent-subsidiary relationship from the "viewpoint of securing greater trust from the wide range of interested parties surrounding corporations."[49] The key issue within the topic of the proper form of corporate governance remains the question of director independence.[50]

2. *Possible Impact of the Toyota Case*

The Toyota case is particularly interesting because Toyota has been held out in Japan as the prime example of the strength of the traditional system of Japanese corporate governance. Until recently Japanese often contrasted the success of Toyota, the champion of this tradition, with the poor performance of the reformer Sony, which was the first major Japanese corporation to introduce executive officers separate from directors in 1996, adopted the "American-style" board committee system following its introduction in 2003, and now has a foreigner as its CEO. In fact, some commentators have attributed the gradual and voluntary nature of Japanese corporate governance reform to this "Toyota effect" – the well-publicized success of Toyota under the traditional governance system acting as a disincentive for Japanese companies to increase the number of outside directors or adopt the new board committee structure.[51]

This popular comparison between the "traditional" and "Western" forms of corporate governance was always somewhat exaggerated. Toyota modified its governance system in 2003 through the introduction of "non-board managing officers," a reduction in the number of directors on its board (from over 40 to 29), and other reform measures. Sony and other companies that adopted the board committee system were partially motivated by a traditional desire for greater efficiency through quicker managerial decision-making.[52] In other words, Japanese corporations may have utilized different means to achieve broadly similar goals.

---

49 For information on the new Corporate Legislative Section and its first meeting (on 22 April 2010), see *http://www.moj.go.jp/shingi1/shingi04900013.html.*

50 *See Kigyô tôchi no arikata ni tsuite no saikin ni okeru omo na shiteki* [Main Recent Comments on the Form of Corporate Governance], available at *http://www.moj.go.jp/content/000046835.pdf.* This reference material #1 to the first meeting of the new Section lists three main issues to be covered: (1) monitoring function of outside directors, (2) monitoring function of outside company auditors, and (3) independence of outside directors and outside company auditors. *Id.*

51 MILHAUPT, *supra* note 38. See also YANAI, *supra* note 40.

52 See YANAI, *supra* note 40. Sony had been reforming its board and management structure since 1997 for the stated purpose of allowing management to exert strong leadership. In that year it reduced the number of directors on its board from 38 to 10. For a report on its early efforts, see S. SANO, Corporate Governance at Sony, 3rd OECD Asian Roundtable to Discuss Corporate Governance, 4 April 2001, available at *(cont.)*

In addition, The FSA study group report has stimulated discussion about the possibility of a "mixed model" of company auditors cooperating with a limited number of outside directors (e.g., 1 or 2) and the corporate department responsible for internal controls to form a corporate governance structure with greater appeal to foreign institutional investors than the traditional company auditor structure.[53] Indeed, there is the practical issue of whether some companies might alter their corporate governance structure primarily as a means of attracting greater investment from foreign institutional investors rather than as a means of improving corporate governance.[54]

Nevertheless, even today Toyota remains an insider-dominated system, as every area of the company is represented by a senior managing director on the board and there are no outside directors.[55] Sony remains a company with a majority of outside directors, and has voluntarily adopted New York Stock Exchange standards on director independence for its outside directors.

---

http://www.oecd.org/dataoecd/6/36/1873238.pdf. Tokyo Stock Exchange data also indicates that the stated reasons for switching to the board committee system by companies which did so related more to strengthening management functions (96.4%) and clear separation of supervision and management (94.3%) than to monitoring of management by outside directors (40%). See TOKYO STOCK EXCHANGE, *supra* note 39, 43.

53 See generally *Jôjô kaisha o meguru ruru kaisei to wagakuni no koporeto gabanansu* [Rule Amendments relating to Listed Companies and Japanese Corporate Governance], in: Shôji Hômu 1879 (2009) 16.

54 This is alleged by some to have occurred in China and Korea, which have both established a fixed minimum percentage of independent directors for listed companies. This does not appear to be a decisive consideration in Japan, despite the significant increase in foreign ownership of shares of Japanese companies over the past 15 years, which as of 2009 comprises 26% of the Japanese market. See TOKYO STOCK EXCHANGE, INC. 2009 Shareownership Survey 3, available at *http://www.tse.or.jp/english/market/data/shareownership/b7gje60000003t0u-att/English2009.pdf.* Tokyo Stock Exchange data indicate that Japanese companies that have adopted the committee board system do, in fact, have a higher percentage of foreign ownership than listed companies generally. For example, foreign shareholders owned 30% or more of 18 of the 55 listed companies that adopted the board committee system (32.7%), but owned a similarly high percentage of only 196 of the 2,323 companies that retained the traditional company auditor system (8.4%). See TOKYO STOCK EXCHANGE, *supra* note 39, 15. This also means, however, that a far greater number of Japanese companies with a high percentage of foreign ownership has chosen to retain the traditional system rather than to adopt the board committee system. The actual and potential influence of foreign investors on Japanese corporate governance is nevertheless noteworthy, even if it has not resulted in widespread changes in board structures to date. See generally C. AHMADJIAN, Foreign Investors and Corporate Governance in Japan, in: Aoki et al. (eds.) Corporate Governance in Japan: Institutional Change and Organizational Diversity (2007) 125.

