

2015

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Eiji Takahashi

Bluebook Citation

Eiji Takahashi, *"Reception" and "Convergence" of Japanese and German Corporate Law*, 12 U. St. Thomas L.J. 228 (2015).

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ARTICLE

“RECEPTION” AND “CONVERGENCE” OF JAPANESE AND GERMAN CORPORATE LAW

EIJI TAKAHASHI*

INTRODUCTION

The traditional relationship between Japanese and German corporate law has been characterized as the “reception” by the former of the latter. However, in recent years, the development of both Japanese and German corporate law has been modeled on U.S. law. In this article, I term the phenomenon in which the content of the two corporate laws grow increasingly similar to U.S. law “convergence,” and aim to identify and address some issues concerning this new phenomenon.

In Part I, I shed light on the Japanese reception of German corporate law by locating the issues involved. In Part II, I use the examples of the shareholder’s derivative action and the business judgment rule to elaborate on the new relationship of “convergence” between the two nations’ corporate laws. I then discuss the problems caused by this new phenomenon and conclude with a list of suggestions.

I. RECEPTION OF GERMAN CORPORATE LAW BY JAPAN

A. *The Traditional Relationship between Japanese and German Corporate Law: Systems Reception and Theory Reception*

The influence of German law on Japanese civil law is often described as “theory reception” by the latter of the former.¹ However, the systems

* Director of the J.D. Program and Professor of Law, Osaka City University Graduate School of Law. This paper is also published in *Zeitschrift für Japanisches Recht* Nr. 38. I wish to thank Mr. Alan K. Koh of the National University of Singapore Faculty of Law for his assistance in editing this paper. Japanese authors mentioned or cited in this paper are named in the Last Name-First Name order that is proper to East Asian names except where they are named in the reverse order in a western publication.

1. ZENTARO KITAGAWA, *REZEPTION UND FORTBILDUNG DES EUROPÄISCHEN ZIVILRECHT IN JAPAN [RECEPTION AND CONTINUING EDUCATION OF EUROPEAN CIVIL LAW IN JAPAN]* 67 *et seq.* (1970).

aspect has drawn more attention than the theory aspect when it comes to the influence of German law on the Japanese Commercial Code. For example, the former Japanese Commercial Code (*Shōhō*) was drafted by Hermann Roesler, and much of the content was drawn from the provisions of the German General Commercial Code of 1861 (the *Allgemeine Deutsche Handelsgesetzbuch*, “ADHGB”).² The influence of German law on the content of the former Limited Liability Company Act (*Yūgen Kaishahō*) enacted in 1938 was also striking.³ German law continues to exert great influence on the theoretical aspects of Japanese corporate law even today.

B. Japanese Corporate Law Concepts of German Origin

1. The Fundamental Nature of the Stock Corporation

Since the ADHGB of 1861, German law has had a conceptual definition of the stock corporation. The definition in Article 207 of the ADHGB is as follows: “A commercial corporation is a stock corporation if its members participate only through contributing capital, and bear no liability for corporate obligations. Corporate capital is divided into shares or share interests.”⁴ The Imperial German Commercial Code (the *Handelsgesetzbuch*, “HGB”) of 1897 replaced the term “corporate capital” with “paid-in capital” or “share capital” and continued using the ADHGB definition almost word-for-word.⁵

The founder of Japanese corporate law studies, Dr. Okano Keijirō, who studied under Otto von Gierke in Berlin, adopted the 1861 General Commercial Code definition of the stock corporation as an academic concept for Japan’s stock corporation. He also elaborated on the following three features of Japan’s stock corporation in 1929: one, “the fixed fund created by the capital contribution of the members”⁶; two, “the capital is

2. ANNA BARTELS-ISHIKAWA, HERMANN ROESLER: DOKUMENTE ZU SEINEM LEBEN UND WERK [HERMANN ROESLER: DOCUMENTS ON HIS LIFE AND WORK] 62 (2007).

3. SAKAMAKI TOSHIO, HEISATEKI KAISHA NO HŌRI TO RIPPŌ [PRINCIPLES AND LEGISLATION OF CLOSED COMPANIES] 238 (1973); ŌTORI TSUNEO, YŪGEN KAISHAHŌ NO KENKYŪ [STUDIES IN LIMITED LIABILITY COMPANY LAW] 70 (1965); Harald Baum & Eiji Takahashi, *Commercial and Corporate Law in Japan, Legal and Economic Developments after 1868*, in HISTORY OF LAW IN JAPAN SINCE 1868, at 343 (Wilhelm Röhl ed., 2005).

4. The definition of a stock corporation under the Aktiengesetz currently in force is more polished. As defined by Article 1(1), “The company is a stock corporation that constitutes a separate legal entity. Liability to creditors with respect to obligations of the company shall be limited to the company’s assets.” Article 1(2) states, “The company shall have a capital divided into shares.” Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBL. I at 1089, last amended by Gesetz [G], July 23, 2013, BGBL. I at 2586, art. 1 (Ger.), translated in Norton Rose Fulbright, *German Stock Corporation Act (Aktiengesetz): English translation as of September 18, 2013*, <http://www.nortonrosefulbright.com/files/german-stock-corporation-act-109100.pdf>.

5. HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE], 1897, art. 207(1)–(2) (Ger.).

6. OKANO KEIJIRŌ, CORPORATE LAW 207 *et seq.* (Yuhikaku ed., 1929).

divided into a certain number of shares”⁷; three, “the liability of each member is limited.”⁸

Dr. Suzuki Takeo adopted Dr. Okano’s ideas, and following Karl Lehmann,⁹ characterized the stock corporation’s distinctive features as shares, limited liability, and capital.¹⁰ This remains accepted as the traditional doctrine in Japan.¹¹

2. *The Three Principles of Capital*

German legal science emphasized two principles concerning the capital of stock corporations. In 1898, Karl Lehmann argued that the principle of fixed share capital (*Prinzip des festen Grundkapitals*) should apply to the capital of a stock corporation, and that the defined value of assets to be contributed as capital should be clearly stated.¹² Lehmann also argued that the “principle of stability of share capital (*Prinzip der Beständigkeit des Grundkapitals*) should apply, and that once decided, the share capital amount should not be arbitrarily changed.”¹³

Initially, Japanese doctrine simply followed Lehmann’s principals. In 1916, Dr. Matsumoto Jōji argued in support of the principles of fixed share capital and maintenance of capital. On the principle of maintenance of capital, Dr. Matsumoto accepted Lehmann’s *Prinzip der Beständigkeit des Grundkapitals*, arguing that this “means that capital cannot be arbitrarily changed.”¹⁴

7. *Id.*

8. *Id.*

9. 2 KARL LEHMANN, *DAS RECHT DER AKTIENGESELLSCHAFTEN* 158 *et seq.* (1898).

10. However, Suzuki saw capital as a creation of legal policy that takes into consideration the consequences of the regime of shareholders’ limited liability. Therefore, to Suzuki, the features of the stock corporation are in that sense secondary characteristics. SUZUKI TAKEO, *KAISHAHO* [CORPORATE LAW] 19 (rev. ed. 1956).

