Japanese Corporate Law: Important Cases in 2006

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I. INTRODUCTION

In 2006 there were many corporate law cases that characterize the problems with Japanese business culture at present. One of the cases we report in this article addressed an issue that had been controversial for a long time in Japan – namely, political donations. We also discuss a Supreme Court case relating to a provision prohibiting the grant of property interests – a provision introduced as a measure against *sôkai-ya* racketeers.[1] One of the problems Japan confronted after the collapse of the bubble economy was the failure of financial institutions. We look at a case in which the directors of a failed bank were sued for damages. Finally, we address a case where a food corporation selling famous doughnuts concealed trouble concerning food products containing an unlicensed additive and that scandal was later revealed.

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1 For English and German literature on *sôkai-ya* racketeers, see C. MILHAUPT / M. WEST, Economic Organizations and Corporate Governance in Japan: The Impact of Formal and Informal Rules (Oxford 2004) 109; C. MILHAUPT / M. RAMSEYER ET AL., The Japanese Legal System: Cases, Codes, and Commentary (New York 2006) 688; R. MIYAWAKI, *Sôkai-ya (Unternehmenserpresser),* transl. of the original English text into German and annotations by M.K. Scheer, in: ZJapanR / J.Japan.L. 4 (1997) 69.

II. DONATIONS TO A POLITICAL FUND MAINTENANCE ORGANIZATION BY A CORPORATION AND DIRECTORS' BREACH OF DUTY OF CARE [2]

1. Facts

K was a stock corporation with capital of about 33,411,620,000 yen. Its corporate objectives included engineering and construction. K made donations (hereinafter: Donations) to a political fund maintenance organization known as the Peoples' Political Association (hereinafter: PPA), an incorporated foundation affiliated with the Liberal Democratic Party (hereinafter: LDP). K belonged to the Japan Federation of Construction Contractors (hereinafter: JFCC). Each year PPA requested donations from JFCC. If, upon this request, JFCC in turn requested donations from K, the secretarial section of K would consider the request according to criteria such as: (a) whether the amount of the donation would be excessive compared with that in an ordinary year; (b) whether the donation would comply with the Political Funds Control Act; and (c) whether the donation would be unrelated to elections. If these criteria were met, K would make the donation after it received final approval from the president and/or vice-president. This was the process by which all of the Donations had been approved. The final approval for the Donations in 1996 and 1997 was given by Y1. From 1998 to 2000 the final approval was given by Y2. The amounts of the Donations were 28,174,000 yen in 1996, 21,672,000 yen in 1997, 20,672,000 yen in 1998, 16,325,000 yen in 1999, and 12,290,000 yen in 2000. The total amount of the Donations for this period was 99,133,000 yen.

K incurred a loss of 48,800,000,000 yen in March 1998, and a loss of 120,200,000,000 yen in March 2001. K calculated extraordinary losses of 242,600,000,000 yen in March 1998 and 577,100,000,000 yen in March 2001. In January 2001, K passed a resolution at an extraordinary shareholders' meeting reducing its capital from about 82,000,000,000 yen to about 17,000,000,000 yen. K paid dividends to shareholders until March 1997, but did not pay any dividends after March 1998.

X, a shareholder of K, filed a derivative action. X's main arguments were that: (a) the Donations were ultra vires K's corporate objectives; and (b) the Donations were a breach of the directors' duty of care. X argued that Y1 and Y2 were liable for damages equivalent to the amount of the Donations pursuant to Art. 266 para. 1 no. 5 of the then current (pre-2005) Commercial Code (hereinafter: Commercial Code or CC).[3]

The District Court held that losses accumulated over many years had put pressure on K's management, and that after the 48,800,000,000 yen loss in March 1998 K could no longer pay dividends. As a result, from that point on K's directors owed a duty of care, in relation to donations to the political fund maintenance organization, to carefully consider the state of the company compared with the need or usefulness of the donations

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2 Nagoya High Court, Kanazawa Branch, 11 January 2006, in: Hanrei Jihô 1937, 143. See Fukui District Court, 12 February 2003, in: Hanrei Jihô 1814, 151.

3 *Shôhô*, Law No. 48 of 9 March 1899 as amended by Law No. 154/2004.

before deciding such matters as the suitability, amount and timing of the donations. The decision-making process for the Donations after 1 April 1998 lacked care and therefore those decisions constituted improper exercise of the directors' discretion and were acts in breach of the duty of care. Thus, the Court held that Y2, who gave the final approval for the Donations after 1998, breached his duty of care. Y2 and X appealed.

2. Held

When directors, as representatives of a corporation, make political donations, they should take into account various factors when deciding on the amount of the donations, including the scale and business performance of the corporation, social and economic positions, and the parties to whom the donations are made. When directors make inappropriate donations that go beyond what is rational, they breach the duty of care they owe to the corporation. According to the ascertained facts, from 1996 to 2000 when the Donations were made, K's capital was 82,085,000,000 yen. Its sales figures ranged from about 800,000,000,000 to about 1,000,000,000,000 yen, although the economic circumstances were severe after the collapse of the bubble economy. Ks scale and business performance ranked highly in the construction industry (it usually placed third by capital and fifth by sales). The amounts of the Donations ranged from about 12,000,000 yen to about 28,000,000 yen per year. These amounts were very small compared with the limit imposed by Art. 21-3 para. 2 CC (87,000,000 yen in the case of K). Furthermore, when K needed improvement in relation to its assets and management in the above-mentioned economic circumstances, the amounts of its donations decreased every year. In particular, the 2000 Donation was less than half the amount of the 1996 Donation. K was also a corporate member of the JFCC — a uniform industrial organization in the construction industry — and it was not inappropriate to respond to the JFCC's requests for donations. Since the PPA, the other party to whom the Donations were given, was a lawful organization, it was qualified to receive the Donations. Taking these circumstances into consideration, the Donations were not unreasonable, and therefore the directors did not breach their duty of care.

3. Comment

In Japan, donations by corporations and other legal entities to political fund maintenance organizations has long been a controversial issue and the present case deals directly with that issue. The donations by K from 1996 to 2000 were the subject matter in this case.

The leading case concerning a stock corporation and donations to a political fund maintenance organization is the Supreme Court case of *Yahata Steel*.[4] There were three points at issue in that case. The first was whether political donations could come within

4 Supreme Court, 24 June 1970, in: Hanrei Jihô 596, 3.

the scope of a stock corporation's objectives. The second was whether stock corporations were allowed to make such donations under constitutional law. The third was whether directors would breach their duty of loyalty by allowing the corporation to make these donations. According to the Supreme Court, the donations would come within the objectives in a corporation's articles of incorporation as long as the donations, when observed from an objective and abstract viewpoint, could be seen to have a social function. In relation to the second point at issue, the Supreme Court rejected an argument that donations by corporations would influence voting rights, which were granted only to natural persons, and as a result the donations would violate the exercise of those rights and therefore violate constitutional law. The Court held that the donations would neither cause such influence nor violate the free exercise of voting rights, and therefore corporations were allowed to make political donations in the same way as natural persons. The Court also expressed the view that legislation should regulate these donations. In relation to the third point, the Supreme Court took the view that the duty of loyalty and the duty of care were one and the same duty.[5] Taking this view, the Court decided that the directors did not breach the duty. In deciding this, the Court held that when directors, as representatives of a corporation, make donations, they should take into account various factors such as the scale and business performance of the corporation, social and economic positions, and the parties to whom the donations are made. Directors breach their duty of loyalty to the corporation when the amount of the donations they make is inappropriate and beyond what is reasonable in the circumstances. Generally, the above three points are at issue in cases relating to political donations.