55 Information on Toyota's governance can be obtained on its website: its annual report filed with the SEC in the US on Form 20-F (see *http://www.toyota.co.jp/en/ir/library/sec/index.html*) and an English translation of a corporate governance report which Toyota files with the Tokyo Stock Exchange (see *http://www.toyota.co.jp/en/ir/library/cg/index.html*).

Although a few Western publications have taken note of the corporate governance aspects of Toyota's crisis,[56] there has been virtually no discussion within Japan.[57] The popular perception in Japan is that Toyota had a failure of internal communications regarding safety and quality issues and responding to government inquiries. However, this is unrelated to board structure and director independence, as these latter concerns relate more to "external" matters such as monitoring of management and public disclosure rather than to internal communications. The debate within Japan over the role of outside/independent directors has been going on for years, and to date Toyota's troubles have not been linked to this ongoing discussion.

Nevertheless, we can anticipate that Toyota's crisis may have an impact on the arguments surrounding corporate governance reform in Japan in two areas: monitoring of management and internal controls. Much of the ongoing debate on the potential role of independent directors focuses on the effectiveness of measures to improve monitoring by company auditors under the traditional governance system by strengthening their role. Company auditors, unlike the board, cannot hire and fire managers, and in the past they were often criticized as being simply former company employees who were assigned to a new company position rather than functioning as independent monitors of management.[58] Toyota's case may be presented as evidence to support the view that the traditional system of inside directors and company auditors cannot be sufficiently reformed solely through the introduction of outside (and more recently, independent) company auditors; rather, it is necessary for companies with the traditional corporate structure to also have independent directors.

As for internal controls, the Companies Act requires internal control systems for all large corporations, and that naturally covers both companies with the traditional company auditor structure and companies with the board committee structure. It is striking that one important cause of Toyota's crisis was its four-month delay in reporting to US

---

56 See, e.g., Toyota: Accelerating into Trouble, in: The Economist, 13 February 2010, 10; M. STOCKER / Y. GOTO, A Recall for Toyota's Corporate Governance?, in: Pensions & Investments, 5 April 2010, 14; B. ARONSON, Learning from Toyota's Troubles – Where's the Board?, Jurist Legal News & Research, 23 February 2010, available at *http://jurist.org/forumy/ 2010/02/learning-from-toyotas-troubles-wheres.php*

57 This situation will hopefully be addressed partially by the recent publication of an abbreviated version of this article in Japanese. See B. ARONSON, *Toyota mondai no kyokun: Nihon ni okeru torishimari yakkai no kantoku, kaisha no kikan sekkei oyobi torishimari-yaku no dokuritsusei o meguru giron* [Learning from Toyota's Troubles: The Debate on Board Oversight, Board Structure, and Director Independence in Japan] (Shuichi Takahashi, translator), in: Shôji Hômu 1909 (2010) 4.

58 This criticism is not limited to Japan. German corporate law scholars have also been critical of the limitations and functioning of the *kansa-yaku* system, which was inspired by the two-tier German board system. For example, Prof. Harald Baum has labeled the Japanese corporate auditor system as a "1 ½ tier board." Private e-mail from Prof. Harald Baum to the author, 12 July 2010. See also H. BAUM / E. TAKAHASHI, Commercial Law and Corporate Law in Japan: Legal and Economic Developments After 1868, in: W. Röhl (ed.), A History of Law in Japan Since 1868 (Brill, Leiden 2005) 330, 396.

authorities on accelerator and other problems experienced in Europe in the fall of 2009. This represents a breakdown in internal communications – an area that is generally regarded as a strength of insider-dominated boards (see *Table 1*).[59] We can anticipate a renewed argument that boards with independent directors are generally better at overseeing internal controls and compliance, since independent directors may perceive a greater need to develop effective information and reporting systems in order to obtain the necessary information to exercise their oversight function.