11. MORIMOTO SHIGERU, *KAISHAHO SHŌKŌIHŌ TEGATAHŌ KŌGI* [LECTURES ON CORPORATE LAW, BUSINESS TRANSACTIONS, AND BILLS] 28 *et seq.* (2d ed. 2011); MAEDA HITOSHI, *KAISHAHO NYŪMON* [INTRODUCTION TO CORPORATE LAW] 18 *et seq.* (12th ed. 2009); ŌSUMI KENICHIRO, *IMAI HIROSHI & KOBAYASHI RYŌ, SHIN-KAISHAHO GAISETSU* [AN OUTLINE OF THE NEW COMPANIES ACT] 19 *et seq.* (2d ed. 2010); TAKAHASHI EIJI, *KAISHAHO GAISETSU* [AN OUTLINE OF CORPORATE LAW] 37 (2d ed. 2014). In contrast, Professors Egashira Kenjirō and Kanda Hideki argue that of shares, limited liability, and capital, only limited liability is a fundamental distinguishing feature of the stock corporation. EGASHIRA KENJIRŌ, *KABUSHIKI KAISHAHO* [STOCK CORPORATIONS LAW] 32 *et seq.* (4th ed. 2011); KANDA HIDEKI, *KAISHAHO* [CORPORATE LAW] 26 (14th ed. 2012).

12. LEHMANN, *supra* note 9, at 167.

13. *Id.* at 168.

14. MATSUMOTO JŌJI, *KAISHAHO KŌGI* [LECTURES ON CORPORATE LAW] 208 *et seq.* (1916). Matsumoto’s “principle of maintenance of capital” was what Lehmann called “the principle of stability of capital,” and corresponds to today’s “principle of constant capital” (*Shihon Huhēn no Gensoku*). TAKAHASHI, *supra* note 11, at 39.

Subsequently in 1928, Rudolf Müller-Erbach emphasized the sufficiency of the capital fund (*Das Aufbringung des Grundkapitals*)¹⁵ and the continuous maintenance of the capital fund (*Die dauernde Erhaltung des Grundkapitals*)¹⁶ as the distinctive features of stock corporation capital. He also elaborated on the obligation to contribute the equivalent of the full capital sum from the perspective of capital sufficiency, and the prohibition on the return of contributed capital and corporate purchase of its own stock from the perspective of capital maintenance.¹⁷

Based on Lehmann's theory, and taking into account Müller-Erbach's opinion, Dr. Okano explained the necessity for the entirety of a corporation's share capital to be subscribed as the principle of fixed share capital, and that from this principle is derived the principles of constant capital and capital fund maintenance.¹⁸ Regarding the principle of capital maintenance, Okano reasoned that "property equivalent to the share capital amount must be kept as the economic foundation of the corporation."¹⁹ The foundations of the three principles of capital in Japanese corporate law were thus laid. The three principles of capital became the established doctrine through the efforts of Dr. Suzuki²⁰ and remained the leading doctrine until the 2005 amendments.²¹

The legislative draftsmen of the Companies Act of 2005 took the view that the new statute did not incorporate the duty to ensure capital sufficiency in its traditional sense. This view was based on the abolishment of the promoter's duty of warranty of subscription²² and duty of warranty of contribution.²³ Since then, academic opinion has been divided on the question of whether the three principles of capital remain applicable to the regime under the Companies Act of 2005. Although the majority opinion is that the three principles remain relevant to the Companies Act,²⁴ Professor Kanda Hideki argues that of the three principles, only the principle of capi-

15. RUDOLF MÜLLER-ERBACH, *DEUTSCHES HANDELSRECHT* [GERMAN COMMERCIAL LAW] 247 *et seq.* (3d ed. 1928).

16. *Id.* at 249 *et seq.*

17. *Id.*

18. OKANO, *supra* note 6, at 209.

19. *Id.* at 208 *et seq.*

20. SUZUKI, *supra* note 10, at 24 *et seq.*

21. NISHIHARA KAN'ICHI, KAISHAHŌ (SHŌHŌ KŌGI II) [CORPORATE LAW (LECTURES ON COMMERCIAL LAW II)] 76 *et seq.* (1969).

22. Art. 192(1), pre-2005 Shōhō (Comm. C.).

23. *Id.* Art. 192(2); Kōriya Daisuke & Iwasaki Tomohiko, *Kaishahō ni okeru Saikensha Hogo (jō)* [Creditor Protection in the Companies Act (Part 1)], 1764 SHŌJI HŌMU 52 (2005). Previously, promoters and directors at formation of the stock corporation were liable to subscribe for any shares left unsubscribed, and to pay in any capital contribution not paid in by subscribing members.

24. EGASHIRA, *supra* note 11, at 35 *et seq.*; MAEDA, *supra* note 11, at 21 *et seq.*; TAKAHASHI, *supra* note 11, at 38 *et seq.*

tal maintenance survives, as members are disenfranchised if they fail to discharge their duty to pay in share capital.²⁵

The three principles of capital that Japanese law acquired from German law were useful conceptual tools for explaining the principles of corporate finance. However, the enactment of the Companies Act of 2005 narrowed the field to which the three principles of capital are applicable. Japanese corporate legal studies now face the challenge of returning to the founding spirit of the field and of discovering and developing a coherent theory inherent within the structure of corporate finance.

3. *Corporation-in-Formation*

The leading theory in early German doctrine described pre-incorporation legal relationships as that of a partnership of promoters. In 1864, Paul Laband explained the relationship of share subscribers by arguing that during pre-incorporation, there existed at least a partnership of promoters, and it is to this partnership that subscribers of shares owe the duty to pay in capital.²⁶

In contrast, Otto von Gierke argued in 1887 that “if the law recognizes an established association, then the law cannot refuse to recognize an association undergoing the establishment process. The fixed realm of legal principles that govern life within the public body also covers its life during the infancy of the public body.”²⁷ In making this argument, Gierke had in mind the stock corporation as an example of such an association.

Building on the work of scholars like Otto von Gierke,²⁸ Dr. Tanaka Kōtarō drew a parallel between the existence of this pre-incorporation form with the existence of a fetal stage before an infant human’s birth. He argued that corporations also had a fetal stage, which he called the “corporation-in-formation,” and structured his theory of the legal relationships involved around that concept.²⁹ As to the motive behind the concept of the corporation-in-formation, he later reflected:

The birth of an organizational body such as the stock corporation is not a single act, nor would a single act suffice to make it happen. First the promoters must create the articles of incorporation, followed by a subscription for shares, issuance, paying in of

25. KANDA, *supra* note 11, at 268.

26. Paul Laband, *Rezension: Renaud, Das Recht der Actiengesellschaften* [Review: Renaud’s *The Law of Stock Corporations*], 7 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 617, 620 (1864).

27. OTTO VON GIERKE, DIE GENOSSENSCHAFTSTHEORIE UND DIE DEUTSCHE RECHTSPRECHUNG [THE ASSOCIATION THEORY AND GERMAN CASE LAW] 135 *et seq.* (1887).