In addition to the above case, there is also a case that addresses political donations by a life insurance corporation.[6] The High Court held that a mutual corporation (*sôgo kaisha*) incorporated for the purpose of carrying on a life insurance business, and whose original objectives did not include carrying out political acts, would not be at liberty under constitutional law to make political donations. Furthermore, the Court held that it was a matter for the legislature to prohibit all such political donations or to allow them within a quantitative or qualitative limit. The Court then decided that political donations by the mutual corporation were allowed because the Political Funds Control Act existed to regulate political donations and the donations made by the mutual corporation were within the limits imposed by the Act. In relation to the second and third points mentioned above, the High Court also followed the Supreme Court decision and considered the mutual corporation in the same way as a stock corporation.

Apart from these cases, there is also a Supreme Court case regarding a political donation by a certified public tax accountants' association (hereinafter: Association).[7]

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5 *Ibid.*
6 Osaka High Court, 11 April 2002, in: Hanrei Taimuzu 1120 (2003) 115.
7 Supreme Court, 19 March 1996, Minshû 50 (3), 615; Hanrei Taimuzu 914, 62.

In this case, the Association collected a special membership fee of 5,000 yen from each member to make a donation to a political body carrying out political activities intended to improve the social and economic status of certified public tax accountants. The Association decided to collect a further special membership fee of 5,000 yen from each member to make another donation to the political body. A member of the Association brought an action. The Supreme Court found that: (a) a certified public tax accountants' association was a legal entity with a legal nature different from corporations; (b) it was not allowed to treat the scope of the Association's objectives in the same way as corporations; (c) a certified public tax accountants' association was required to be incorporated by public tax accountants and its purpose was stipulated under tax law; (d) membership in a certified public tax accountants' association was mandatory for public tax accountants in the sense that they are indirectly required to join one; (e) only public tax accountants who were members of a certified public tax accountant's association were allowed to carry on a tax practice; and (f) members of a certified public tax accountant's association were virtually prevented from leaving that association. In light of these points, the Supreme Court held that when determining the scope of the objectives of a certified public tax accountant's association it is necessary to consider the freedom of thought and beliefs of each member. A decision by a certified public tax accountants' association to make a donation to a political body would be closely connected to a member's support for a particular party or candidate. The Court then held that a donation to a political body by a certified public accountants' association was ultra vires its objectives.

Further, there is a Supreme Court case relating to donations to a political party by a labor union.[8] In this case the Court held that political activities by labor unions would fall within the scope of their objectives. However, the Court decided that because workers have a strong interest in joining a labor union and there are substantial virtual restrictions on their freedom to leave the union, labor unions may engage in political activities but this would not impose, at least not without conditions, a duty on members to cooperate with those activities. The Supreme Court then held that a labor union, as a body, is free to select a party to support or a so-called unified candidate and to promote an election campaign, but it is not allowed to force its members to cooperate with that selection or campaign, and the same applies to the bearing of the costs of a labor union's political activities. As such, the Supreme Court held that labor unions are allowed to make political donations, but they are not allowed to force their members to pay membership fees in order to collect funds to make donations.

Based on the above cases, political donations by stock corporations or mutual corporations would be considered within the scope of their corporate objectives.

8 Supreme Court, 28 November 1975, in: Hanrei Taimuzu 330, 213.

The present case concerned donations by stock corporations, and can be categorized with the *Yahata Steel* case. However, according to both cases, in relation to political donations, matters such as the amount of the donation should be decided by taking into account various factors, including the scale and business performance of the corporation, its social and economic position, and the parties to whom the donations are made, and as long as that decision and the donation itself is within reason, the directors will not breach their duty of care. Conversely, if the decision or the donation is beyond what is reasonable, the directors will breach the duty.

The common academic theory on political donations by stock corporations supports the decision in the *Yahata Steel* case.[9] However, it maintains in terms of the first point raised above that those donations should be considered not from the viewpoint of social interests, but of the interests of the corporation.[10] According to this theory, by extending the meaning of the objectives stipulated in a corporation's articles of incorporation, those donations can be accepted on the grounds that they are acts indirectly supporting the fulfillment of the corporate objectives.[11] Specifically, the donations are beneficial in the sense that they will help a corporation avoid having its progress or growth being interfered with.[12] In relation to the second point raised above, the common academic view is that political donations do not violate constitutional law because they do not have a direct influence on the exercise of voting rights and therefore they are not against public policy (see Art. 90 of the Civil Code).[13] On the third point, the common theory takes the same view as the Supreme Court.[14]

There are other academic theories with views different from the common theory.[15] One influential theory suggests that political donations by stock corporations should not

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9 T. SUZUKI, *Shôhô kenkyû III* [Studies on Commercial Law III] (Tokyo 1971) 326 *et seq.*; M. KITAZAWA, *Kaisha no seiji kenkin* [Political Donations by Corporations], in: K. Ueyanagi / T. Ôtori et al., *Kaisha-hô enshû I* [Seminar on Corporations Law I] (Tokyo 1983) 1, 5 *et seq.*; T. SUZUKI, *Kaisha no seiji kenkin* [Political Donations by Corporations], in: T. Ôtori / A. Takeuchi et al., *Kaisha hanrei hyakusen* [100 Collected Cases on Corporations] (5th ed., Tokyo 1992) 9; M. YANAGA, *Enshû kaisha-hô* [Seminar Corporations Law] (Tokyo 2006) 7 *et seq.*; E. IZUMIDA, *Kaisha no seiji kenkin* [Political Donations by Corporations], in: E. Egashira / S. Iwahara et al., *Kaisha-hô hanrei hyakusen* [100 Collected Cases on Corporations Law] (Tokyo 2006) 8 *et seq*.

10 SUZUKI, *Shôhô kenkyû III*, *supra* note 9, 326 *et seq.*; KITAZAWA, *supra* note 9, 5 *et seq.*; SUZUKI, *Kaisha no seiji kenkin*, *supra* note 9, 9.