Table 1

Comparison of Strength of Corporate Auditor System
and Board Committee System

Issue	*Corporate Auditor System*	*Board Committee System*
1. Board and management functions	Combination of board and management functions	Separation of management and oversight functions
2. Management decisions	Overlap with board allows incorporation of strategic corporate goals in decisions	Use of executive officers allows quicker decisions
3. Board decisions	Board has familiarity with business, experience, expertise, and information	Board exercises greater oversight over management
4. Confidentiality vs. transparency	Maintains corporate secrecy	Use of board committees and outside directors increases transparency
5. Inside appeal	Preservation of corporate culture – motivates employees and managers	Promotion and compensation may be more merit-based
6. Outside appeal	Widely accepted by Japanese strategic business partners	Widely accepted governance structure familiar to foreign institutional investors

59 On the other hand, the traditional Japanese corporate governance system is relatively weak on formal information and reporting systems and supervision of management action on matters such as vehicle recalls. As illustrated in the Daiwa Bank case, directors are likely to defer to the "director-in-charge" of any area of a company, despite the fiduciary duties owed by each individual director. In addition, this reliance may well be recognized by Japanese courts, which must apply the law on fiduciary duties to the existing board structure and processes.

On the other hand, defenders of the traditional governance system may point to continuing corporate scandals in the United States during the 2008 financial crisis despite an ever-increasing emphasis on director independence.[60] In addition, they may call Toyota a special case, as long-standing internal management struggles between the founding family and professional managers may have been a significant factor in restricting information flow and in Toyota's slow response to its recall problems.

IV. CONCLUSION

Toyota's problems will likely have a significant impact both on its own operations, including the board and its duty of oversight, and on the broader ongoing debate in Japan on corporate governance and the potential role of independent directors. It is still too early to predict the extent to which there may be legal issues regarding the responsibility of Toyota's board and any potential liability for its directors and auditors. At present there are no shareholder suits alleging director's breach of fiduciary duty under Japanese law.[61] However, ongoing government investigations and discovery in numerous private lawsuits in the United States have the potential of revealing facts that could cause Toyota's board to be a greater focus of attention, as well as possibly providing the necessary factual framework to support such a legal claim.

The potential impact of Toyota's case on corporate law reform is also speculative. We are no longer in the late 1990s when America's technology boom prompted popular books in Japan on the necessity of Japanese businessmen giving up their traditions and

60 The apparent downfall of Toyota does not condemn the entire system of Japanese corporate governance. Every system has its corporate scandals. The result of scandals, such as Enron, in the United States has been an even greater emphasis on independent directors in the Sarbanes-Oxley Act and elsewhere. Such measures were not effective in preventing new scandals, such as those accompanying the financial crisis of 2008. For example, one oft-cited weakness at Citigroup was the board's lack of industry expertise and experience, and its resulting inability to monitor traders' risk management practices concerning complex financial products.

61 Among the more than 300 suits filed in the United States, however, there is one lawsuit which alleges breach of directors' fiduciary duties under U.S. law. See *The Miller Family Trust, Derivatively on behalf of Toyota Motor Corporation and Toyota Motor Sales, U.S.A., Inc*. v. *Fujio Cho et al.*, No. BC438095 (Superior Court of California, Los Angeles County, filed May 21, 2010), available at 2010 Westlaw 2155547 (Cal. Superior). The allegation of the applicability of U.S. law comes from the governing law provision of the Deposit Agreement under which American Depositary Shares of Toyota Motor Corporation were issued in the United States. Id. at para. 11. However, prior case law has held that American purchasers of depositary receipts do not have standing to bring a shareholder derivative suit against a Japanese corporation and its wholly owned U.S. subsidiary. See *Batchelder* v. *Kawamoto*, 147 F3d 915 (9th Cir. 1998), cert. denied, 525 US 982 (suit against Honda Motor Company, Ltd. And its wholly owned U.S. subsidiary). This result seems logical, at least to the extent that fiduciary duties of directors of Japanese corporations should be governed by Japanese law.

acting like "Anglo-Saxons." Japan has largely resisted calls for more outside/independent directors to date. However, concerns about the competitiveness of Japanese companies and pressure from international institutional investors will continue, and Toyota's crisis might make Japan more receptive to calls to reconsider its traditional system of corporate governance and increase board independence.

However, the biggest issue is the complete lack of discussion in Japan to date concerning the significant corporate governance aspects of Toyota's problems, particularly the following: (1) how should inside directors exercise independent judgment to fulfill their duty of oversight under the traditional Japanese board structure, and (2) whether adding even a small number of outside directors is likely to result in the development of more robust and effective internal control systems and, more generally, in more objective and understandable business information being provided to the board. The crisis therefore also presents an opportunity for Toyota, Japan's most widely respected corporation, to contribute to the reform and continuing evolution of Japanese corporate governance practices.