28. 1 OTTO VON GIERKE, DEUTSCHES PRIVATRECHT: ALLGEMEINER TEIL UND PERSONENRECHT [GERMAN PRIVATE LAW: GENERAL PART AND THE LAW OF PERSONS] 486 *et seq.* (1895); GIERKE, *supra* note 27, at 135 *et seq.*

29. TANAKA KŌTARŌ, GŌMEI-KAISHA SEKININ-RON [ON LIABILITY IN UNLIMITED COMPANIES] 376 *et seq.* (1919).

capital, holding of the meeting of formation Thus it is by going through the stages that a corporation is born, a process strikingly similar to how a fetus grows in stages in the mother's body, and becomes a complete person upon birth. Accordingly, I conceptualized the promoters as an organ of the fetal corporation, and attempted to ground the basis of promoters' obligations in their status as such.³⁰

He characterizes this approach as “[one from] a sociological perspective observing legal persons in a biological, organic way. In other words, its theoretical foundation is not that of a Romanistic, individualistic theory of private law, but rather of Germanistic collectivism.”³¹ The theory of “corporation-in-formation” first introduced into Japanese law by Dr. Tanaka still receives support from lower court judgments³² and prevailing doctrinal thought to this day.³³

However, the concept of the corporation-in-formation in prevailing Japanese legal thought differs from its German counterpart in one distinct respect. Under German law, there is an initial agreement between the promoters to form the corporation—“the partnership of promoters” (*Vorgründungsgesellschaft*). By accomplishing the purpose of this partnership, which is to determine the articles of incorporation,³⁴ the partnership is dissolved.³⁵ Subsequently, the rights and duties of the partnership of promoters are succeeded by the corporation-in-formation (*Vorgesellschaft*), and the corporation in turn succeeds the rights and duties of the corporation-in-formation with the registration of formation. The German theory, therefore, is that the growth of the corporation progresses in stages.³⁶

In contrast, in Japanese law, the corporation-in-formation and the partnership of promoters are competing concepts. In prevailing Japanese doctrine:

[T]he partnership of promoters, which is a partnership formed under the civil law . . . does not develop into a corporation-in-formation, but rather co-exists separately from the corporation-in-formation. It is just that the promoters, who are both members and an organ of the corporation-in-formation, and the members of the partnership of promoters are, as explained above, the same insofar as the personal aspect is involved. Also, the corporation-in-forma-

30. YANAGISAWA TAKESHI, IKITEKITA MICHI (TANAKA KŌTARŌ) [THE PATH I HAVE LIVED (MEMOIRS OF TANAKA KOTARŌ)] 121 (1950, reprinted 1997).

31. *Id.* at 122.

32. Tōkyō kōsai [Tokyo High Ct.] Jul. 26, 1976, 831 HANREI JIHŌ 94 (Japan); Tōkyō kōsai [Tokyo High Ct.] May 23, 1989, 1252 KIN'YŪ HŌMU JIŌ 24 (Japan).

33. EGASHIRA, *supra* note 11, at 105 n.2; KANDA, *supra* note 11, at 55 *et seq.*

34. Art. 726, Bürgerliches Gesetzbuch [BGB] [Civil Code] (Ger.).

35. Article 726 of the German Civil Code states that a partnership formed under civil law is dissolved by accomplishing its stated purpose. *Id.*

36. Friedrich Kübler & Heinz-Dieter Assmann, Gesellschaftsrecht [Law of Organizations] 377 *et seq.* (6th ed. 2006).

tion and the partnership of promoters are closely connected. That is to say, the creation of the articles of incorporation, subscription of shares and the performance of duties necessary for the formation of the corporation and the like by the promoters are, to the corporation-in-formation, the creation of its constitution, formation and the operations of its organ. However, to the partnership of promoters, such acts are the performance of the partnership agreement.³⁷

The jurisprudence of the lower courts in Japan also takes the view that the partnership of promoters and corporation-in-formation co-exist.³⁸

After 1970, Flume argued that the fundamental nature of a partnership at civil law is that of collective ownership (*Gesamthand*), where the rights and duties of the partnership belong to the partners as a collective.³⁹ This became prevailing doctrine.⁴⁰ It was a result of characterizing the civil law partnership as a type of collective, an idea that originated in German law.

The 1994 Reorganization Act enabled the change from an organization of persons to an organization of capital.⁴¹ This change brought strong arguments that partnerships in civil law have legal personality.⁴² In addition, on January 29, 2001, the Federal Court of Justice handed down a decision recognizing the legal capacity of the external partnership in civil law.⁴³ At Flume's centennial memorial symposium, Karsten Schmidt said, "I am beginning to wonder if the *Körperschaft* and the external organization of persons are but just separately regulated legal persons."⁴⁴

The legal nature of the partnership of promoters is thought to be that of a partnership in civil law. But consider the possibility of introducing into Japanese law the new idea, recognized by German judicial precedent, that a partnership in civil law has legal capacity. If so introduced, legal relation-

37. Kitazawa Masahiro, *Setsuritsu-chū no Kaisha to Hokkinin Kumiai* [*The Corporation-in-Formation and the Partnership of Promoters*], in 5 KEIYAKUHŌ TAIKEI (TOKUSHU NO KEIYAKU 1) [COMPENDIUM OF CONTRACT LAW (SPECIFIC CONTRACTS 1)] 116 (Keiyakuhō Taikēi Kankō I'inkai ed., 1963). For a similar view, see SUZUKI TAKEO & TAKEUCHI AKIO, KAISHAHŌ [CORPORATE LAW] 56 (3d ed. 1994).

38. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 21, 1992, 1434 HANREI JIHŌ 54 (Japan).

39. 1 WERNER FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS: TEIL 1, DIE PERSONENGESellschaft [THE GENERAL PART OF CIVIL LAW: PART 1, THE ASSOCIATION OF PERSONS] 56 (1977).

40. According to Karsten Schmidt, an external partnership under civil law is a *Gesamthandsgesellschaft*. KARSTEN SCHMIDT, GESELLSCHAFTSRECHT [LAW OF ORGANIZATIONS] 1697 (4th ed. 2002).

41. Kōsei-hō [Reorganization Act] art. 214(1) (1994) (Japan).

42. Thomas Raiser, *Gesamthand und juristische Person im Licht des neuen Umwandlungsrechts* [*Collective Ownership and the Legal Person in Light of the New Reorganization Act*], 194 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 495, 505, 511 (1994) (Japan).

43. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 29, 2001, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 146, 341 (Ger.).