11 SUZUKI, *Shôhô kenkyû III*, *supra* note 9, 326 *et seq.*; KITAZAWA, *supra* note 9, 5 *et seq*.

12 SUZUKI, *Shôhô kenkyû III*, *supra* note 9, 326 *et seq.*; KITAZAWA, *supra* note 9, 6.

13 SUZUKI, *Shôhô kenkyû III*, *supra* note 9, 332; KITAZAWA, *supra* note 9, 8 *et seq*.

14 SUZUKI, *Shôhô kenkyû III*, *supra* note 9, 324 *et seq.*; KITAZAWA, *supra* note 9, 10 *et seq*.

15 For academic theories on political donations, see IZUMIDA, *supra* note 9, 8; T. NAKAHARA, *Kaisha no seiji kenkin* [Political Donations by Corporations], in: T. Ôtori / S. Ochiai et al., *Kaisha hanrei hyakusen* [100 Collected Cases on Corporations] (6th ed., Tokyo 1998) 8.

be allowed.[16] According to this theory, these donations are void under constitutional law and civil law before corporate law matters can even be considered, unless all shareholders agree to the donations.[17] The donations should reflect the will of each citizen, each being a natural person, because they influence trends in politics and the formation of the political views of individuals.[18] This theory is not presently followed by the courts.

Following the Supreme Court decision in the *Yahata Steel* case, the common academic theory and the present case, if one takes the view that political donations by stock corporations are allowed and come within the scope of corporate objectives, then the only issue will be whether a corporation's directors breached their duty of care in making the donations. As long as the donations are not unreasonable, the directors will not breach the duty. In this context, there is an academic theory that argues, in relation to whether directors or executive officers breach their duty of care by making political donations, that the decision need not be based on the interests of shareholders. As long as the donations respond to social expectations or requests and they are for appropriate amounts considering such matters as the scale and business performance of the corporation and the parties to whom the donations are made, the directors and executive officers will not breach the duty.[19] This approach will bring to the courts a standard to apply when considering the rationality of political donations in the future.

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16 I. KAWAMOTO, *Gendai kaisha-hô* [Current Corporations Law] (9th ed., Tokyo 2004) 70; Y. TOMIYAMA, *Gendai shôhô-gaku no kadai* [Issues in Current Commercial Law] (Tokyo 1975) 123 *et seq.*; Y. NIYAMA, *Kei'ei zaimu taishitsu kaizen-saku shinkô-chû no kabushiki kaisha no seiji kenkin to torishimari-yaku no zenkan chûi gimu ihan* [Political Donations by a Corporation to Improve the Financial Standing of Management and Directors' Breach of Duty of Care], in: Jurisuto 1332 (2007) 100; K. TORIYAMA, *Kaisha ni yoru seiji kenkin to torishimari-yaku no sekinin* [Political Donations by Corporations and the Liability of Directors], in: Kinyû Shôji Hanrei 1263 (2007) 23.

17 KAWAMOTO, *supra* note 16, 70; TOMIYAMA, *supra* note 16, 123 *et seq.*; NIYAMA, *supra* note 16, 100; TORIYAMA, *supra* note 16, 23. For comments on this case at first instance, see M. ARATANI, *Seiji kenkin ni tsuite torishimari-yaku no sekinin wo mitometa jirei* [A case in which directors were found liable for political donations], in: Kin'yû Shôji Hanrei 1174 (2003) 69; Y. TANABE, *Kyogaku sonshitsu wo dashita kaisha no seiji kenkin ni tsuki torishimari-yaku no zenkan chûi gimu ihan ga aru toshite motometa kabunushi daihyô soshô ga ninyô sareta jirei* [A case where a derivative action alleging directors' breach of duty of care due to corporate political donations causing substantial loss was accepted], in: Hanrei Taimuzu 1205 (2006) 73; M. IIDA, *Kumagai gumi kabunushi daihyô soshô* [Kumagai Gumi and a Derivative Action], in: Hôgaku Shinpô 110 (11 and 12) (2004) 187; G. Ô, *Kesson kaisha no seiji kenkin ni tsuki torishimari-yaku no zenkan chui gimu iihan ga mitomerareta jirei* [A case in which directors were found liable for political donations by a corporation incurring a loss], in: Hôgaku Shinpô 111 (1 and 2) (2004) 523.

18 KAWAMOTO, *supra* note 16, 70; TOMIYAMA, *supra* note 16, 124 *et seq.*; NIYAMA, *supra* note 16, 100.

19 K. EGASHIRA, *Kabushiki kaisha-hô* [Law of Stock Corporations] (Tokyo 2006) 20; M. KONDÔ, *Kaisha no kifu to torishimari-yaku no zenkan chûi gimu (ge)* [Donations by Corporations and Directors' Duty of Care (2)], in: Shôji Hômu 1663 (2003) 19.

III. THE GRANTING OF PROPERTY INTERESTS BY DIRECTORS THREATENED BY A SPECULATOR [20]

1. Facts

A was known as a speculator. A incorporated C and was its representative director. B was a stock corporation whose business was to produce and sell sewing articles. Its shares were listed in the First Section of the Tokyo Stock Exchange. D was a main bank of B. Y1, Y2 and Y3 were representative directors of B. Y2 and Y3 came from D.

A had bought a number of B's shares either personally or through C since 1996. At the end of March 1987, C was the largest shareholder of B, holding 32,556,000 shares, and A was the thirteenth largest shareholder, holding 3,000,000 shares. A was appointed a director of B at a shareholders' meeting in June 1987. C had borrowed 49,000,000,000 yen by December 1987 and an additional total of 96,600,000,000 yen from Q by the end of September 1988. 17,400,000 of B's shares were set as a security for 50,000,000,000 yen of the above-mentioned 96,600,000,000 yen in debt. From around October 1988, A had demanded that Y1 and Y2 buy the shares of B that C was holding. A was again appointed a director of B at a shareholders' meeting on 29 June 1989. On 28 July 1989, A forced Y2 to sign a note (hereinafter: Note) stating that B was responsible for buying out or supplying the funds to buy out 17,400,000 shares of B held by A and that B would buy out or supply the funds to buy out those shares.

On 1 August 1989, A made Y1 and Y3 believe that he had sold shares in B, accompanied by the Note, to a corporation associated with a gangster organization, and demanded that Y1 and Y3 provide A with 30,000,000,000 yen if they wished the sale to be cancelled. On 4 August 1989, A abused Y1 and Y3 for not arranging provision of the money and threatened them, saying that two hit-men had arrived from Osaka. On 5 August, Y3 complained to D about the strained circumstances. D obtained a firm promise that B would be responsible for the financing of the 30,000,000,000 yen and D would not be incur any responsibility if trouble arose. D then agreed to indirect financing through third parties. On 6 August, B held an extraordinary meeting of directors and resolved that B would guarantee the financing of the 30,000,000,000 yen and set the premises of the head office as security. Between 10 and 11 August 30,000,000,000 yen originating from an affiliated corporation of D arrived at C via a few third parties.