SUMMARY

Toyota's response to its current troubles is striking because it has continued a rather narrow emphasis on manufacturing quality and production issues in the face of a full-fledged crisis. Conspicuously absent in the discussion of Toyota's problems to date is the role of governance institutions, particularly the role of Toyota's board of directors. The structure and functions of a typical Japanese corporate board may serve to reinforce the penchant for corporate secrecy in Japan and other factors which are often cited as a cause of Toyota's problems.

This Article considers the potential significance of Toyota's troubles for Japanese corporate governance by examining two issues. First, it looks at the relevant fiduciary duty of Toyota's directors, i.e., the general duty of oversight set forth in case law in the Daiwa Bank shareholder derivative litigation (2000) and the related subsequent statutory duty to establish a system of internal controls provided in the Companies Act (2005). Potential director liability would depend on the filing of a shareholders derivative suit and the discovery of facts which show director's negligence in devising, implementing, and monitoring specific measures to carry out the board's existing overall policy on internal controls.

Second, it considers the Toyota case in light of the ongoing debate in Japan during the last decade between competing board structures: the traditional company auditor (kansa-yaku) structure with no required outside directors and the newer alternative board committee structure with a required majority of outside directors. The potential role of independent directors remains controversial and is currently the hottest topic

in Japanese corporate governance. The recent failures of Toyota, a highly successful champion of the traditional Japanese governance system, might help make Japan more receptive to calls by international and domestic institutional investors to take measures to increase board independence.

ZUSAMMENFASSUNG

Toyotas Reaktion auf die jüngsten Schwierigkeiten hat viele überrascht: ungeachtet seiner ernsthaften Krise befasste sich das Unternehmen weiterhin nur mit Fragen der Qualitätssicherung und produktionsspezifischer Abläufe. Auffällig war insbesondere, dass die Rolle der Überwachungsgremien, namentlich des Verwaltungsrates, in der Diskussion um die Probleme bei Toyota überhaupt keine Rolle gespielt hat. Struktur und Funktion eines typischen japanischen Verwaltungsrates dürften vordringlich dazu dienen, die in Japan verbreitete Vorliebe für die Geheimhaltung von unternehmensbezogenen Informationen und andere Faktoren zu verstärken, die gemeinhin als Ursache für die Schwierigkeiten von Toyota angesehen werden.

Der Beitrag setzt sich anhand von zwei Beispielen mit der möglichen Bedeutung auseinander, welche die Probleme von Toyota für die künftige Corporate Governance in Japan haben könnten. Zunächst wird die Rolle der Treuepflichten beleuchtet, die einem Verwaltungsratsmitglied obliegen, wozu zum einen die allgemeine Überwachungspflicht zählt, wie sie von den japanischen Gerichten seit den Aktionärsklagen gegen die Daiwa Bank (2000) entwickelt wurde, und zum anderen die damit zusammenhängende sekundäre gesetzliche Pflicht nach dem Gesellschaftsgesetz von 2005, ein funktionsfähiges unternehmensinternes Kontrollsystem einzurichten. Eine mögliche Haftung auf Schadensersatz der Verwaltungsratsmitglieder hängt von der Erhebung einer Aktionärsklage ab sowie von der Aufdeckung von Fakten, die Pflichtverstöße bei der Gestaltung, Implementierung und Überwachung solcher Kontrollmechanismen belegen würden.

Zum Zweiten setzt der Beitrag den Toyota-Fall in Bezug zu der nach wie vor andauernden japanischen Diskussion über Vor- und Nachteile unterschiedlicher Organisationsmodelle der Aktiengesellschaft: der traditionellen Form mit internen Prüfern (kansa-yaku)*, aber keinem Erfordernis unabhängiger Verwaltungsratsmitglieder, und der neueren Struktur mit Ausschüssen, die mehrheitlich mit unabhängigen Mitgliedern zu besetzen sind. Die Vorteile unabhängiger (externer) Verwaltungsratsmitglieder sind nach wie vor umstritten; hierbei handelt es sich um den derzeit in Japan am hitzigsten diskutierten Aspekt der Corporate Governance. Das Versagen Toyotas, eines höchst erfolgreichen Champions der tradierten japanischen Governance-Struktur, könnte dazu beitragen, dass der Ruf ausländischer wie auch nationaler institutioneller Investoren nach einer verstärkten Unabhängigkeit der Verwaltungsratsmitglieder japanischer Unternehmen im Lande mehr Gehör als in der Vergangenheit finden.*

(Übers. durch die Red.)