44. Karsten Schmidt, *Die Personengesellschaft als Rechtsfigur des 'Allgemeinen Teils'* [*The Organization of Persons as a Legal Construct of the 'General Part'*], 209 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 181, 202 (2009).

ships created while a corporation is in formation would belong to the partnership of promoters, and it would suffice to say that these relationships would simply be succeeded by a corporation formally brought into existence upon registration. It is necessary to consider, in this case, whether the competing concept of corporation-in-formation is truly necessary.⁴⁵

4. *The Dualism of the Act of Electing a Director and the Contract of Appointment*

German law distinguishes between the election (*Bestellung*) and the appointment (*Anstellung*) of directors. This is called the “separation principle” (*Trennungstheorie*).⁴⁶ According to German law, election is an act under corporate law and refers to the act of the relevant party (the would-be director) becoming the corporate organ of “director” by his acceptance. Appointment, on the other hand, refers to the creation of contractual relationships between the corporation and each individual director. To end a relationship of appointment, the appointment contract must be terminated.⁴⁷ In such a case, in order to terminate an employment relationship without a fixed term, there must be one or more important grounds for termination as pursuant to Article 626 of the Civil Code.

The consensus in Japanese law is that election of a director is a unilateral act conditioned upon the acceptance of the elected person, which becomes effective with the shareholder resolution electing the director and the elected person’s acceptance.⁴⁸ On the other hand, Dr. Ōsumi Kenichirō and Dr. Imai Hiroshi, influenced by the separation principle from German law, argue that the election of directors has, in addition to its organizational law aspect (in the sense of making the elected persons part of a corporate law organ), a personal law aspect in the sense that the elected person has to bear the personal duty of providing labor as a director. Therefore, according to Ōsumi and Imai, the consensus understanding of election as a unilateral act cannot explain the personal law aspect.⁴⁹

Japanese corporate law contains rules premised on the consensus that removal of directors constitutes a unilateral act. Specifically, under Japanese corporate law, a corporation may remove a director at any time.⁵⁰ In contrast with German law, which is premised on the separation principle, the contract of appointment loses effect at the same time as the termination of the director. A removed director has a right to claim damages for “remu-

45. TAKAHASHI, *supra* note 11, at 44.

46. *See* AktG art. 84(1)(5).

47. 79 BGHZ 38 (41) (Ger.).

48. SUZUKI & TAKEUCHI, *supra* note 37, at 270 n.9.

49. *See* ŌSUMI KENICHIRO & IMAI HIROSHI, KAISHAHŌRON CHŪKAN [ON CORPORATE LAW, MIDDLE PART] 149 *et seq.* (3d ed. 1992).

50. Kaisha-hō [Companies Act] art. 339(1) (Japan).

neration that should have been received.”⁵¹ However, where the removal was for proper grounds, the removed director loses the right to damages.⁵²

The German-influenced separation principle is effective in the protection of directors in their role as laborers. Under German law, even if a director is removed, so long as there are no grounds for the termination of the appointment contract, the appointment contract continues to be in effect, and the director does not lose his right to claim remuneration.⁵³ Japanese law, on the other hand, aims to safeguard the right to remuneration within a tort framework by framing the right to remuneration as the right to claim “loss of benefits that should have been received.”⁵⁴ However, under this framework, the burden of proof as to the amount of benefits that should have been received falls on the director. On this point, as compared with the German separation doctrine, the protection of directors as persons receiving remuneration is weaker. Because a removed director bears the burden of proving her losses (benefits that should have been received), where the director’s remuneration (1) takes the form of stock options,⁵⁵ (2) varies with corporate performance, or (3) is otherwise uncertain,⁵⁶ the director’s burden of proof can be difficult depending on how the remuneration is to be determined.

If we follow the German-theory-inspired views of Ōsumi Kenichirō and Imai Hiroshi, and follow the separation principle to its logical conclusion, we should amend Article 339(2) of the Companies Act. The amendment should make clear that the removal of a director does not automatically terminate the director’s contract, that special grounds are required to terminate the appointment contract, and that the director does not lose his right to claim remuneration upon removal.⁵⁷

51. Companies Act art. 339(2) (Japan).

52. Japanese Companies Act Article 339(2) establishes a form of legal responsibility that is aimed at balancing the guarantee of the freedom of shareholders to remove their directors on the one hand, and on the other hand, the protection of the expectation of a director with regards to his term of appointment. See ŌSAKA KŌTŌ SAIBANSHO [OSAKA HIGH CT.] Jan. 30, 1981, 32(1-4) KAKYŪ SAIBANSHO MINJI SAIBAN [KAMINSHU] 17. Therefore, the amount of compensation should be the amount of benefit that a director would have received at the end of his term of office if he had not been removed. See EGASHIRA, *supra* note 11, at 372 n.7.

53. THOMAS RAISER & RÜDIGER VEIL, RECHT DER CAPITALGESELLSCHAFTEN [THE LAW OF STOCK CORPORATIONS] 129 *et seq.* (5th ed. 2010).

54. Companies Act art. 339(2) (Japan).

55. *Id.* art. 361(1)(1), (3).

56. See Takahashi Eiji, in CHIKUJŌ KAISETSU KAISHAHŌ DAI 4-KAN KIKAN I [ARTICLE-BY-ARTICLE COMMENTARY OF THE COMPANIES ACT VOL. 4 ORGANS I] 465 *et seq.* (Sakamaki Toshio & Tatsuta Misao eds., 2008).

57. See TAKAHASHI EIJI, DOITSU KAISHA-HŌ GAISETSU [AN OUTLINE OF GERMAN COMPANY LAW] 150 (2012).

C. *Reception of German Legal Doctrine in Japanese Lawmaking*

1. *Shareholder's Duty of Loyalty*

The birth of inquiry into the shareholder's duty of loyalty in Japan was contemporaneous with the beginning of Nazi law research in Japan. At that time, some scholars, influenced by Nazi legal thought, actively advocated the introduction of a shareholder's duty of loyalty doctrine.⁵⁸ However, prevailing legal thought did not recognize such a duty. As Tanaka argued:

The shareholder's duty is none other than the duty of capital contribution Once the subscription has been paid in[,] neither that shareholder nor those who acquire those shares bear any obligation. A legal relationship of loss sharing also does not arise as between the members, unlike a general partnership company. This is shareholders' limited liability, a core principle of stock corporation law first clearly articulated in the commercial codes of France, the Netherlands, and Spain.⁵⁹

Also drawing on the principle of shareholders' limited liability, Ōsumi argued that "ordinarily, shareholder rights do not include any obligations."⁶⁰

Suzuki, who led the field of corporate law studies in postwar Showa-era Japan, argued that, viewed formalistically, "a stock corporation is not a contractual association of members, but rather is formed from corporation-member relationships with the group as the axis."⁶¹ This draws a rigid distinction between the civil law partnership and the corporate nature of the stock corporation. He further argued that although shareholders' collective rights were introduced to protect their individual rights:

[I]t is difficult to imagine that it would be acceptable for shareholders, in the exercise of their collective rights, to insist upon only their personal interests and improperly infringe upon the interests of other shareholders. At the very least, such a level of consideration is to be expected, even if the relationship of trust between shareholders does not rise to the level of that in a real partnership. I am of the view that the shareholder's duty of loyalty as recognized by recent German doctrine may and should be recognized within the boundaries and upon the grounds as set out above.⁶²

58. See Eiji Takahashi, *Gleichbehandlungsgrundsatz und Treuepflicht im japanischen Gesellschaftsrecht [Principle of Equal Treatment and the Duty of Loyalty in Japanese Corporate Law]*, in *DIE BEDEUTUNG DER RECHTSDOGMATIK FÜR DIE RECHSENTWICKLUNG [THE IMPORTANCE OF LEGAL DOGMA IN LEGAL DEVELOPMENT]* 261, 270 *et seq.* (Rolf Stürner ed., 2010).