A had no intention of repaying the money, and there was no hope of getting it back. The total recovery of the financing was difficult. It was unnecessary for B to pay the money and the financing equated to granting property interests to A. Y1, Y2 and Y3 knew this and knew that it was an act management was not permitted to do.

C had received a large amount in loans to acquire shares in B and other corporations. After receiving the above-mentioned 30,000,000,000 yen, A still demanded that B assume C's debts. In the end B, through its affiliated corporations, did assume C's debts.

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20 Supreme Court, 10 April 2006, in: Hanrei Jihô 1936, 27.

In the end, A was arrested on 19 July 1990 and resigned from the office of director on 19 September. The affiliated corporations of B failed and B suffered large losses.

X, a shareholder of B, brought an action for damages, arguing that B suffered a loss of 93,900,000,000 yen due to the 30,000,000,000 yen financing arrangement and the assumption of C's debts, and that Y1, Y2 and Y3 were liable for damages on the grounds that they: (a) breached their duty of loyalty and duty of care; and (b) violated a law prohibiting the granting of property interests to shareholders (Art. 266 para. 1 no. 2 CC).

At first instance,[21] the Court held that: (a) Y1, Y2 and Y3's responding to A's demand was inevitable for B's existence; and (b) A's demand was obstinately repeated, endangering the basis of the corporation's existence, and was malicious. It was impossible to say that Y1, Y2 and Y3, in the circumstances at that time, and conducting the general management of a corporation, could have chosen a more appropriate option than the one they chose. In relation to the assumption of the debts, the Court held that, when looking at the directors' decision in terms of their business judgment, there was no material or careless mistake in their knowledge of the facts, and the process and substance of the decision-making were neither irrational nor inappropriate from the viewpoint of the management of a corporation. The Court dismissed X's claim.

The High Court held[22] that Y1, Y2 and Y3 ostensibly breached their duties of loyalty and care, but considering the cunning and violent threats by A, their judgment was an inevitable act of a normal management. As to X's argument about the granting of property interests, the Court held that B's management believed that they granted the property interests in order to take back the shares transferred to the gangster organization, and in fact, the 30,000,000,000 yen grant was the result of extortion. Thus, the Court refused the argument. X appealed.

2. Held

(a) As to liability for breaching the duty of loyalty and duty of care (Art. 266 para. 1 no. 5 CC)

A, from the beginning, had no intention to repay 30,000,000,000 yen that he received in the guise of loan money. The defendants (Y1, Y2 and Y3) had no prospects of getting the money back. Accordingly, the recovery of the total loan money would be difficult. Moreover, the provision of the money was not necessary for B. Therefore, it is clear that there was no rational grounds to justify the above-mentioned financing. The defendants argue that A implied to them that he transferred shares in B to a corporation associated with a gangster organization. Based on that implication, the defendants feared that gangsters would interfere in the management of B and as a result of this, the corporation's credit would be harmed and the corporation itself would collapse. However, in

21 Tokyo District Court, 29 March 2001, in; Hanrei Jihô 1750, 40.
22 Tokyo High Court, 27 March 2003, in: Hanrei Taimuzu 1133 (2003) 271.

relation to shares that are listed on the stock exchange and are freely transferable, it is impossible to prevent people undesirable to corporations, including gangsters, from acquiring shares and becoming shareholders. Therefore, if the management are confronted by such shareholders with improper demands due to an abuse of their status as shareholders, then the management will have a duty to take proper measures in accordance with the law. In the present case, the defendants were not in a situation where they could not be expected to take proper measures with regard to A's statements such as reporting it to the police. Therefore, negligence cannot be denied on the grounds that it was inevitable for the defendants to propose that they would follow A's unjust demand and provide C with the vast amount of 30,000,000,000 yen.

(b) As to liability for violating the law prohibiting the granting of property interests in connection with the exercise of shareholders' rights (Art. 266 para. 1 no. 2 CC)

Since the transfer of shares is the transfer of the status of shareholder and is not an "exercise of shareholders' rights", if a corporation grants a property interest to someone as consideration for transferring shares, that transfer will not necessarily come within the granting of property interests prohibited by Art. 294-2 para. 1 CC. However, where a corporation provides someone with consideration to acquire shares from shareholders who are undesirable to the corporation in order to prevent those shareholders from exercising shareholders' rights such as voting rights, then the provision of that consideration will be an act granting a property interest "in connection with the exercise of shareholders' rights".

B believed A's statement that A had sold a number of shares in B to a corporation associated with a gangster organization and feared that the gangsters, as a large shareholder, would intervene in the management of B. To avoid this, B provided A with an unjustifiably large amount of 30,000,000,000 yen through indirect financing for the purpose of buying back the shares. Therefore, B's granting of the above-mentioned interest was carried out "in connection with the exercise of shareholders' rights" under Art. 294-2 para. 1 of the Commercial Code.

3. Comment

This was the first case in which the Supreme Court expounded conditions on the provision prohibiting the granting of property interests (hereinafter: property interest provision).[23] That provision is one of the characteristics of the Japanese Company Law (hereinafter: Company Law or CL)[24] that differentiates it from German corporate law.[25]

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23 *Janomemishin kabunushi daihyô soshô* [Janomemishin and a Derivative Action], in: Hanrei Taimuzu 1214 (2006) 82, 84; S. MATSUBARA, *Janomemishin kabunushi daihyô soshô jôkoku-shin hanketsu* [Janomemishin and the Derivative Action Appeal Decision], in: Hanrei Jihô 1956 (2007) 198, 200.

24 *Kaisha-hô,* Law No. 86/2005.

The property interest provision was introduced by a 1981 amendment of the Commercial Code to eliminate the granting of interests to *sôkaiya* racketeers (Art. 294-2).[26] Under the Company Law, the property interest provision is found in Art. 120. According to this provision, stock corporations are prohibited from giving any property interest to any person on its own account or on the account of its subsidiaries in connection with the exercise of shareholders' rights (Art. 120 para. 1 CL). The purpose of this provision is neither to ensure fairness in the exercise of shareholders' rights nor to prevent the distortion of that fairness through the granting of property interests, but to prevent the waste of corporate assets.[27] If a stock corporation grants property interests in violation of that provision, the directors or executive officers who were involved with the grant of the property interests will be jointly and severally liable to the stock corporation for the amount equivalent to the value of the property interests (see Art. 120 para. 4 CL and Art. 21 of the Enforcement Regulation of the Company Law (hereinafter: ERCL)). However, where the directors or executive officers involved prove that they did not neglect their duty of care in performing their own responsibilities, they will be exempted from the liability to pay (see Art. 120 para. 4 CL and Art. 21 ERCL). Nevertheless, regardless of whether negligence is found, the directors or executive officers who actually gave the property interests owe an absolute liability (*mukashitsu sekinin*) (see Art. 120 para. 4 CL). On this point, there is criticism that the absolute liability is too strict.[28] Thus, according to this provision, as long as it is in connection with the exercise of shareholders' rights, the provision is applicable to the grant of property interests even to persons other than *sôkaiya* racketeers.[29] Matters such as the exercise of rights, the non-exercise of rights, and modes or methods of exercise could all come within the scope of the provision.[30] The person who receives the interest does not have to be a shareholder. For example, a corporation may give a property interest to a person on the condition that the person does not purchase shares and enter the transfer in the record of shareholders. This example of granting property interests would also be included in the prohibition under the provision.[31] There is also no condition on the application of the provision that the corporation suffer a loss.[32] Even if the consideration is reasonable,

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25 For literature in German, see E. TAKAHASHI / J. RUDO, Mißbrauch von Aktionärsrechten in Japan und Deutschland, in: Recht in Japan, Heft 12 (2000) 71 *et seq*.

