RECHTSPRECHUNG / CASE LAW

Japanese Corporate Law: Important Cases in 2007/2008

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I. INTRODUCTION

The condition of the Japanese economy was good until spring 2008, but the latest economic indicators have been negative.[1] After the collapse of the bubble on 28 December 1990, the Resolution and Collection Corporation sought liability for managers of failed financial institutions, but issues regarding management liability arising from the aftermath of the bubble's collapse are still unresolved. One example of this is a recent case involving the application of a statute of limitations concerning claims for damages from former managers of a bank. Furthermore, Japan also has a serious problem with the issue of *karôshi*, or 'death by overwork'.

This paper comments on four cases: first, a case regarding a shareholder's right to apply for an inspector to investigate a corporation, in a situation where the shareholder's ability to satisfy the conditions necessary for such a right is affected by the corporation issuing new shares (II). Second, a case concerning the reasons a corporation is able to give for refusing demands by shareholders to show its accounts (III). Third, a claim seeking damages from past managers of a failed bank, and the application of statutes of limitations to that claim (IV). Fourth, a case involving the duty owed by a small family corporation to adequately attempt to ensure the safety of a nominal executive director,

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1 Nihon Keizai Shimbun, 28 June 2008, 5; Nihon Keizai Shimbun, Evening Issue, 23 June 2008, 1.

and the duty of care owed by a representative director to execute such a duty on behalf of his corporation (V).

II. The Decline of Shareholding Rate Caused by the Issuance of New Shares and the Standing of Shareholders Concerning the Appointing Inspectors [2]

1. Facts

X1 and X2 (hereinafter, cited collectively as "X") were shareholders in corporation Y. X began procedures to apply to the Court to appoint an inspector for Y, as specified in Article 294 Paragraph 1 of the Commercial Code before the 2005 Amendment [3] (hereinafter, cited as "Commercial Code before the Amendment", or "CCBA"). The application was on the grounds that there was reason to suspect misconduct or the existence of material facts in violation of a law, regulation or the company's articles of incorporation. At the time of the application, X possessed approximately 3.2% of the voting rights in Y. However, a shareholder whom Y had issued debentures with subscription warrants exercised the debentures, resulting in Y issuing a number of new shares. After the new shares had been issued, X now possessed only 2.97% of Y's voting rights.

Y argued that X was now unable to meet the condition of holding 3% of the total voting rights, as per Article 294 Paragraph 1 CCBA, and hence sought dismissal of X's application for the appointment of an inspector.

In the first instance the Court held that, excepting special circumstances, shareholders lose the right to apply for inspectors where they fail to meet voting rights conditions due to a corporation issuing new shares. The fact that a shareholder met the conditions at the time of application was inadequate. The Court dismissed X's application.

X appealed, and in the second instance the Court held that X had met the voting conditions at the time of application, as per Article 294 Paragraph 1 CCBA. Further, it found that X's right was not extinguished even where new shares were issued, which had resulted in X's percentage of voting rights falling below the specified criterion of 3%. The Court reversed the original Court's ruling and remanded the case to the Tokyo District Court.

Y applied for permission to appeal. Permission was granted and the Supreme Court upheld Y's appeal, reversing the second Court's decision and remanding the case to the Tokyo High Court.

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2 Supreme Court, 28 September 2006, in: 1950 Hanrei Jihô (2007) 163.

3 *Shôhô,* Law No. 48/1899.

The Supreme Court decision is as follows.

2. *Held*

Certain shareholders of a corporation had 3% or more of total voting rights at the time when those shareholders, under Article 294 Paragraph 1 CCBA, applied to the Court to appoint an inspector for the corporation. Subsequently, the corporation issued new shares with the result that the aforementioned shareholders now had less than the 3% of voting rights necessary for the application. In this kind of case, excepting special circumstances such as where a corporation issues new shares specifically for the purpose of obstructing an application to appoint an inspector, the application will be deemed unlawful and dismissed on the grounds that the shareholders do not have sufficient standing under Article 294 Paragraph CCBA.

3. *Comment*

The Commercial Code before the Amendment had a system whereby shareholders could apply to the Court to have inspectors appointed (Article 294 CCBA) in order to protect the interests of shareholders. Currently, similar provisions can be found in the Company Code[4] (Article 358 Company Code) (hereinafter, cited as "CC"). According to Article 294 Paragraph 1 of the Commercial Code before the Amendment, an application to appoint an inspector can be made where there is reason to suspect misconduct, or material facts, in contravention of any laws, regulations or the corporation in question's articles of incorporation. Only shareholders with 3% or more of total shareholder voting rights have a right to apply for an inspection of the company's affairs and assets (for CC, see Article 358 Paragraph 1).

At the time of its application, X held about 3.2% of voting rights as a shareholder of Y, meeting the relevant condition under Article 294 CCBA. However, another shareholder exercised debentures with share subscription warrants, resulting in the issuance of new shares and X's share of voting rights decreasing to 2.97%. Thus the main issue the courts were faced with was whether it is sufficient for the 3% of voting rights condition to be satisfied at the time of application alone, or whether it must continue to be fulfilled until the moment the Court appoints an inspector. The Supreme Court held that in a situation such as the one before it, where a shareholder who holds 3% or more of the voting rights suffers a decrease in the percentage of rights to below 3% due to the issuance of new shares, the shareholder loses the right to apply for an inspector and their application should be dismissed. However, it left open the possibility of the right surviving where special circumstances, such as where the corporation issues new shares specifically for the purpose of obstructing the application, are found.

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4 *Kaisha-hô*, Law No. 86/2005.

There are few cases similar to the present one, where shareholding rates decline to below the necessary threshold in the period of time between applying for an inspector and the Court appointing an inspector, with the issue of survival or extinguishment of the right to apply brought into question.[5] The few cases that do exist were decided before an amendment in 1938.[6] In these cases too, the shareholders' right to apply was deemed to have been extinguished. However, in each of the cases the shareholders were themselves the cause of the decline in shareholdings: applicants had either transferred their shares, or did not pay for a part of their shares[7]. However, in the present case the applicant's decline in relative voting rights was due to the corporation issuing new shares to shareholders other than the applicant. This occurred regardless of the applicant's will. Thus in this case the Supreme Court was asked to determine the standing of an applicant no longer able to meet the necessary conditions due to actions other than their own. The Supreme Court held that the applicant would lose the right to apply even in that case.

Many scholars consider that these cases should be divided into two types.[8] The first is where the voting rights condition is not satisfied due to the applicant transferring shares. The second is where the applicant is unable to meet the condition due to actions taken solely by the corporation. In the former cases, the application for an inspector should be dismissed, but in the latter the application should be allowed.[9] Some scholars argue that on principle the application should be dismissed even where the loss of voting rights is due to the corporation issuing shares. According to these scholars, only in exceptional circumstances where the corporation is found to have abused its rights or breached the principle of good faith should the applicant's right not be extinguished.[10] This would occur primarily when a corporation issues shares for the purpose of obstructing applications.