59. TANAKA KOTARŌ, *KAISEI KAISHAHŌ RON [ON THE REVISED CORPORATE LAW]* 459 *et seq.* (1939).

60. ŌSUMI KENICHIRO, *ZENTEI KAISHAHŌ RON JŌ-KAN [ON THE COMPLETELY REVISED CORPORATE LAW, VOL. 1]* 265 (1964).

61. Suzuki Takeo, *Kaisha no Shadan Hōjin-sei [The Personal Association Nature of the Corporation]*, in 2 SHŌHŌ KENKYŪ: KAISHAHŌ (1) [II STUDIES IN COMMERCIAL LAW: CORPORATE LAW (1)] 17 (1971).

62. *Id.* at 21.

These views of Suzuki found fruition in the “abuse of majority vote doctrine” introduced by the 1981 revisions to the Commercial Code. Article 247(1)(iii), as enacted that year, established a basis for setting aside a shareholder resolution at a shareholders’ meeting “where an extremely improper resolution is passed due to the exercise of voting rights by a shareholder for whom the resolution presents a special conflict of interest.”⁶³ However, scholars were reluctant to go beyond the abuse of majority vote doctrine to recognize a shareholder’s duty of loyalty.

However, in Germany following the 1970s, the position that a shareholder’s duty of loyalty should be recognized came to prevail in legal thought.⁶⁴ With the recognition of a duty of loyalty between shareholders in the *Linotype* decision of the German Federal Supreme Court on February 1, 1988,⁶⁵ scholars began to argue that such developments in German jurisprudence should also be received into Japanese law.⁶⁶

The Interim Recommendations on Corporate Law Reform, issued by the Ministry of Justice Civil Affairs Bureau Counsel’s Office in December 2011, proposed clear language providing for the “liability of natural persons deemed to have similar influence as a parent corporation in view of their voting power.”⁶⁷

The shareholder’s duty of loyalty has a flaw in that it fails to provide a legal basis for liability for damages where natural persons at the top of a group company (*Konzern*) infringe the interests of a subsidiary or a subsidiary of a subsidiary of the controlling corporation. This is because the natural persons in control at the top of the *Konzern* are not shareholders of the harmed corporations unlike corporations, where it is the opposite situation.⁶⁸ I therefore suggest that to complement existing regulation in Japanese law, Japan should enact legislation modeled on Article 117 of the *Aktiengesetz*, which establishes liability for persons exercising influence

63. Article 247(1)(iii) of the Commercial Code as amended in 1981 corresponds to Article 831(1)(iii) of the Companies Act. On the latter provision, see Harald Baum & Eiji Takahashi, *Klagen gegen fehlerhafte Hauptversammlungsbeschlüsse im japanischen Aktienrecht* [*Suits against Faulty Resolutions of Shareholder Meetings in Japanese Stock Corporation Law*], 32 ZEITSCHRIFT FÜR JAPANISCHES RECHT [JOURNAL OF JAPANESE LAW] 153, 158 *et seq.* (2011).

64. Cf. Dirk A. Verse, *Treuepflicht und Gleichbehandlungsgrundsatz* [*The Duty of Loyalty and the Principle of Equal Treatment*], in 2 AKTIENRECHT IM WANDEL: GRUNDSATZFRAGEN DES AKTIENRECHTS [STOCK CORPORATION LAW IN TRANSITION: FUNDAMENTAL QUESTIONS IN STOCK CORPORATION LAW] 579, 595 *et seq.* (Walter Bayer & Mathias Habersack eds., 2007).

65. 103 BGHZ 184.

66. Cf. Takahashi, *supra* note 58, at 272.

67. HÖMUSHŌ MINJIKYOKU SANJIKAN-SHITSU [MINISTRY OF JUSTICE CIVIL AFFAIRS BUREAU COUNSEL’S OFFICE], KAISHAHŌ-SEI NO MINAOSHI NI KANSURU CHŪKAN SHI’AN [INTERIM RECOMMENDATIONS ON CORPORATE LAW REFORM] 14 (Dec. 2011).

68. YVES LAKNER, DER MEHRSTUFIGE KONZERN [THE MULTI-LEVEL CORPORATE GROUP] 196 (2005); Takahashi Eiji, *Mochibun Kaisha to Kigyo Ketsugo Hosei* [*Membership Companies and Regulation of Corporate Groups*], 1969 SHOJI HOMU 4, 5 (2012).

even when there is negligence on their part, as well as when the harm was pursuant to a shareholder resolution.⁶⁹

2. Reception of the Duty to Direct in Corporate Group Law

In 1982, Hommelhoff argued that since the capital contribution made by a parent to a subsidiary is an asset of the parent, the parent's directors have the authority and duty to direct the subsidiary.⁷⁰ Hommelhoff termed such authority and duty the "Konzern duty of direction."⁷¹ To resolve the conflict between this duty and authority and the duty of the subsidiary's directors,⁷² Hommelhoff argued that the allocation of authority as between the directors of the parent and those of the subsidiary should be resolved by the shareholders' meeting of the parent corporation.⁷³ Under the influence of this Konzern duty of direction, there was debate in Japan over whether to introduce a duty of parent directors to supervise the operations of subsidiaries.⁷⁴

The rule that would have established the Konzern duty of direction was proposed as an alternative in the event that multiple derivative actions did not make it into the final reform legislation. As it appears likely that multiple derivative actions will be enacted into law, introduction of the Konzern duty of direction has been shelved. In my personal view, it is commendable that Japan did not receive the German doctrine on Konzern direction.⁷⁵

The problem with the Konzern duty of direction that Japanese corporate law considered introducing lies in its conflict with the subsidiary's directors' duty of loyalty. Duties in corporate law come hand-in-hand with authority. Directors of subsidiaries bear the duty to operate the subsidiary so as to maximize its gains.⁷⁶ On the other hand, since the parent's capital contribution to the subsidiary is part of the parent's assets, the parent's di-

69. Takahashi Eiji, *Doitsuho ni okeru Eikyoryoku Riyōsha no Sekinin Kisei to Nihon no Kaishahō Kaisei no Kadai* [*The Liability Regime for Exercisers of Influence in German Law and Issues in Japanese Corporate Law Reform*], in GURŌBARU-KA NO NAKA NO KAISHAHŌ KAISEI [CORPORATE LAW REFORM WITHIN GLOBALIZATION] 324 (Kitamura Masashi & Takahashi Eiji eds., 2014).