26 EGASHIRA, *supra* note 19, 320; A. TAKEUCHI, *Kabunushi no kenri kôshi ni kansuru rieki kyôyo* [Granting Interests in connection with the Exercise of Shareholders' Rights], in: A. Takeuchi, *Kaisha-hô no riron II* [Principles of Corporations Law II] (Tokyo 1984) 53.

27 TAKEUCHI, *supra* note 26, 59.

28 EGASHIRA, *supra* note 19, 427; T. INABA, *Torishimari-yaku no sekinin no atarashii katachi* [New Forms of Directors' Liability], in: Shôji Hômu 1690 (2004) 15.

29 EGASHIRA, *supra* note 19, 320; K. UEYANAGI ET AL. (ed.), *Shinban chûshaku kaisha-hô (9)* [New Edition Commentary on Corporations Law (9)] [T. Seki] (Tokyo 1988) 238.

30 TAKEUCHI, *supra* note 26, 58.

31 *Ibid.*

32 EGASHIRA, *supra* note 19, 321.

acts such as giving preference for orders to a corporation associated with *sôkaiya* racketeers will fall within the scope of the provision.[33] If a corporation gives property interests to a specific shareholder with no or little consideration, it is presumed that the corporation gave the property interests in connection with the exercise of shareholders' rights (see Art. 120 para. 2 CL). The purpose of this presumption is to prevent the grant of interests to *sôkaiya* racketeers in the name of, for example, a continuing subscription for a small number of newspapers.[34]

According to the judgment in the present case, where a corporation gives property interests to a person as consideration for transferring shares, the act of the corporation is not considered to be granting property interests under the property interests provision. This is because the transfer of shares is the transfer of the status of shareholder. However, in order to prevent shareholders who are undesirable to a corporation from exercising shareholders' rights, including voting rights, the corporation may give property interests to acquire shares from the shareholders. This act of the corporation will equate to the granting of property interests "in connection with the exercise of shareholders' rights" under the property interests provision. Therefore, in this instance the corporation would violate the property interests provision (see Art. 120 para. 1 CL) and the directors or executive officers involved in the granting of the property interests and those who actually carry it out will be subject to the above-mentioned liability (see Art. 120 para. 4 CL; Art. 21 ERCC).

As seen above, according to this case the granting of property interests to prevent shareholders undesirable to a corporation from exercising their voting rights would violate the property interests provision. This case raises issues in relation to defense measures for takeovers, including, for example, the question whether the property interests provision should apply to those defense measures.[35] For example, as general defense measures corporations will acquire their own shares or have third parties introduced. In these cases, *sôkaiya* racketeers have nothing to do with the defense measures.[36] The question arises whether the property interests provision should apply to these cases.[37]

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33 *Ibid.;* TAKEUCHI, *supra* note 26, 58.

34 EGASHIRA, *supra* note 19, 321.

35 See Z. SHISHIDO, *Shitesuzi kara no kyôhaku ni ôjite kyogaku no kinin wo kôfu suru koto toshita torishimari-yaku no sekinin* [Liability of Directors responding to threats from a speculator and deciding to gift a substantial amount of money], in: *Heisei 18 nendo jûyô hanrei kaisetsu* [Analysis of Important 2006 Cases] in: Jurisuto 1332 (2007) 104, 106

36 *Ibid.,* 104.

37 For the relationship between the property interests provision and defense measures, see Z. SHISHIDO, *supra* note 35, 104, 106. For comments not referred to here, see Y. ITÔ, *Kabunushi he no rieki kyôyo ni kan suru torishimari-yaku no sekinin* [Directors' Liability for Granting Interests to Shareholders], in: Hôgaku Kyôshitsu 312 (2006) 6; T. FUJIWARA, *Iwayuru shitesuji toshite shirareru A ga B-sha no kabushiki wo bôryokudan no kanren kaisha ni baikyaku suru nado to B-sha no torishimari-yaku de aru Y-ra wo kyôhaku shita*

IV. Directors' Liability for After the Fact Knowledge of Sale of Food Products Containing an Unlicensed Additive [38]

1. Facts

D was a stock corporation selling food products through a franchise system under the trade name MD. D was selling a meat bun named "Ô Nikuman" (hereinafter: O Product). Under the Food Sanitation Law, except for some additives, a license from the Minister of Health, Labour and Welfare was necessary to use additives, and the sale of food containing additives without a license was prohibited. D sold 13,140,000 O Products between May 2000 and 20 December 2000 (hereinafter: Sales). These O Products contained an additive, TBHQ (hereinafter: Addition). D did not have a license for this additive.

Z, through ZZ corporation, of which Z was a director, hoped to be commissioned by D to produce O Products. Z found that O Products produced by corporation H contained TBHQ. On 30 November 2000, D held a sampling meeting for the O Products of ZZ, at which Z announced that the O Products produced by H contained TBHQ. G heard this from D and reported it to B, who was a director of D and head of operations for the MD franchise. Around 2 December 2000, B informed A, a director of D, that O Products contained TBHQ and that D had already requested that a public agency test the O Product. He asked A to wait until the results of the test were received on 6 December before disposing of the stock of O Product. A agreed with B. On 6 December G received a test result reporting that TBHQ was not found. G told B this and in turn B told A. Around 8 December 2000, A and B decided to continue to sell the O Products produced by H to the extent of having those products in stock at member stores and warehouses (hereinafter: Continuation of Sales). From 11 December 2000 to 18 January 2001, D and B paid Z a total amount of 63,000,000 yen (hereinafter: Payment).

The Ministry of Health, Labour and Welfare received an anonymous tip about the Sales. On 15 May 2002, the public health center conducted on-the-spot inspections at eight MD stores in Osaka. On 20 May, D held a press conference and announced the Sales. From the next day, the Sales and the Payment were largely reported in newspapers and other media. On 31 May 2002, D received from the Osaka prefectural government an administrative disposition prohibiting the sale of O Products. After the

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ba'ai ni oite A no yôkyû ni ôjite kyogaku no kinin wo kôfu suru koto wo teian shi mata wa kore ni dôi shita Y-ra no kashitsu wo hitei suru koto ga dekinai to sareta jirei [A case where A, who was known as a so-called speculator, threatened to sell shares to a corporation affiliated with a gangster organization, the directors, Y, responding to A's demand, either directly suggested giving a vast amount of money or agreed to such suggestion, and the court found that it could not deny Y's negligence], in: Kin'yû Shôji Hanrei 1249 (2006) 62; D. Konoe, *Janomemishin kôgyô kabunushi daihyô soshô jiken* [Janomemishin Kôgyô and a Derivative Action], in: Kinyû Shôji Hanrei 1249 (2006) 20.