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5 A. KOIDE, *Kabushiki kaisha no kabunushi ga Shôhô (Heisei 17 nen hôritsu dai 87 gô ni yoru kaisei mae no mono) 294 jô 1kô ni motoduki kensa-yaku sennin no shinsei wo shita jiten de sô-kabunushi no giketsu-ken no 100 bun no 3 ijô wo yû shite ita ga shinkabu hakkô ni yori sô-kabunushi no giketsu-ken no 100 bun no 3 miman shika yûshinai mono to natta bawai ni okeru jôki shinsei no tekihi* [An Application in a Case where a Shareholder of a Stock Corporation, under Article 294 Paragraph 1 of the Commercial Code (the Code before an Amendment by the 2005 87th Law), Applied to Appoint an Inspector and had more than 3% of Total Voting Rights, but the Shareholder had less than 3% of Total Voting Rights because of the Issuance of New Shares], in: 1974 Hanrei Jihô (2007) 211. For this case, see E. KURONUMA, *Shinkabu hakkô ni yoru mochikabu hiritsu no teika to kensa-yaku sennin no shinsei tekikaku* [Decline of Shareholding Rate by New Share Issue and Legal Standing for Appointing an Inspector], in: 1268 Kinyû Shôji Hanrei (2007) 14.

6 KOIDE, *supra* note 5, 211.

7 KOIDE, *supra* note 5, 209.

8 KOIDE, *supra* note 5, 209.

9 KOIDE, *supra* note 5, 209.

10 KOIDE, *supra* note 5, 209.

The court in the present case is thought to have taken the latter view; even if the percentage of voting rights declines solely due to actions taken by the corporation, the applicant will lose the right to apply for an inspector.[11] Further, in order to defeat the dismissal of the application, the onus will be on the applicant to prove such special circumstances as are accepted by the Supreme Court. For an applicant who holds less than 3% of voting rights such a task would pose difficulties.[12]

The Supreme Court in this case could be said to have taken the same position as the lower Courts where shareholders lost the right to apply for an inspector due to share transfers and exchanges by the corporation, generally enacted after the shareholders filed derivative actions.[13] In these cases scholars criticized the position of the Courts,[14] and legislation was drafted to resolve the controversy (Article 851 Paragraph 1 CC).[15] In terms of the applicant's ability to apply for the appointment of inspectors, the options are either that the Court will take a different position or a legislative approach may be necessary.

German law also has a system of inspectors called *Sonderpüfer*. Shareholders and others who contribute at least 1% of a corporation's capital can file an application to the Court to appoint a *Sonderpüfer* to inspect the process of incorporation or executive affairs (§ 142 sec. 2, para. 1 AktG).[16] It is understood that the 1% condition must continue to be met until the Court gives a decision regarding the application.[17] In German law, there has not yet been a case such as the present one in which the necessary conditions were met at the time of application, but lost, due to actions by the corporation, before a decision was handed down. Thus the position taken by the Japanese Court in this case may prove a useful reference for interpretation of legislation in Germany.

11 KOIDE, *supra* note 5, 209.

12 KOIDE, *supra* note 5, at 211.

13 Tokyo High Court, 24 July 2003, in: 1858 Hanrei Jihô 154 (2004); E. TAKAHASHI / T. SAKAMOTO, Japanese Corporate Law: Important Cases in 2003 and 2004, in: ZJapanR / J.Japan.L. 20 (2005) 248.

14 A. KOIDE, *Shinkabu hakkô ni yoru mochikabu hiritsu no teika to kensa-yaku sennin seikyû* [Decline of Shareholding Rates by New Share Issuance and the Application to Appoint an Inspector], in: Heisei 19 nendo jûyô hanrei kaisetsu, 1354 Jurisuto (2008) 112; KOIDE, *supra* note 5, 212.

15 KOIDE, *supra* note 5, 212; KOIDE, *supra* note 14, 112.

16 For an English translation of the German *Aktiengesetz*, see, H. SCHNEIDER / M. HEIDENHAIN, The German Stock Corporation Act, München (1996) 21.

17 U. HÜFFER, Aktiengesetz, 7th ed., Munich 2006, § 142 Rdnr. 24; G. SPINDLER, in: K. Schmidt / M. Lutter (eds.), Aktiengesetz Kommentar, 1. Band, Cologne 2008, § 142 Rdnr. 42.

III. A SHAREHOLDER'S APPLICATION TO INSPECT BOOKS AND THE RELEVANCE OF THE PARENT CORPORATION'S BUSINESS [18]

1. *Facts*

Corporation Y was engaged primarily in the broadcasting industry. Its capital was 54,874,768,896 yen, and it could issue 400,000,000 shares. At the time of this case the number of outstanding shares was 190,323,968. Y was listed in the First Section of the Tokyo Stock Exchange.

Corporation X was engaged mainly in holding and employing securities. All of its outstanding shares were held by R, also a stock corporation. As at 31 March 2007, X held 299,012 voting rights in Y, amounting to more than 3% of Y's voting rights. Y's annual shareholders' meeting was held on 28 June 2007 (hereinafter, cited as "Shareholders' Meeting").

R began to acquire Y's shares through R's subsidiaries in August 2005. On 13 October 2005 R presented an offer of a business alliance to Y, but this proposal did not develop. Each of Y's securities statements concerning the March terms of 2006 and 2007 show that Y expended a total of 92,586,000,000 yen over the two years in order to acquire securities for investment. In contrast, total expenditure for acquiring securities for investment from the March term of 2003 to the March term of 2005 was 17,965,000,000 yen.

X claimed that it was necessary to inspect, transcribe or otherwise obtain security ledgers, security books or their equivalent pertaining to the five years from the March term of 2003 to the March term of 2007 in order to be able to exercise its voting rights at the upcoming Shareholders' Meeting (hereinafter, these documents are cited as "Claimed Documents"). On the basis of this necessity, on 22 May 2007, X notified Y of its claim to inspect the Claimed Documents.

Y responded on 28 May 2007 in a document entitled "Regarding the Claim of Inspection, Transcription or Others of Legal Documents". It rejected X's claim for the Claimed Documents on the following grounds: (1) as it was already clear that X would oppose proposals and bills presented by Y, there was no need of inspection or obtainment of the Claimed Documents; (2) X already had access to sufficient information, in the form of Y's securities statements and other disclosed information, to exercise its voting rights; (3) X's parent company R had a competitive relationship with businesses which Y jointly developed with other corporations; usually a business partner with whom Y had a cross-shareholding relationship. X again claimed inspection of the

18 Tokyo District Court, 20 September 2007, in: 1985 Hanrei Jihô (2008) 140. For decisions relating to provisional disposition, see, Tokyo District Court, 15 June 2007, in: 1270 Kinyû Shôji Hanrei (2007) 40; Tokyo High Court, 27 June 2007, in: 1270 Kinyû Shôji Hanrei (2007) 52.