70. PETER HOMMELHOFF, DIE KONZERNLEITUNGSPFLICHT [THE KONZERN DUTY OF DIRECTION] 418 (1982).

71. *Id.* at 419.

72. See AktG art. 76.

73. HOMMELHOFF, *supra* note 70, at 500.

74. There is discussion of introducing a rule that "the board of directors shall supervise the operations of the corporation's subsidiaries" in Supplementary Document 23 of the Corporate Law Subcommittee.

75. Takahashi Eiji, *Kigyō shūdan niokeru naibu tōsei* [*Internal Control in the Corporate Groups*], 1452 JURIST 26, 32 (2013).

76. Kaisha-hō [Kaisha-hō] [Companies Act] arts. 330, 350 (Japan); Minpō [Minpō] [Civ. C.] art. 644 (Japan).

rectors have the duty to increase the value of the capital contribution made to the subsidiary as part of their duty of loyalty to the parent.

What should happen if directors of the parent order that some measure be taken to maximize gain to the parent, but the directors of the subsidiary determine in the exercise of their judgment that the measure harms the interests of the subsidiary? Should the duty of direction of the parent's board take precedence, and the subsidiary's directors be thereby obligated to execute the measure? Or should the subsidiary's directors be entitled to refuse, in accordance with their duty to maximize benefit to the subsidiary?

The duty of direction that Japanese corporate law considered introducing cannot satisfactorily answer this question. Since the conflict of duties arises primarily because there are no rules specifying the allocation of authority within a corporate group structure, it may be said that the allocation of powers should be left to an organ of the parent corporation, as suggested by Hommelhoff. However, it would exceed its capacity if the parent's shareholders' meeting allocated powers according to Hommelhoff's proposal.⁷⁷ A shareholders' meeting is, after all, akin to a large ship—it lacks the information on the basis of which to allocate powers between the various corporate organs within a corporate group. Also, it cannot respond rapidly to the constantly changing needs of the corporate group. Therefore, reception of the Konzern duty of direction into Japanese corporate law is not desirable.

II. CONVERGENCE OF JAPANESE AND GERMAN CORPORATE LAW

A. *The New Relationship between Japanese and German Law*

In recent years, the content of Japanese and German corporate law has grown more similar without mutual exchange. Central to the "convergence" of the corporate laws of these two countries is the law of the United States. In this section, I shall explain this new phenomenon using the business judgment rule and the shareholder's derivative action as case studies.

B. *Japanese Law*

1. *Introduction of the U.S. Business Judgment Rule into Japan*

The American business judgment rule came to be studied in Japan relatively early as a topic in comparative law, but Japanese scholars have long been skeptical of its reception, citing differences between the Japanese and American legal systems. In 1983, stating the principle as "directors bear no liability for honest or sincere mistakes in judgment, and the courts do not

77. Bruno Kropff, *Zur Konzernleitungspflicht* [On the Konzern Duty of Direction], 1984 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [JOURNAL OF BUSINESS AND CORPORATE LAW] 112, 124 *et seq.* (1984).

intervene in mistakes of judgment,”⁷⁸ Professor Kawahama Noboru questioned the appropriateness of introducing the business judgment rule into Japanese law, and of thereby excluding business judgment from judicial review. He suggested that although the courts have neither the knowledge nor experience in managing corporations, they are able to review the appropriateness of judgments.⁷⁹ He also argued that since the suppression of judicial review of business judgment under the American business judgment rule is closely connected with the American system of civil litigation, to call the Japanese rule that merely confirms liability for negligence the “business judgment rule” is to create unnecessary confusion.⁸⁰

On the other hand, Professor Kondō Mitsuo, in 1989, argued that because management involves risk and requires specialized knowledge and expertise that courts lack, it is inappropriate for courts to pass judgment and impose harsh liability on directors.⁸¹ Therefore, courts should recognize that directors have a certain degree of discretion, and grant deference to their business judgment.⁸² Professor Kondō’s position later became the foundation of Japan’s business judgment rule.

2. *Structural Impediments Initiative*

In September 1989, the Structural Impediments Initiative, a series of talks aimed at correcting the trade imbalances between Japan and the United States, was held. The United States identified Japan’s keiretsu system, distribution practices, savings patterns, and more as causes of its trade deficit, and in a bid to improve matters, the United States government created a list of suggestions and requested that the Japanese government take action on those points.⁸³ The American negotiators urged Japan to strengthen shareholder protection by increasing the degree to which shareholders may hold managers liable through shareholder lawsuits.⁸⁴

3. *1993 Revisions*

The 1993 revisions included clear language deeming shareholder derivative actions to be claims of a non-calculable nature,⁸⁵ a change that caused the claim amount in shareholder derivative actions to be set at JPY

78. Kawahama Noboru, *Beikoku ni okeru Kei'ei Handan Gensoku no Kentō* (1) [A Study of the Business Judgment Rule in the United States (1)], 114(2) HŌGAKU RONSŌ, 79 *et seq.* (1984).

79. *Id.* at 59.

80. *Id.*

81. KONDŌ MITSUO, *KAISHA KEI'EISHA NO KASHITSU* [THE NEGLIGENCE OF CORPORATE MANAGERS] 180 *et seq.* (1989).

82. *See id.*

83. A summary of the list of suggestions by the U.S. government is recorded in NIPPON HŌSŌ KYŌKAI SHUZAI-HAN [NHK], NHK SUPESHARU NICHIBEI NO SHŌTOTSU [NHK SPECIAL: U.S.-JAPAN CONFLICT] 305 *et seq.* (1990).

84. *Id.* at 315.

85. Commercial Code art. 267(4) (Japan) (as of 1993 revision).

950,000 and the filing fees at JPY 8,200.⁸⁶ Dr. Nakano Tei'ichiro characterized the reform as an exceptional one caused by foreign pressure.⁸⁷ Dr. Kitazawa Masahiro also clearly identified the Structural Impediments Initiative as the catalyst that eased the bringing of derivative actions.⁸⁸

As a result of the 1993 revisions to the Commercial Code, filing fees for shareholder derivative actions came to be treated the same way as non-calculable claims, such as administrative litigation against local government authorities. Regardless of the claim amount, all shareholders were allowed to file a derivative action at the flat rate of JPY 8,200.⁸⁹

4. *Explosion in Shareholder Derivative Actions and the Development of the Business Judgment Rule*

The flat JPY 8,200 filing fee for bringing a shareholder derivative action caused an explosion in derivative litigation that could not have been anticipated by the legislators. Before 1993, there was an average of one derivative action every two years.⁹⁰ However, in 1993, the year of the reform, shareholders brought thirty-nine actions in that year alone.⁹¹ In 1999, the peak year, 220 derivative actions were brought in the courts.⁹²

In addition, courts began to adjudicate many cases of director liability. Contemporaneous with the explosion in derivative litigation, Japanese jurisprudence began to clearly formalize adjudication of duty of care and duty of loyalty issues, following American legal thought.