38 Ôsaka High Court, 9 June 2006, in: Hanrei Taimuzu 1214 (2006) 115.

Sales were revealed, in the fiscal year ending march 2003, D made total contributions of 10,561,000,000 yen (hereinafter: Contribution) to compensate MD member stores for decreased revenues, the costs of campaigns to raise sales, and the costs of recovering reputation.

A shareholder X filed a derivative action maintaining that Y1 to Y11, A and B, who were representative directors, directors or corporate auditors, were liable for damages of 10,624,000,000 yen, the sum of the Contribution and the Payment (A and B were separated from the present case and the court held that they were liable for damages in a different case).[39]

At first instance, the Court held that Y2, who was a managing director at the time of the Sales, knew of the Addition around 29 December 2000, just after the Sales ceased, but Y2 reported it neither to Y1, who was a representative director and the president, nor to the board of directors. The Court decided that Y2 was liable for damages, but held that the other directors and a corporate auditor, including Y1, who resigned from the board of directors in June 2001, did not have knowledge of the Sales until July 2001 and were therefore not liable. X and Y2 appealed.

In the High Court, one of main issues was whether the defendants at first instance (hereinafter: defendants) breached their duty of care by not taking appropriate measures to minimize D's damage and loss of reputation as soon as they became aware of the Addition and the Sales.

2. Held

The defendants had ample knowledge of the risk that Z would reveal the Addition and Continuation of Sales to the media, but ignored it and decided on the unclear action "to not voluntarily make an announcement". The defendants argued that this was a matter of business judgment.

However, this was not a rational crisis measure for a corporation selling food and causing serious problems such as the Addition and the Continuation of Sales, as well as their concealment, to take in relation to consumers and the media.

There is a recent public trend for consumers to be extremely sensitive to food safety and expect corporations to take strict measures to ensure that safety. If a corporation selling food knowingly continued to sell illegal food containing unlicensed additives, then that fact alone would seriously damage the corporation's reputation regardless of whether the food is likely to be harmful to people's health. Moreover, the corporation would be severely criticized if it concealed the fact. Contrary to past concealment, the corporation should respond by voluntarily announcing the fact and making it clear that the trouble has been solved through the implementation of safety measures. It should also act positively to gain back the trust of consumers and develop new relationships of

39 Ôsaka District Court, 9 February 2005, in: Hanrei Jihô 1889, 130.

trust by giving the impression that the concealment was already a thing of the past. Moreover, the media and public opinion are sensitive to scandals and the suppressive nature of corporations. If a corporation is seen, even slightly, to be concealing a scandal, it will be covered extensively and questioning will escalate. The reputation of the corporation will thereby be seriously damaged. It is clear from past cases that this will happen. In circumstances where, as in the present case, a dubious supply of 63,000,000 yen was made and it is suspected that a positive attempt was made to conceal that supply, it is sufficiently foreseeable that a further plan to passively conceal the supply would result in a crisis relating to food safety which would threaten the existence of the corporation.

To avoid such a situation, management was clearly expected to positively consider plans to minimize the damage of loss of reputation that D would suffer as a result of the serious illegal acts already committed. However, the defendants did not explicitly discuss such plans at meetings of the board of directors. Instead, they implicitly approved a plan "to not voluntarily make an announcement", which was unclear and left the situation to develop on its own. This cannot be called "business judgment".

In terms of adopting the plan "to not voluntarily make an announcement" and failing to consider positive plans to mend damage due to the reactions of consumers and the media, those defendants who were directors clearly breached their duty of care. The defendant who was a corporate auditor also breached his duty of care in auditing the directors' clear negligence of their duties.

Y1, Y2 and the other defendants are liable for extending the damage by breaching their duty of care. The proportion of the liability of each defendant will be different, depending on such matters as their position, and when they became aware of the facts.

3. Comment

The main issues in this case are: (a) when the defendants became aware of the Addition and the Sales; and (b) whether they breached their duty of care by not taking appropriate measures to minimize the damage and loss of reputation to D as soon as they became aware of the above facts.[40] As to the first point, according to the Court, Y1, who was a representative director and president, became aware of the facts around 8 February 2001; Y2, who was a managing director, became aware around the end of December 2000, the other defendants became aware after July 2001. As to the second point, the High Court held that the defendants breached their duty of care. In addition to these two issues, the Court determined an amount of damages for which each defendant was liable to the

40 Another main issues in this case was the amounts of damages the directors would owe, and how those amounts would be calculated. For details on this issue, see M. KITAMURA, *Ihô kôi no inpei ni yoru shin'yô no shitsu'i to torishimariyaku no baishô sekinin* [Loss of Confidence by Concealing Illegal Acts and Directors' Liability for Damages], in: Shôji Hômu 1803 (2007) 4, 9 *et seq*.

extent that proper causality was found between the duty of care and the Contribution.[41] Specifically, Y1 was liable to D for five percent of the Contribution, Y2 was liable for a total amount of five percent of the Contribution and the payment to Z of 30,000,000 yen, and the other defendants were jointly and severally liable for two percent of the Contribution.

In relation to the breach of the duty of care, X argued that the defendants had a duty of care to set up the following systems: (a) a risk control system to prevent unlicensed additives such as TBHQ from being mixed in with foods sold by D; (b) a system whereby the discovery of the addition of such unlicensed additives would require the directors to act, and any illegal acts would be reported to the board of directors; and (c) in relation to the Payment, a system whereby if directors or others knew of a suspicion of illegal acts such as threats, a mandatory investigation would be conducted and the results would be brought to the board of directors. However, the defendants failed to set up these systems. The High Court stated that it was a matter of business judgment to set up a risk control system and to decide its details, and extensive discretion was given to directors. The Court held that it could not be said that D did not have such a system. The Court then held that the defendants breached their duty of care because they did not take appropriate measures to minimize the damage and loss of reputation to D as soon as they became aware of the Addition and the Sales. More specifically, the defendants did not announce the above facts at an earlier stage even though that would have been an appropriate measure in the circumstances. The defendants breached their duty of care in this regard.

The Company Law has provisions clearly stating a duty to set up a risk control system or an internal control system (see Art. 348 para. 3 no. 4, para. 4; Art. 362 para. 4 no. 6, para. 5; Art. 416 para. 1 no. 1 CL; Art. 98, Art. 100, Art. 112 ERCL).[42] This case began before the commencement of the Company Law. Since Y7 was a corporate auditor, D was not a corporation with directors' committees. In this case, X relied on directors' duty of care as the basis for a duty to set up the above-mentioned systems. In this case the Court refused the duty to set up a risk control system or an internal control system, but it held that the directors of D breached their duty of care by failing to announce the Addition and Sales.