Claimed Documents via a letter dated 30 May, but Y again refused the claim in a letter dated 4 June.

On 6 June 2007, X filed an action for provisional disposition of the Claimed Documents for the purposes of inspection or transcribing. On 15 June, the Court held that of the Claimed Documents, those concerning the two years of March term 2006 and 2007 (hereinafter, cited as "Necessary Documents") should be available for inspection. Reasons for refusing the inspection could not be found in Y's reasons, and therefore a claim for inspection of the Necessary Documents would generally be allowed. However, there was no prima facie evidence showing the necessity of the protection provided by provisional disposition in relation to the Necessary Documents. The Court thus dismissed the action for provisional disposition.

X immediately appealed to the Tokyo High Court on 18 June 2007. On 27 June, the High Court held that (1) inspection of the Necessary Documents would be necessary, but that (2) X, or businesses run by X which had a substantially competitive relationship with businesses run by Y, had a high probability of having such a relationship with Y himself. Furthermore, the Court restated that there was no prima facie evidence showing the necessity of provisional disposition. The Court dismissed the provisional disposition arguments.

An action for merits was brought before the Tokyo District Court, but the Court dismissed the action.

2. *Held*

Article 433 Paragraph 2 of the Company Code lists circumstances where corporations can refuse claims for inspection or handing over of account books to shareholders. Paragraph 2 Number 3 allows for refusing claims "where a claimant is a person who runs or is engaged in a business having a substantially competitive relationship with the corporation". Business competitors or others could otherwise search for trade secrets of the corporation under the guise of an inspection of accounting documents, and use the trade secrets to gain advantage in their own business or give secrets to other competitors. If business competitors were allowed to do this, the possibility of serious damage being done to the corporation arises. The aim of Paragraph 2 Number 3 is understood as an attempt to prevent such a danger. However, the possibility of serious damage arises not only where the claimant and corporation are competitors, but also where the business of the claimant's parent company is substantially in competition with the corporation.

Under the former Commercial Code, the above possibility was taken into consideration, and the circumstances where the refusal of inspection of documents was allowable were taken to incorporate not only whether the claimant's business was essentially competing, but also whether the claimant held the corporation's shares "for a person competing with the corporation". The present Company Code kept most of the substance of the former Commercial Code regarding circumstances where refusing inspections is allowable, and relisted all the circumstances where such refusal is acceptable. As such, in cases where the claimant is a wholly-owned subsidiary of a company who is in a substantially competitive relationship with the corporation, it will not be consistent with the Company Code if the situation is not deemed to be encompassed within Article 433 Paragraph 2 Number 3 CC, on the grounds that the claimant itself does not compete with the corporation.

Therefore, cases where "the claimant runs a business that has a substantially competitive relationship with the business of the corporation" under Article 433 Paragraph 2 Number 3 of the Company Code includes not only the claimant's business, but also where the claimant (a wholly-owned subsidiary) executes business in cooperation with its parent corporation.

Moreover, considering that the purpose of Article 433 Paragraph 2 Number 3 CC is to prevent serious damage to the corporation, the claim of a person with a high probability of competing with the corporation in the near future would not be substantially different from the claim of a person who is in actual competition with the corporation. If that is the case, the "competitive relationship" under Article 433 Paragraph 2 Number 3 CC includes both actual competition and a high probability of competition in the near future.

3. Comment

Article 433 of the Company Code regulates claims for the inspection of accounting books and documents. According to the Article, a shareholder in possession of 3% or more of shareholders' voting rights has a right to make a claim (Paragraph 1). The Corporation can refuse the claim if the claimant runs or is engaged in a business that is in a substantially competitive relationship with the business of the corporation (Article 433 Paragraph 2 Number 3 CC). In the present case the claimant was X, a shareholder of Y, and a wholly-owned subsidiary of R. The main business of X was holding or employing shares, which did not compete with Y's primary business of television broadcasting. However R ran a business supplying services on the internet. These services included: mail-order sales, supplying various information, information collection and processing, communications, and also "broadcasting as under the Broadcasting Law, and developing, producing, guiding and selling broadcast related technology". R owned and broadcast on two satellite channels, and also ran a channel distributing animation on the internet.

As noted above, refusing claims for inspection of documents under Article 433 Paragraph 2 Number 3 CC includes situations where the claimant and the corporation have a substantially competitive relationship, and also situations where the parent corporation of a wholly-owned subsidiary claimant had a competitive relationship with the corporation. In the present case the businesses of Y and R were found to have such a relationship. As a result, Y was allowed to refuse the X's claim.

Shareholders also had a right to claim documents for inspection under the Commercial Code before the Amendment (Article 293-6). But the claim could be rejected where the claimant was a person in competition with the corporation (Article 293-7 Number 2 CCBA). This right to reject claims was understood to include where a parent company was a competitor of the corporation and totally controlled its subsidiary, which then became a shareholder in the corporation and claimed accounting documents for inspection.[19] In the present case, as noted above, the Court held that the Company Code had effectively adopted the definition of situations where rejection of claims was allowable from the Commercial Code before the Amendment, and that Article 433 Paragraph 2 Number 3 of the Company Code would cover events where a wholly-owned subsidiary conducted business together with its parent company, and such business was in competition with the corporation. Thus, the view accepted under the Commercial Code before the Amendment could be said to have been accepted by the Court in the present case.

According to the court the "competitive relationship" of Article 433 Paragraph 2 Number 3 CC includes both actual competition and cases where there is a high probability of competition in the near future. The reason for the Court holding this position may be that there is no difference in the possibility of serious damage being done between a person actually competing with the corporation and a person highly likely to compete in the near future.[20] Specifically, information acquired through inspection and transcription could be employed to gain advantage in competing businesses in the future.[21] In this case the damage caused would not differ from that in a case in which a person in actual competition abused information acquired through inspection.[22]

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19 K. ÔSUMI / H. IMAI, *Kaisha-hô ron (chû) [dai 3 han]* [Corporate Law (2) [3rd Edition]] (1992) 510; K. UEYANAGI ET AL, *Shinban chûshaku Kaisha-hô (9)* [New Commentary on Corporate Law (9)] (1988) 222.

20 M. YANAGA, *Kaikei chôbo shiryô etsuran no kyozetsu jiyu – kaisha to kabunushi oyobi sono kanzen oya-gaisha ga 'jisshitsuteki no kyôsô kankei ni aru' no igi'* [Grounds for Refusing the Inspection of Accounting Books and Documents – Meaning that Corporations and Shareholders and the Shareholders' Parent Company Have a Substantially Competitive Relationship], in: 1996 Hanrei Jihô (2008) 208; H. KANSAKU, *Kyôgyô wo riyû to suru kaikei chôbô Eesuran seikyû no kyohi* [Refusal of Application for Inspecting Accounting Books on the Grounds of Competing Business], in: Heisei 6 nenndo jûyô hanrei kaisetsu, 1068 Jurisuto (1995) 105. See also, Tokyo District Court, 4 March 1994, in: 1495 Hanrei Jihô, (1994) 139.