Until 1993, no courts in Japan had clearly referred to the business judgment rule, but instead had held that directors have discretion in matters of business judgment. If that discretion was exceeded, then the directors would be liable to the corporation.⁹³

The Tokyo District Court established the form of the business judgment rule in the *Cemedine* decision of February 8, 1996.⁹⁴ The controversy arose when a glue manufacturer called Cemedine Inc. initiated a joint venture with an American company, Harvey Universal, Inc., for the purpose of

86. Minji soshō-ryō rūru [Civil Litigation Fee Rules] art. 4(2), app. 1(1) (Japan).

87. Nakano Tei'ichirō, *Soshōbutsu no Kakaku* [The Value of Claims], 833 HANREI TAIMUZU 28 (1994).

88. Kitazawa Masahiro, in SHINPAN CHŪSHAKU KAISHAHŌ DAINI HOKAN HEISEI 5-NEN KAISEI [NEW ANNOTATED CORPORATE LAW SECOND SUPPLEMENTARY VOLUME HEISEI 5 REFORMS], 32 (Ueyanagi Katsurō, Ōtori Tsuneo & Takeuchi Akio eds., 1996).

89. The current filing fee is a flat rate of JPY 13,000.

90. Eiji Takahashi, *Corporate Governance in Japan: Vorgriff auf künftige Reformen in Deutschland?* [Corporate Governance in Japan: In Anticipation of Future Reforms in Germany?], in VERBÄNDE UND ORGANISATION IM JAPANISCHEN UND DEUTSCHEN RECHT [ASSOCIATIONS AND ORGANIZATION IN JAPANESE AND GERMAN LAW] 81, 89 (Dieter Leipoldt ed., 2006).

91. *Id.*

92. For the figures, see *id.* at 89.

93. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sep. 21, 1993, 1490 HANREI JIHŌ 154 (Japan).

94. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Feb. 8, 1996, 144 SHIRYŌBAN SHŌJI HOMU 115 (Japan).

selling glue in the United States. Cemedine and Harvey Universal came together to create Cemedine USA Inc. As sales remained sluggish, Cemedine acquired all of Harvey Universal's shares and assumed Harvey Universal's capital contributions.

In this decision, the Tokyo District Court held that "where there is no mistake that is both important and negligent with respect to the underlying facts, and there is nothing in the decision making process or content that is especially unreasonable or inappropriate as corporate managers,"⁹⁵ directors breach neither their duty of care nor their duty of loyalty. This holding came to be known as the "Cemedine formula,"⁹⁶ and was followed in many lower court decisions.⁹⁷

Later, in criminal cases, the Supreme Court of Japan came to recognize the business judgment rule directly. In the decision of November 9, 2009,⁹⁸ the Court held the defendants (who included directors of a bank) liable for criminal breach of trust where the defendants provided unsecured financing to a client in financial trouble in the knowledge that the loan was not recoverable. The Court opined that, in general, "bank directors owe the same kinds of duties as directors of ordinary corporations, namely, the agent's duty of care (Article 644, Civil Code) and the duty of loyalty (Article 254-3 pre-2005 reform Commercial Code, Article 355 Companies Act), and there is room for the application of the so-called business judgment rule."⁹⁹

In the *Apamanshop Holdings* decision of July 1, 2010,¹⁰⁰ the Supreme Court recognized the application of the business judgment rule to civil cases. The dispute was over the liability of the parent corporation relating to the valuation of an acquisition of shares in an unlisted subsidiary. The Supreme Court held that "the decision over a corporate reorganization . . . is left to specialist business judgment When there is nothing 'remarkably unreasonable' about the process by which [a business decision] is arrived at or the contents of the decision, the directors do not breach their duty of care as a prudent manager."¹⁰¹

95. Tokyo Dist. Ct. Feb. 8, 1996, 144 SHIRYÖBAN SHÖJI HÖMU 121 (Japan).

96. Takahashi Eiji, *Kanren Kaisha ni taisuru Shi'enkin Kyōkyū to Kei'ei Handan Gensoku* [Provision of Financial Support to Related Companies and the Business Judgment Rule], 1747 SHÖJI HÖMU (2005) 56.

97. See, e.g., Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Feb. 20, 2002, 1109 HANREI TAIMUZU 226 (Japan); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jul. 9, 2005, 1909 HANREI JIHŌ 87 (Japan).

98. Saikō Saibansho [Sup. Ct.] Nov. 9, 2009, 63(9) KEISHŪ 1117 (Japan).

99. *Id.*

100. Saikō Saibansho [Sup. Ct.] Jul. 15, 2010, 2091 HANREI JIHŌ 90 (Japan). For a case comment, see Dan W. Puchniak & Masafumi Nakahigashi, *Case No. 21 (Apamanshop Case)*, in BUSINESS LAW IN JAPAN – CASES AND COMMENTS: INTELLECTUAL PROPERTY, CIVIL COMMERCIAL AND INTERNATIONAL PRIVATE LAW – WRITINGS IN HONOUR OF HARALD BAUM 215–26 (Moritz Bälz et al. eds., 2012).

101. Saikō Saibansho [Sup. Ct.] Jul. 15, 2010, 2091 HANREI JIHŌ 93 (Japan).

Following the *Apamanshop* decision's formulation of the business judgment rule, the trend has been for courts to use that formulation as the standard statement of the business judgment rule.¹⁰² Nevertheless, some lower courts still follow the older *Cemendine* formula.¹⁰³

5. *Analysis of the Background to the Reception of the Business Judgment Rule*

The 1996 lowering of court filing fees and subsequent explosion in derivative actions may be identified as the catalyst for the introduction of the business judgment rule into Japanese law. Together with this trend, the business judgment rule became progressively formalized in the case law. The business judgment rule, in its doctrinal logic, avoids suppressing the entrepreneurial spirit. It functions by severing the connection between mistakes in business judgment and civil liability for damages through shareholder derivative actions and recognizing the discretion of directors on management matters.

On the background behind the formalization of the business judgment rule in Japanese law, Professor Kondō Mitsuo argued:

[A]s the Heisei era wore on, cases in which derivative actions [we]re brought against directors grew in number, and as awareness of the derivative action as a threat grew, awareness of the business judgment rule amongst the general public grew also. In response, the courts progressively formalized the business judgment rule. An example is the decision holding that where there is no mistake that is both important and negligent with respect to the underlying facts, and there is nothing in the decision-making process or content that is especially unreasonable or inappropriate, the duty of care is not breached.¹⁰⁴

C. *German Law: The Introduction of the Derivative Action and Legislative Enactment of the Business Judgment Rule*

The 2005 Act on Corporate Integrity and Modernisation of Avoidance and Rescission Rights (UMAG)¹⁰⁵ not only legislatively introduced the shareholder's derivative action long advocated in academic circles, but also enacted into law the business judgment rule long recognized in court jurisprudence.

102. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 27, 2011, unreported, LEX/DB: 25470380 (Japan); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 24, 2153 HANREI JIHŌ 109 (Japan).