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41 On this point, see KITAMURA, *supra* note 40, 9 *et seq.*; K. HATADA, *Shokuhin eisei-hô jô shiyô ga mitomerarete inai shokuhin tenkabutsu wo shiyô shita shôhin ga hanbai sareteita koto wo ato kara ninshiki shita torishimari-yaku no kôhyô subeki gimu* [Directors who became aware after the fact that products which contained a food additive not allowed to be used under the Food Sanitation Law, and the directors' duty to make an announcement], in: Heisei 18 nendo Jûyô Hanrei Kaisetsu [Analysis of Important 2006 Cases] (Jurisuto 1332 (2007) 102, 103).

42 For risk control systems or internal control systems, for example, see S. NOMURA, *Torishimariyaku no kantoku gimu to naibu tôsei taisei* [Directors' Duty to Supervise and Internal Control Systems], in: E. Egashira / S. Iwahara et al., *supra* note 9, 124.

V. BAD LOANS TO CORPORATIONS IN FINANCIAL DIFFICULTY AND THE LIABILITIES OF DIRECTORS OF A BANK [43]

1. Facts

In 1900 A bank was incorporated and its network grew to more than two hundred main, branch, and other offices. On 17 November 1997 its management failed.

In 1987 A made a loan to N. Between 30 April 1991 and 31 March 1992 A made loans to E four times.

On 11 November 1998, a representative director of A concluded a contract with X for the sale and purchase of assets of A. On this contract, A transferred A's right to claim against the defendants for damages based on default (hereinafter: Transfer). From 3 to 14 December 1998, A gave the defendants notice of the Transfer. X filed an action arguing that the defendants, who were directors of A, breached their duty of care and duty of loyalty by approving loans made by A and thereby caused damage to A, namely that A could not collect on loans of about 13,700,000,000 yen to E, and of about 2,700,000,000 yen to N. X argued that the defendants were liable for this damage. At first instance, the Court dismissed X's claim. X appealed. In the present case the main issue was, in relation to the degree of the duty of care in making loans, whether the directors of a bank have a stricter duty than directors of general business corporations.

2. Held

Since directors of stock corporations are, as specialists, given a mandate for the management of the corporation, to perform their duties with special knowledge and experience, the directors are required to make decisions purposively, comprehensively and from a policy viewpoint. When directors of banks are determining a loan, on the one hand they are expected to ensure and expand interests obtainable from the loan such as interest income, expansion of business opportunities, and improving the possibility of collecting on loans already made. On the other hand, from the viewpoint of ensuring the sound management of banks and the protection of depositors, when directors of banks are deciding whether to approve loans they are expected to observe principles of certainty (safety) (i.e. supplying loans which are certain to collect) and profitability (i.e. supplying loans which are profitable to the bank). Due to these principles and the public interest, the extent of discretion given to the directors of banks is limited.

A decision as to whether the directors of a bank have breached their duty of care should be made by considering the knowledge and experience generally expected of directors of banks and by looking at: (a) whether the information gathering, analysis and consideration given to the judgment concerned lacked rationality in the light of the

43 Sapporo High Court, 2 March 2006, in: Hanrei Jihô 1946, 128.

situation at that time; and (b) whether the reasoning and substance of the judgment presupposing the information gathering, analysis and consideration were irrational in light of the principles of certainty and profitability, and the public interest in banking affairs.

Thus, the substance of the duty of care that directors of banks owe is different from that of the duty of care that directors of general business corporations owe. This difference in substance arises from a difference in business affairs. Therefore, it is meaningless to discuss which directors owe the stricter duty of care by comparing the degree of the duty of care owed by directors of banks and directors of general business corporations.

After explaining the above, the Court held as follows. Although the loans to E took the form of a "loan", they were really contributions of money with no plans to collect. They were in fact "donations", and as such they would have needed the approval of the board of directors for the disposition of an important asset (Art. 260 para. 2 no. 1 CC). Since there were no approvals by the board of directors, the defendants violated the Commercial Code by carrying out those loans. As for the loan to N, even if a right to claim damages arose, it would have become extinct on the grounds of extinctive prescription. In the end, the Court ordered that the defendants jointly and severally pay 3,000,000,000 yen.

3. Comment

In this case, the Resolution and Collection Corporation (hereinafter: RCC), which obtained credits by transfer from a failing bank, pursued liabilities against the bank's former management. Many financial institutions failed after the collapse of the bubble. The RCC was incorporated as a national policy corporation to deal with the failing financial institutions. The RCC pursued liabilities against directors and other officers of these institutions and, as a result, a number of cases concerning the liabilities of directors and officers of financial institutions have accumulated.[44] In cases where actions have been brought against the directors and other officers of financial institutions, one of the crucial issues is whether the directors of financial institutions owe a stricter duty of care than directors of general business corporations.[45] The present case was one of this

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44 S. IWAHARA, *Kin'yû kikan torishimari-yaku no chûi gimu – kaisha-hô to kin'yû kantoku-hô no kôsaku* [Duty of Care of Directors of Financial Institutions – Complications with Corporations Law and Financial Supervision Law], in; S. Kozuka / M. Takahashi (ed.), *Ochiai Sêi'ichi sensei kanreki kinen – shôji-hô he no teigen* [60th Birthday Celebration for Professor Ochiai Sei'ichi – Opinions on Commercial Law] (Tokyo 2004) 175; A. YOSHII, *Hatan kin'yû kikan wo meguru sekinin hôsei* [Legal Systems for Liabilities Concerning Failing Financial Institutions] (Tokyo 1999) 264 *et seq*.

45 IWAHARA, *supra* note 44, 175.

kind.[46] It is established in Japan, based on the analysis of cases and academic theories, that the substance and degree of the duty of care required of the management, such as directors and executive officers, of financial institutions are different from the substance and degree of the duty of care required of the management of general business corporations,[47] and that the duty of care for the management of financial institutions, in relation to both the process and substance of the decisions made by management, entails a higher standard than the duty of care for the management of business corporations.[48] In the present case, the Court held that the substance of the duty of care that directors owe can differ based on a difference in business affairs, and therefore the substance of the duty of care that directors of banks and those of general business corporations owe can be different. As such, the standard of the duty of care required of the directors of banks can be stricter than that of the duty of care required of the directors of general business corporations.[49]

The business judgment rule applies in relation to the duty of care. In applying the business judgment rule, United States courts scrutinize whether any conflicts of interest are found between the directors and the corporation and whether there is any irrationality in the directors' decision-making process, but the courts do not interfere in relation to whether the substance of the judgment made by the directors is rational.[50] Under the Japanese business judgment rule, the courts also scrutinize the substance of the judgment made by directors.[51] This is also true of the German business judgment rule

46 For details on a number of these cases, see *ibid*.

47 *Ibid.*, 210; K. YOSHIHARA, *Torishimari-yaku no kei'ei handan to kabunushi daihyô soshô* [Business Judgment of Directors and Derivative Actions], in: H. Kobayashi / M. Kondô, *Shinpan kabunushi daihyô soshô taikei* [New Edition Outline of Derivative Actions] (Tokyo 2002) 119. For analysis of cases, including the preceding literature, see S. KANKI, *Kin'yû kinô yakuin no yûshi kessai sekinin* [Officers of Financial Institutions and their Liability for Approvals of Loans] (Tokyo 2005) 15 *et seq.*, 52 *et seq*.