21 KANSAKU, *supra* note 20,105.

22 M. KONDÔ, *Kaikei chôbo etsuran, tôsha seikyû to kyôgyô kaisha* [Application for Inspection and Transcription of Accounting Books, and Corporations in Business Competition], in: 1356 Shôji Hômu (1994) 7; H. KATAGI, *Shôhô 293 jô no 7 dai 2 gô no 'kaisha to kyôgyô wo nasu kaisha niwa chikai shôrai kaisha to kyôgyô wo okonau gaizen-sei ga takai kaisha mo fukumareru toshite kabunushi ga chôbo etsuran nado wo motometa kari-shobun meirei*

Regarding the phrase "a corporation running a competing business" in Article 293-7 Paragraph 2 CCBA, one case exists in which the Court held that the words were applicable to corporations actually running competing businesses and to corporations that are highly likely to run such businesses in the near future.[23] In addition, in the provisional disposition hearings of the present case, the Court held that a "competitive relationship" as per Article 433 Paragraph 2 Number 3 of the Company Code was applicable not only to actual competitive relationships, but also where there is a high probability of entering into a competitive relationship in the near future.[24] The Court in the present case followed the precedents and the opinion of the provisional disposition hearings.[25] Regardless, R and Y were found to be in an actual competitive relationship. Therefore the Court reasonably ascertained that Y had appropriate grounds for refusing the claimant.[26] According to the present case, the competitive relationship under Article 433 Paragraph 2 Number 3 CC would cover a case with high probability of a competitive relationship developing in the near future. The question of what particular cases could be deemed to fall under "high probability" could be posed.[27] At this point, a corporation preparing to engage in competing business activities is considered to be within the scope of "high probability".[28]

IV. STATUTES OF LIMITATIONS APPLYING TO CLAIMS FOR DAMAGES AGAINST DIRECTORS [29]

1. *Facts*

T, a bank (*Hokkaidô Takushoku Bank*) was incorporated in 1900 and became a city bank in 1955. Between 1975 and 1984, its network had footholds not just in Hokkaidô, but also in 200 areas throughout Japan and overseas. As one of the "city bank members", it occupied an important position in the Japanese financial system. However, on 17 November 1997 T ceased to operate.

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wo kyakka shita jirei [A Case regarding a Dispositional Order in which a Shareholder Sought Inspection etc., of Accounting Books was Dismissed on the Grounds that the Phrase 'a Corporation Competing with the Corporation' Stipulated in Article 293-7 Number 2 of the Commercial Code would Include a Corporation with a High Probability of Competing with the Corporation in the Near Future], in: 1515 Hanrei Jihô (1994) 246; S. MORIMOTO, *Kaisha-hô [dai 2 han]* [Corporate Law [2nd Edition]] (1995) 308.

23 Tokyo District Court, 4 March 1994, in: 1495 Hanrei Jihô (1994) 139.

24 Tokyo High Court, 27 June 2007, in: 1270 Kinyû Shôji Hanrei, (2007) 52.

25 YANAGA, *supra* note 20, 208.

26 YANAGA, *supra* note 20, 208.

27 YANAGA, *supra* note 20, 208.

28 YANAGA, *supra* note 20, 208. See also, Tokyo District Court, 4 March 1994, in: 1495 Hanrei Jihô, (1994) 139.

29 Supreme Court, 28 January 2008, in: 1995 Hanrei Jihô (2008) 151.

M, a stock corporation, was incorporated in 1971. Its primary business was interior finishing work and signboards. M requested financing from T from January to February 1989 in order to accelerate *azuki* bean market deals, which were carried out by M's subsidiary, limited liability corporation K. T granted M a total of 2,750,000,000 yen in financing (hereinafter, referring to as "*Azuki* Financing"). M had finalized accounts for the *azuki* deals by March 1990 and had calculated a net loss of 1,650,000,000 yen. In October 1990, M planned trading in dried silk cocoons in an attempt to recover the losses from the *azuki* deals, and again approached T for financing. T decided that direct financing was impossible, and instead offered the proposal to corporation TF. In October, T's efforts resulted in TF supplying financing of 1,500,000,000 yen. By February 1991, financing from TF to M had reached 3,400,000,000 yen. On 17 June 1991, T, based on a promise previously made to TF at the time TF began financing, assumed 2,415,000,000 yen of the debt, the remainder of the financing from TF to M yet to be repaid. M continued to ask T for financing related to dried silk cocoon trading. From February to March 1992, T supplied 600,000,000 yen (hereinafter, these financings are cited as "Dried Silk Cocoon Financing").

On 17 April 1992, M was unable to pay either interest or principal to T; delayed performance; essentially collapsed most of its operations and became insolvent. As a result, it became impossible or substantially difficult for T to collect the remainder of the debt.

A representative director of T reached an agreement with X, a plaintiff in the present case, to sell and purchase various assets of T on 11 November 1998. On 16 November, T transferred to X assets including the right to claim damages that T possessed on M's default of its obligations (hereinafter, cited as "Transfer"). On 3 December the representative director gave a notice concerning the transfer to Y1-Y7 (directors of T) (hereinafter, cited collectively as "Y").

Plaintiff X, the Resolution and Collection Corporation, received the Transfer from T bank. Subsequently, in order to retrieve debts owed, X filed the current action claiming damages from Y under Article 266 Paragraph 1 of the Commercial Code before the Amendment, by arguing that T suffered substantial damage as a result of Y's breach of its duty of care, and duty of loyalty, in several financings that Y authorized.

In the first and second instances, the main issues were first, whether Y breached a duty of care in relation to the *Azuki* Financing and the Dried Silk Cocoon Financing, and second, whether statutes of limitations affected X's right to claim damages from Y under Article 266 Paragraph 1 Number 5 of the Commercial Code before the Amendment. Regarding the first point, both Courts found that Y breached their duty of care. On the second point the original Court held that the damages that Y owed, prescribed in Article 266 Paragraph 1 CCBA, were statutory damages specially provided by the Commercial Code, and as such would be extinct after 10 years due to the limitation on general credits. The second Court found that, even if Y owed liability due to commercial mandate contracts between themselves and the corporation, liabilities owed to corporations by directors through damages under Paragraph 1 Number 5 did not arise from commercial acts of the mandate contracts. As such Article 522 CCBA, which provides for the limitation of commercial credits to five years, would not apply to the abovementioned credits. Thus the second Court did not accept Y's arguments that the debts for damages owed to T by Y had became extinct due to Article 522 CCBA's limitation provisions. Therefore, the first and second Courts ultimately reached the same conclusion in terms of limitations: namely that it was not extinct due to a limitations period specified under Article 522 CCBA. Y appealed to the Supreme Court.

The issue of breach of duty of care had already been settled, so the Supreme Court addressed only the issue of limitations.

2. Held

The purpose of Article 266 CCBA is to clearly and strictly outline the liabilities that directors owe to corporations. This is also the case where the directors' liabilities as per Article 266 Paragraph 1 Number 5 CCBA are joint and several liabilities other than default liabilities, as under Article 415 of the Civil Code.

Directors' liabilities to corporations under Article 266 Paragraph 1 Number 5 CCBA are default liabilities, arising where directors fail their duties and cause damage to the corporation. However, these liabilities are given special weight by the law, and therefore cannot be seen as merely a changed form of the liabilities typically found in the commercial acts of mandate contracts. Moreover, directors' breach of duties to corporations cannot easily be uncovered from outside the company; so while usually a speedy settlement of accounts in commercial transactions is desirable, this is not appropriate when one is faced with the issue of directors' failure to perform duties. Therefore, there are not sufficient grounds to justify applying Article 522 CCBA, directly or with analogical interpretation, to issues involving directors' damages to corporations due to breach of duties.

Accordingly, the period of limitation regarding the right to claim damages from directors owed to corporations under Article 266 Paragraph 1 Number 5 CCBA should not be five years as prescribed in Article 522 CCBA, but 10 years as per Article 167 Paragraph 1 of the Civil Code.

3. *Comment*

Both the Civil Code (hereinafter, cited as "Civ C") and the Commercial Code before the Amendment prescribe a limitations period. In the Civil Code the period for general credits is 10 years (Article 167) and in the Commercial Code, covering credits arising from commercial acts, it is five years (Article 522). In the present case, Y (directors of bank T) were found to have breached their duty of care (Article 254 Paragraph 3 CCBA, Article 644 Civ C, Article 330 CC).[30] According to Article 266 Paragraph 1 Number 5 CCBA (see, Article 423 CC) directors are jointly and severally liable for damages to their corporation if the directors acted in contravention of any laws, regulations or articles of incorporation. These laws and regulations include a duty of care and a duty of loyalty. Thus, in cases where directors breach either duty, they would be liable for damages to their corporation under Article 266 Paragraph 1 Number 5 CCBA.

In the present case, as noted above, Y were found to be liable for damages to T on the grounds that Y breached their duty of care in relation to the *Azuki* Financing and the Dried Silk Cocoon Financing. The plaintiff X, through assets acquired by the Transfer, pursued Y for damages which Y owed to T. The issue the Supreme Court dealt with was whether the directors' debts owed to the corporation should be considered to have arisen from commercial acts, or whether they should be deemed to be general credits. The difference determines whether a five or a 1 year limitations period applies. Regarding this point, the Supreme Court held that the limitations period was 10 years, in accordance with Article 167 of the Civil Code. The reasoning behind this was that the liability of the directors for damages under Article 266 Paragraph 1 Number 5 CCBA was for default liability arising from a failure to perform duties. Such obligations, however, were deemed to be special liabilities given extra force by the law, and as such were not simply an alternate form of commercial acts arising from mandate contracts.

The German Stock Corporation Act also has provisions imposing liability for damages on directors who breach their duties (§ 93 Abs. 3 AktG). There is some controversy as to how the legal nature of this liability should be interpreted. The choice is between construing it as a so called "organ liability" (*Organhaftung*), which refers to legislative liabilities specially prescribed by the law,[31] or as a default liability.[32] Under the German Stock Corporation Act, the effective period of directors' liability to corporations for damages is limited to five years (§ 93 Abs. 6 AktG).

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30 As to this point, for a case commentary on the first Original Court's decision, see, T. MATSUI, *Hatan ginkô no moto torishimari-yaku no yûshi kessai to zenkan chûi gimu* [Approval for Loans and Duty of Care of Former Directors of a Failed Bank], in: 1286 Jurisuto, (2005) 120. For duty of care of directors of banks, see, E. TAKAHASHI / T. SAKAMOTO, Japanese Corporate Law: Important Cases in 2006, in: ZJapanR / J.Japan.L. 24 (2007) 251, 267.

31 K. HOPT, in: K. HOPT / H. WIEDEMANN (ed.), Großkommentar AktG, Berlin 1999, § 93 Rdnr. 20; W. HEFERMEHL / G. SPINDLER, in: Münchner Kommentar zum Aktiengesetz, Munich 2004, § 93 Rdnr. 10.

32 U. HÜFFER, Aktiengesetz, *supra* note 17, § 93 Rdnr. 11.

V. *KARÔSHI* AND THE LIABILITY OF REPRESENTATIVE DIRECTORS [33]

1. Facts

T was born on 24 February 1940 and graduated from high school in 1958. After graduation he was employed by store O, a predecessor to corporation Y1. In 1976 T was appointed as a director of Y1. After this, he was referred to as an executive director inside the company and externally. On 31 August 2000 at approximately 2 am, whilst on a business trip, T died in bed from acute circulatory failure in Toyama city. He was 60 years old at the time of death. He had a wife X1, and two children, X2 and X3.

Y1 was a stock corporation whose main business was wholesaling bags and pouches of various kinds. Y2 was a representative director of Y1. T's work in Y consisted of visiting retailers in the area he was responsible for, receiving orders and consigning products that had been ordered. Y1's officers were representative director Y2, executive director T, and director A who was Y2's mother. Y1 usually had 7 employees, but 3 resigned in February 2000. As one of the remaining employees also resigned in July 2000, there were three employees left at the time of T's death.

On 26 September 1995, T was diagnosed with lumbar intervertebral disk herniation. On 10 November, he underwent a surgical operation removing a section of herniated disc containing four fifths of the hernia. Later, T suffered from coxarthrosis, and on 18 July 2000 he was diagnosed with essential hypertension.

X1 filed a claim to the Chief of the Ôsaka Central Labor Standard Supervision Office for family compensation and funeral expenses under the Workers' Compensation Insurance Law. X1 maintained that T's death was caused by work, but she received a decision that no payment would be made (hereinafter, cited as the "Decision") on the grounds that T was not considered an employee under the Labor Standards Law, and thus the Workers' Compensation Insurance Law would not apply. Dissatisfied, X1 filed an application to have the decision examined by the Ôsaka Workers' Compensation Insurance Examiners, but her application was dismissed. X1 then filed an application for re-examination to the Panel of Workers' Insurance, but no decision had been reached 3 months after the application was received. Finally, X1 filed an action with the Ôsaka District Court, which struck out the original Decision of 29 October 2003. Thereafter, on 18 August 2004, the Chief of the Ôsaka Central Labor Standard Supervision Office held T to be an employee, and affirmed that T's death was caused by his work and fell under the category of an accident at work.

33 Ôsaka High Court, 23 January 2007 in: 1980 Hanrei Jihô (2007) 74, 1289 Kinyû Shôji Hanrei (2008) 28. Ôsaka High Court, 18 January 2007, in: 1980 Hanrei Jihô (2007) 85, 1289 Kinyû Shôji Hanrei, (2008) 31.