48 YOSHII, *supra* note 44, 264 *et seq.*; IWAHARA, *supra* note 44, 211; YOSHIHARA, *supra* note 47, 119.

49 YOSHIHARA, *supra* note 47, 119; K. YOSHIHARA, *Torishimari-yaku no chûi gimu to kabunushi daihyô soshô* [Directors' Duty of Care and Derivative Actions], in: E. EGASHIRA / S. IWAHARA ET AL., *supra* note 9, 123.

50 EGASHIRA, *supra* note 19, 424. For German comments on the business judgment rule in the United States, see H. MERKT / S. GÖTHEL, US-amerikanisches Gesellschaftsrecht (2nd ed., Frankfurt a.M. 2006) 426 *et seq*.

51 H. KANDA, *Kaisha-hô* [Corporations Law] (9th ed., Tokyo 2007) 192; for the Japanese business judgment rule, see YOSHIHARA, *supra* note 47, 78; YOSHIHARA, *supra* note 49, 122; EGASHIRA, *supra* note 19, 423 *et seq*. For German comments on the development of the Japanese business judgment rule, see E. TAKAHASHI, Corporate Governance in Japan: Vorgriff auf künftige Reformen in Deutschland?, in: D. Leipold (ed.), Verbände und Organisationen im japanischen und deutschen Recht (Köln 2006) 91 *et seq*.

(Art. 93 para. 1 German Stock Corporation Act [Aktiengesetz])[52]. In Japan, however, directors are given substantial discretion.[53] The business judgment rule also applies to directors and other officers of financial institutions.[54] In the case of the management of financial institutions, however, compared with the management of general business corporations, the required standard of rationality in terms of both the process and substance of the business judgment made by the management is high, and the extent of the management's discretion is small.[55] In the present case, the Court stated that there are restrictions on the extent of the discretion of directors of banks in relation to decisions whether to give loans.

VI. CONCLUSION

The Japanese economy in 2006 was stable and in good condition compared with the period after the bubble collapse. The number of individual shareholders is increasing.[56] There were 39,800,000 individual shareholders in the 2006 fiscal year, which is a rise of 1,200,000 from the previous year.[57] The interests of shareholders tend to be emphasized in relation to corporate governance. Shareholders' meetings have become more important as a place where the management can communicate directly with shareholders,[58] and they are expected to be run in such a way that many individual shareholders can participate. At the shareholders' meetings, the directors are expected to give clear explanations of matters relating to the corporation's management. In this context, the provision preventing the activities of *sôkaiya* racketeers, and the decision of the Supreme Court relating to that provision, are significant to shareholders. In Japan, the courts

52 M. LUTTER, Die Business Judgment Rule und ihre praktische Anwendung, in: Zeitschrift für Wirtschaftsrecht (ZIP) (May 2007) 845. For English comments on the German business judgment rule, see T. NARUISCH / F. LIEPE, Latest Developments in the German Law on Public Companies by the Act on Corporate Integrity and Modernization of the Right of Resolution –Annulment (UMAG) Shareholder Activism and Directors' Liability Reloaded, in: The Journal of Business Law (May 2007) 238.

53 EGASHIRA, *supra* note 19, 423, YOSHIHARA, *supra* note 49, 123.

54 IWAHARA, *supra* note 44, 215 *et seq.*; KANKI, *supra* note 47, 24.

55 IWAHARA, *supra* note 44, 216 *et seq.*; YOSHIHARA, *supra* note 47, 119; YOSHIHARA, *supra* note 49, 123. For comment on a case where the business judgment rule was applied to the business judgement of directors of a securities corporation, see E. TAKAHASHI, *Kanren kaisha ni taisuru shienkin kyôyo to kei'ei handan gensoku* [Supply of Supporting Funds to an Associated Corporation and the Business Judgment Rule], in: Shôji Hômu 1747 (2005) 55.

56 See E. TAKAHASHI / T. SAKAMOTO, Practical Experiences with the New Japanese Company Code in 2005/2006, in: ZJapanR / J.Japan.L. 23 (2007) 41 *et seq*.

57 Nikkei Shinbun, 16 June 2007.

58 See TAKAHASHI / SAKAMOTO, *supra* note 56, 41 *et seq*.

allow stock corporations to make political donations. The issue of political donations by stock corporations has been discussed for a long time and one academic view arguing that such donations should not be allowed under constitutional law is not currently followed by the courts.

The 2006 cases discussed in this paper reveal traditional problems with the Japanese business world: the business world and political world have a close money-based connection, and the issues between the business world and violent gangsters remain unresolved. The courts tolerate the Japanese business practice of political donations, following the Supreme Court in the *Yahata Steel* case. On the other hand, the courts take a tough stance against gangsters by strictly applying the provision prohibiting the granting of interests to them.

ZUSAMMENFASSUNG

Der Beitrag analysiert vier aktuelle obergerichtliche Entscheidungen zu gesellschaftsrechtlichen Fragen, die in Japan große Beachtung gefunden haben. In den Urteilen geht es im Kern um die japanische Unternehmenskultur und die Interpretation der japanischen Ausprägung der business judgement rule. *Eine Entscheidung des Obergerichts Nagoya setzt sich aus dieser Perspektive mit den Voraussetzungen und Grenzen von Parteispenden durch Unternehmen auseinander. Das Thema wird in Japan seit langem kontrovers diskutiert. In dem anschließend vorgestelltem Urteil des Obersten Gerichtshofes geht es um die Zulässigkeit von Sondervergütungen an Aktionäre aus dem Umfeld des organisierten Verbrechens. Auch dies ist eine Problematik, die die japanische Justiz immer wieder beschäftigt hat. In der dritten Entscheidung befaßt sich das Obergericht Osaka mit den Anforderungen, die an die unternehmerischen Sorgfaltspflichten zu stellen sind, um Schaden von dem Unternehmen fernzuhalten. Letztere stehen auch im Mittelpunkt des vierten Urteils. Das Obergericht Sapporo hatte die Frage zu klären, ob für das Management eines Finanzinstituts verschärfte Sorgfaltspflichten gelten; dies hat es bejaht.*

(Zusammenfassung durch die Red.)