Subsequently X1, X2 and X3, all T's heirs, filed an action to the Ôsaka District Court[34] for damages against Y1 and Y2 on the grounds that T's death was caused by overwork at Y1. The action, as laid out below, reached the Ôsaka High Court in the present case.[35] The facts outlined above are the material facts in the present case. However, to more closely analyze the phenomenon of overwork of an employee as it occurred in a small family business in Japan, more detailed facts are presented below.

According to the Ôsaka High Court, Y2's grandfather, O1, established O in 1935. It became corporation Y1 in March 1967. Representatives of Y1 were O1, O2 (1976-) and Y2 (1999-). Since T became a live-in employee of O, T maintained loyal service to the three representatives, and both T and the representatives were vital parts of the business. T had a gentle and sincere personality, playing with Y2 when Y2 was young and T was a live-in employee. As time went on, T gained a significant measure of trust from the family. In 1976 T was given the office of executive director, and registered as a director in the commercial registrar. Y1 had 15,000 outstanding shares, of which T held 1250 until O2 died on 31 July 1999 and T transferred the shares to Y2. Y1's shareholders were thus Y2, and two employees A and H. All Y1's shares were held by the family of the representatives, and so neither official shareholders' meetings nor meetings of the board of directors were ever held. There were only a few employees, and as such there were neither official workplace rules nor wage rules in Y1. Y1's articles of incorporation did not contain clauses concerning the position of an executive director or a director's right to execute any given duties. When T took the office of executive director, no proceedings were taken in terms of changing the contract he worked under from an employee's contract to a director's contract.

T did not play a substantial managerial role in areas such as accounting, finance or distribution of net profits. However he played the major role in the daily business of instructing and organizing employees, undertaking business trips, consigning products and ordering goods. T had his operation for lumbar intervertebral disk herniation on 10 November 1995. Post surgery, he dragged his feet, and went to work later at 8:45, which took between 20 and 30 minutes by electric bicycle.

The staff of Y1 as of December 1999 consisted of three directors, Y2, T and Y2's mother, three male employees engaged in Y1's business, three female employees engaged in office work and H, who was Y2's wife. The three female employees quit together in February 2000, and in July 2000 one of the male employees also resigned. At this stage, only T, Y2 and two male employees were engaged in business affairs. A substantial part of T's work every month was business trips to local prefectures to visit customers who had dealt with the company for 20 to 30 years. He had been doing

34 Ôsaka District Court, 17 April 2006, in: 1289 Kinyû Shôji Hanrei (2008) 40.

35 Ôsaka High Court, 18 January 2007, in: 1980 Hanrei Jihô (2007) 74, 1289 Kinyû Shôji Hanrei (2008) 31. Ôsaka High Court, 23 January 2007, in: 1980 Hanrei jihô (2007) 85, 1289 Kinyû Shôji Hanrei (2008) 28.

this since he was young, going to the Hokuriku area for 6 days and 5 nights, Shikoku area for 4 days and 3 nights, and Okayama prefecture for one day.

Of the more than 40 customers in the Hokuriku area, T visited between 20 and 30 on his business trips there. Hokuriku generally took one week towards the end of each month. T left his house at 6 am in a company car loaded with sample goods. He drove on the highway for approximately four hours, arriving in Fukui prefecture and visiting customers there until 7:30 to 8:30 pm. From the second to the fifth day, T left his hotel at 8 or 9 am, visiting customers in Kanazawa in Ishikawa prefecture, and Takaoka and Toyama in Toyama prefecture. On the last day of his business trip, T left his hotel at around 9 am, and visited customers in Toyama until 4 pm. He then returned home by 9:30 pm. On a typical trip to the Hokuriku region T covered between 1,400 and 1,600 kilometers.

During his business trips to Shikoku, T visited more than ten customers. He left his home either at midnight, and went to Shikoku via Okayama prefecture, taking a ferry for the last section of the journey, or at 4 am, driving to Takamatsu in Kagawa prefecture via the large connecting bridge Seto Ôhashi. Either way, after arriving in Takamatsu, T visited customers in Tokushima and Kôchi prefectures. He would then return to Takamatsu at the end of his trip, return by either bridge or ferry and arrive home by about 10 pm. The distance covered was approximately 1,000 kilometers.

T took a break from work from 12 to 16 August 2000. From 17 to 19 August he worked at the offices of Y1. On 20 August, a Sunday, he worked on business from home. From 21 August until Friday 25 August, he worked at Y1's offices as usual. During these days, he arrived at the office around 8:30 am, and worked until 8 pm. On 25 August at around 8 pm he visited hospital to receive medicine to treat his hypertension, but he did not see a doctor. On Saturday 26 August at 5:50 am, he left home with a company car, a Toyota Noah minivan for his business trip to the Hokuriku area. On that day he visited customers in Fukui and stayed the night there. The next day T visited more customers in Fukui and another city, and came back to stay at the same hotel in Fukui. On Monday 28 August, he arrived at Ishikawa prefecture and visited customers in Kanazawa and other cities in the area. On 29 August he visited Wajima, Suzu and Noto in Ishikawa prefecture. In Noto his car broke down, and after taking it to a repair shop at 3 pm he borrowed another car from the shop. He continued to visit customers, and when a replacement car from a rental company arrived, he transferred the goods from his former car to the replacement car. The replacement car was an automatic, which he was not used to. He continued visiting customers in Ishikawa prefecture and later in Toyama prefecture. At 11 pm he found a hotel and stayed there in Takaoka city. The temperature that day in Ishikawa prefecture was an average of 26.9 degrees Celsius, with a maximum of 32.5° and minimum of 22°. From 9 am to 4 pm, it was over 30°.

On 30 August, a Wednesday, he visited Kurobe, Namerikawa, Takoka and Toyama in Toyama prefecture. He arrived at his hotel in Toyama city at 8:03 pm, and at approximately 8:30 he rang his wife and told her, "It was hot, the car broke down, and I'm tired from driving a car different to my usual one, so I'm going to be late tomorrow because I have to fetch the company car". After talking to his wife he went out to eat for about an hour and returned to the hotel around 10 pm. At this point, there were no obvious signs that he was unhealthy or abnormal. He had visited 29 customers by this point of his trip. The temperature in Toyama on the 30th was an average of 28.6°, with a maximum of 32.8°, minimum of 24.4°, and between 8 am and 5 pm it was over 30°, with little cloud cover.

The next morning T did not appear at the lobby in time for the 10 am checkout. A member of the hotel went to check whether he was in his room, and found him dead on the bed. The estimated time of death was 2 am on the 31 August, and the cause listed on his death certificate was acute circulatory failure.

The facts above were found by the Ôsaka High Court. In the present case the issue related to corporate law was that Y2, as a representative director, allegedly owed a duty of care to his company, Y1. That duty required him to fulfill Y1's duty to adequately ensure the safety of T. However if Y2 was found to have breached that duty of care in bad faith or with gross negligence, he would therefore be liable to T for damages under Article 266-3 of the Commercial Code before the Amendment. Thus, the issue in this case was whether Y2 would be liable for damages under that article.

The Ôsaka District Court found that T had worked at corporation Y1 for 42 years, and that during these years he was an executive director for 24 years. It established that he supervised general business and was in charge of managing labor, work and personnel issues.[36] Therefore, Y1 and thus Y2 did not owe him a duty to adequately consider his safety. X1, X2 and X3 appealed to the Ôsaka High Court, which gave its decision on 18 January 2007.[37] Within a week of handing down its decision the Ôsaka High Court discovered it had contravened laws and regulations in its 18 January decision and issued an alteration decision on 23 January 2007 (see Article 256, Civil Procedure Code).[38] However, the 23 January decision only altered the amount of damages and did not make any substantive modifications to the 18 January decision. As such, only the 18 January decision will be discussed below.

The Ôsaka High Court in the 18 January decision found that although T had held the title of director for a long time T's title was only nominal - considering real working conditions such as T's work type, the substance of the work, work time and work place.

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36 Ôsaka District Court, 17 April 2006, in: 1289 Kinyû Shôji Hanrei (2008) 40.

37 Ôsaka High Court, 18 January 2007, in: 1980 Hanrei Jihô, at 74 (2007), 1289 Kinyû Shôji Hanrei (2008) 31.

38 Ôsaka High Court, 23 January 2007, in: 1980 Hanrei Jihô, at 85, 1289 Kinyû Shôji Hanrei (2008) 28.

The legal relationship that T had with Y1 was within the scope of the employment contract by which services as an employee were rendered under directions and orders of Y1. Therefore, Y1 in general owed T the aforementioned duty to ensure his safety. After settling that issue, the Ôsaka High Court discussed the director's liability.

2. Held

Article 266-3 of the Commercial Code before the Amendment took into consideration the importance of the position of directors in stock corporations, and in relation to cases in which the corporation causes third parties damage through the directors' failure to fulfill their duties, Article 266-3 acts as a statutory liability legally imposed on the directors. Originally, the Commercial Code regulates issues considered to be commerce or commercial matters. However, critical labor-management relations issues reach the level of corporate management. A director's duty of care to a corporation covers not only breaches of duty such as the misappropriation of corporate assets, malpractice and illegal transactions, but also failures to adequately consider the safety of employees in the corporation. […]

Y1 owed T a duty to ensure his safety in order to prevent harm to T's health and life. It had a duty to appropriately control work time and properly adjust working conditions in view of T's ailing health. Taking into consideration the scale and small number of staff of Y1 and the substance of T's work, the duty to ensure his safety could be achieved only through Y2 executing his duties as a representative director of Y1. […] Y2 had sufficient knowledge of the state of T's work, how often he took holidays, etc., and the realities of the business trips to the Hokuriku area following the holidays and could have had knowledge of the excessive nature of the labor T was required to perform. Therefore, through his duty of care to Y1, Y2 ought to have acted so that Y1 duty to ensure T's safety was satisfactorily fulfilled. Y1 neglected this duty with gross negligence, and consequently caused the death of T, a third party. Under Article 266-3 of the Commercial Code before the Amendment, Y2 has the same liability for damages towards X1 and the others as Y1.

3. Comment

The Ôsaka High Court held that although T was an executive director, the title was only nominal. His employment stayed within the extent of an employment contract under which services would be offered in accordance with directions and orders of Y1, and he was therefore owed a duty for consideration of his safety by Y1. The Court then held that the fulfillment of this duty could only be carried out through the actions of Y2; Y2 owed a duty of care that required him to ensure that Y1 fulfilled its duties to ensure T's safety. Y2 breached his duty of care by neglecting to fulfill Y1's duties to T. Ultimately, Y2 owed T liability for damages on the grounds of Article 266-3 CCBA.

The decision of the Ôsaka High Court differs substantively from that of the Ôsaka District Court in that the High Court found that the title of director was merely nominal.

In the present case T gave his loyalty to the family of the representative directors for three generations, over more than 40 years. The representatives gave T the title of director, and in exchange T devoted his work to the representatives, their family and their corporation. The Ôsaka High Court looked at the substantive relationship between T and the representatives of Y1 and found that he was a director in name only, and thus should still considered to be an employee. Accordingly, Article 266-3 CCBA (for CC, see Article 429) can be employed to impose on representative directors a duty of care to ensure that the corporation fulfills its obligations to ensure its employees' safety.

Under the current Company Code, three or more directors are required for corporations that have a board of directors (Article 331 Paragraph 4). Other types of corporations may have only one director (Article 326 Paragraph 1). In either case, the highest or lowest number of directors can be fixed by the articles of incorporation.[39] On the other hand, under the Commercial Code before the Amendment, which regulated Y1 in the present case, all stock corporations had to have three or more directors (Article 255 CCBA). Therefore, Y1 needed at least three directors. Under this law, small family corporations such as Y1 were faced with the problem of a limited number of people who could be or were willing to be directors. Considering this condition under the Commercial Code before the Amendment, it is easy to understand why T was given the title of director.

The Ôsaka High Court, taking into account T's work and position within Y1, gave a decision favorable to T and his heirs. According to this case, in situations where a person is nominally a director but in substance an employee, that employee or their heirs will be given relief. However, the present case does not clearly answer the question of whether the Court would come to the same conclusion regarding nominal directors under the current Company Code. Nonetheless, where a corporation has a board of directors, and a person is nominally given the title of director despite not participating in the management of the corporation in question, a similar approach to the one taken in the present case would be open to the Court.

The present case indicates that relief is available to employees or their heirs under the Company Code. Safety for employees, and compensation where that safety is not adequately guaranteed should be adequately enforced under the law. A likely point raised by the present case is whether the duty of ensuring safety and subsequent compensation to employees or their heirs should be treated as connected to the duty of care that representative directors owe their corporation.

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39 K. EGASHIRA, *Kabushiki kaisha-hô [dai 2 han]* [Laws of Stock Corporations [2nd Edition]] (2008) 356.

VI. CONCLUSION AND RECENT DEVELOPMENTS IN JAPANESE COMPANY LAW PRACTICE

Each case presented in this paper relates to serious problems in Japan. Case IV made it clear that although the Japanese economy has been growing, the pursuit for damages from failed financial institutions that originated from the collapse of the bubble economy has not yet finished. This depends heavily on statutes of limitations and their effect on corporations' right to claim damages from former management. According to this case the limitation will not be five years as under the Commercial Code, but 10 years as per the Civil Code. Also, a longstanding issue in Japanese society is the overwork of employees. *Karôshi*,[40] death caused by overwork, is a solemn and serious matter to the bereaving family. Case V dealt with the *karôshi* of an employee at a small family business. According to this case, representative directors are required to ensure the safety of employees as part of their duty of care towards the corporation.

Management is always expected to consider the interests of their corporation's shareholders. Cases II and III deal with important issues vital to ensure the protection of minority shareholders. Case II held that it is not sufficient to meet the 3% voting right threshold only at the time of application, but that the threshold must be met until the Court has appointed an inspector. Case III shows situations where a corporation is able to refuse shareholders' demands for handing over accounting documents for the purposes of inspection. According to this case, even where the shareholder does not have competing business interests with the corporation in question, if the shareholder's parent company does have such a competing business, then the demand for accounting documents can be legitimately refused.

The practice of Japanese company law seems to be at a turning point.[41] The *Nikkei Shimbun* [42] reports that of the shareholders' meetings held in 2008[43], the peak day was 27 June. On that day 1315 shareholders' meetings were held[44], 142 lower than in the previous year.[45] According to the *Nikkei Shimbun*,[46] shareholders' proposals were pre-

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40 K. NAKATA, Verletzung der Fürsorgepflicht des Arbeitgebers bei Selbstmord eines Angestellten wegen Überarbeitung (*karôshi*) – Entscheidung des Distriktgericht Tokyo vom 28. März 1996, ZJapanR / J.Japan.L, 2 (1996) 142.

41 D. FOOTE, Law in Japan: A Turning Point (Seattle 2007).

42 Nihon Keizai Shimbun, Evening Issue, 27 June 2008, 3; Nihon Keizai Shimbun, 28 June 2008, 11. Also, for reports on 2008 shareholders' meetings, see: Nihon Keizai Shimbun, Evening Issue, 27 June 2008, 22; Nihon Keizai Shimbun, 27 June 2008, 7; Nihon Keizai Shimbun, Evening Issue, 26 June 2008, 3.

43 For English literature on shareholders' meetings, see, E. TAKAHASHI / T. SAKAMOTO, "Practical Experiences with the New Japanese Company Code in 2005/2006", ZJapanR / J.Japan.L. 23 (2007) 41.

44 Nihon Keizai Shimbun, Evening Issue, 27 June 2008, 3; Nihon Keizai Shimbun, 28 June 2008, 11.

45 Nihon Keizai Shimbun, Evening Issue, 27 June 2008, 3; Nihon Keizai Shimbun, 28 June 2008, 11.

46 Nihon Keizai Shimbun, 28 June 2008, 11.

sented at 20 shareholders' meetings, but all the proposals were rejected. Contrastingly, proposals to either introduce or continue existing defense measures to frustrate hostile takeovers were approved at 212 corporations. Foreign investment funds continue to be active[47] to the point where it seems that foreign investment funds are not refused simply on the grounds of being foreign investment funds.[48] One foreign investment fund acquired favorable votes in the 20% range in relation to proposals that the fund presented, although they were all voted down.[49] Steel Partners, who have become very well known in Japan, did not present shareholders' proposals at shareholders' meetings this year, but in January 2008 they gave recommendations to about 30 corporations to purchase those corporations' own shares. As 30% of the corporations thus approached attempted to purchase their own shares,[50] it can be seen that Japanese corporations do, and furthermore can be expected to, make, an effort to listen to foreign investment funds. In the near future, it is expected that an issue revolving around the progression of cross-shareholdings as a defense measure to hostile takeovers will come up.

ZUSAMMENFASSUNG

Der Beitrag analysiert vier neuere Entscheidungen zum japanischen Gesellschaftsrecht:

In der ersten Entscheidung befasste sich der OGH mit den Voraussetzungen des Rechts eines Minderheitsaktionärs, gem. Art. 294 Abs. 1 HG a.F. die Einsetzung eines Prüfers zwecks Untersuchung der Gesellschaftsangelegenheiten zu verlangen. Der Stimmrechtsanteil des Minderheitsaktionärs war nach Antragstellung aber vor Einsetzung eines Prüfers durch Ausgabe neuer Aktien seitens der Gesellschaft unter die von Art. 294 Nr. 1 HG geforderten 3 % gesunken. Der OGH entschied, dass jedenfalls dann, wenn die Aktienausgabe nicht darauf zielte, dieses Recht des Minderheitsaktionärs leerlaufen zu lassen, selbiges mit der Unterschreitung der 3%-Schwelle untergegangen sei.

In der zweiten Entscheidung setzte sich das OG Tokyo mit dem Recht eines Minderheitsaktionärs auseinander, gemäß Art. 433 Abs. 2 des neuen Gesellschaftsgesetzes Einsicht in Unterlagen der Gesellschaft zu verlangen. Nach Art. 433 GesG kann ein Einsichtsrechts abgelehnt werden, wenn der Aktionär ein Konkurrent der Gesellschaft ist. Die Gesellschaft hatte sich hierauf berufen, obwohl nicht der Aktionär selbst, sondern dessen Muttergesellschaft in einem Konkurrenzverhältnis zur Gesellschaft stand. Der OGH entschied, dass bei einem hundertprozentigen Tochterunternehmen auch die Konkurrenzsituation im Verhältnis zur Muttergesellschaft zur Ablehnung des Einsichtsrechts berechtige.

47 Nihon Keizai Shimbun, 28 June 2008, 11; Nihon Keizai Shimbun, 27 June 2008, 11.
48 Nihon Keizai Shimbun, 28 June 2008, 11; Nihon Keizai Shimbun, 27 June 2008, 11.
49 Nihon Keizai Shimbun, 27 June 2008, 11.
50 Nihon Keizai Shimbun, 28 June 2008, 11.

In der dritten Entscheidung geht es um die anwendbare Verjährungsfrist für Ansprüche gegen Verwaltungsratsmitglieder wegen Verletzung ihrer Pflichten gem. Art. 266 Abs. 1 HG a.F. Der OGH entschied, es handele sich dabei nicht um eine Forderung aus einem Handelsgeschäft, für die gem. Art. 522 HG a.F. eine fünfjährige Verjährungsfrist gilt. Stattdessen erklärte er die zehnjährige Verjährungsfrist des Art. 167 Abs. 1 ZG für anwendbar.

Die letzte Entscheidung betrifft einen Fall, in dem das OG Ôsaka über Ansprüche wegen Todes durch Überarbeitung (karôshi) *zu entscheiden hatte. Geklagt hatten die Hinterbliebenen eines langjährigen Mitarbeiters eines kleinen Unternehmens, der nach extensiven Dienstreisen verstorben war. Streitig war, ob die Gesellschaft dem Verstorbenen wie gewöhnlichen Arbeitnehmern eine Fürsorgepflicht geschuldet hatte, obwohl er den Titel eines Verwaltungsratsmitglieds führte. Das Gericht entschied, der Titel sei ihm im konkreten Fall lediglich formell für seine Verdienste um das Unternehmen verliehen worden. Tatsächlich sei der Verstorbene ein Arbeitnehmer und die Gesellschaft sei mithin verpflichtet gewesen, ihn vor arbeitsbedingten Gesundheitsschäden zu bewahren.*

(Zusammenfassung der Red.).