103. See, e.g., Fukoka Chihō Saibansho [Fukoka Dist. Ct.] Apr. 14, 2011, unreported, TKC Doc. No. 25481284 (Japan).

104. KONDŌ MITSUO, HANREI HŌRI KEI'EI HANDAN GENSOKU [DOCTRINE IN CASE PRECEDENT: THE BUSINESS JUDGMENT RULE] 12 (2012).

105. Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts [UMAG] [Law on Business Integrity and Modernization of Litigation Law], Sept. 22, 2005, BGBL. at 2802 (Ger.).

The shareholder's derivative action, as introduced by the UMAG, permits only shareholders holding over one percent, or over €100,000 par value of shares, to bring suit.¹⁰⁶ A shareholder derivative suit may only be brought with leave of court. The court grants permission only when the following four criteria are satisfied: (1) the plaintiff shareholder must prove that her shares are acquired prior to when the breach of duty or loss claimed becomes publicly known; (2) the plaintiff must prove that her demand, with the appropriate time period, on the corporation to bring suit had no effect; (3) the plaintiff must plead facts giving rise to a suspicion that there has been dishonesty or a serious violation of the law or the corporate constitution causing loss to the corporation; and (4) there exists no social welfare policy grounds that trump the bringing of the suit.¹⁰⁷

The shareholder plaintiff may bring the derivative action if the court grants permission,¹⁰⁸ and it is this action pursuant to Article 148(3)(1) of the *Aktiengesetz* that is the shareholder's derivative action.

The UMAG also establishes the business judgment rule as follows: "where the directors reasonably believe that at the time they made the entrepreneurial decision they were acting on appropriate information and for the benefit of the corporation, they do not breach their duty."¹⁰⁹ Writing on the background of the legislative enactment of the business judgment rule, Hopt and Markus Roth explained that, "the purpose of the business judgment rule is to balance the increased ease with which directors may be sued pursuant to Articles 147–149 by establishing a legally-recognized safe harbor and space with freedom from liability for directors."¹¹⁰

As with Japanese law, German law functionally links the formalization of the business judgment rule to the shareholder's derivative action. With the introduction of the shareholder's derivative action, cases in which shareholders bring suit against directors for managerial mistakes have increased, and the legislators' fears that this would lead to atrophy of corporate management or even stagnation of the economy took legislative form as the business judgment rule.

106. AktG art. 148(1).

107. *Id.*

108. *Id.* art. 148(3)(1).

109. *Id.* art. 93(1)(2). For the development of the business judgment rule in German law, see TAKAHASHI EIJI, DOITSU TO NIHON NI OKERU KABUSHIKI KAISHAHŌ NO KAIKAKU: KŌPŌREETO GABANANSU TO KIGYŌ KETSUGŌ HŌSEI [STOCK CORPORATION LAW REFORM IN GERMANY AND JAPAN: CORPORATE GOVERNANCE AND THE REGULATION OF CORPORATE GROUPS] 212 *et seq.* (2007).

110. Klaus J. Hopt & Markus Roth, § 93 *Abs. 1 Satz 2, 4 nF AktG*, in AKTG: GROßKOMMENTAR, margin no. 8 (Klaus J. Hopt & Herbert Wiedemann eds., 4th ed. 26th Suppl. 2006).

D. *Issues Arising from the Convergence of German and Japanese Corporate Law*

In general, the “convergence” of corporate law can be classified into three types according to their causes.

The first type of convergence is that which is caused by competition amongst the corporate laws of different jurisdictions. This is convergence in its original sense. An example is that of the competition that has arisen amongst EU member states sparked by the abandonment of the real seat doctrine. This convergence led to the abolishment of minimum capital in limited liability company¹¹¹ legislation in the member states.¹¹² This type of convergence has been criticized for the lowering of the quality of corporate laws as a whole (the phenomenon called the “race to the bottom”), which results from countries going overboard in their attempt to make their corporate laws attractive to entrepreneurs for the purpose of attracting incorporations. However, where corporate laws appropriately provide for investor and creditor protection, their respective capital markets become more attractive and create the benefit of raising the credit of a corporation incorporated in such jurisdictions internationally. Therefore, the competition to deregulate in corporate laws will not continue without end. Rather, this competition will reach—and stop—at a level where the disadvantages of deregulation begin to outweigh the advantages.

The second type is where an organ created by international treaty or supranational entity adjusts the corporate laws of the member states and leads to the harmonization of the contents of corporate laws. For example, the directives and recommendations of the European Commission have led to the abolishment of the *ultra vires* doctrine in the UK¹¹³ and the compulsory disclosure of individual director’s compensation in Germany.¹¹⁴ This type of “managed” convergence differs from that caused by competition in that it occurs under strict planning and careful consideration with a view of the region to which the convergence will be applicable by the directive-issuing organ. There are also examples such as the EU Action Plan, which

111. In other words, corporate forms such as the Gesellschaft mit beschränkter Haftung [GmbH] (limited liability company) (as opposed to the Aktiengesellschaft [AG] (corporation)).

112. Daniel Zimmer, *Corporate Law Competition in Europe*, 22 J. INTERDISCIPLINARY ECON. 29, 33 *et seq.* (2010).

113. PAUL L. DAVIES, GOWER AND DAVIES’ PRINCIPLES OF MODERN COMPANY LAW 153 (8th ed. 2008).

114. See Takahashi Eiji & Yamaguchi Sachiyo, *EU ni okeru Kigyōhōsei Kaikaku no Saishin Dōkō (ge): Kōdō Keikaku no Jitsugen Katei oyobi Doitsu no Kaikaku Jōkyō* [Latest Developments in EU Company Law Reform: The Process of Implementation of the EU Action Plan and the State of Reforms in Germany (Part 2)], 34(4) KOKUSAI SHŪJI HŌMU 448 (2006).

occurs in response to suggestions by leaders and experts (such as the High Level Group of Company Law Experts).¹¹⁵

The third type of consequence is similar to the first in that it can occur as the result of an attempt by each jurisdiction's corporate law legislators to raise the economic competitiveness of their own respective jurisdictions. However, it can also occur as a result of many jurisdictions imitating jurisdictions that have been successful in the world economy. Two jurisdictions receiving their corporate laws from the same target jurisdiction will come to have the same content in their corporate law. The convergence of Japanese and German corporate law falls into the third type, as the content of the law of these countries became similar despite the absence of mutual exchange by the two countries because of their reception of corporate law from the United States, a country considered to be a model because of its economic success.

Japanese corporate law and corporate law scholarship are moving from a reception of German law towards convergence with the U.S. model. This last type of convergence causes a problem—Japan and Germany, in separately receiving the same norms without mutual exchange, do not share the experience garnered by their legal systems.

By comparing Japanese and German corporate law, the following may be observed: In Japanese law, the business judgment rule remains case law, stopping at the level of implementation Germany was at as of April 21, 1997, the date of the *ARAG/Gamenbeck* decision.¹¹⁶ From the perspective of predictability and certainty of the law, and to formalize the business judgment rule, Japan should consider legislative enactment of the business judgment rule, as was done in Germany.

The problem with German shareholder derivative actions is that it is extremely rare compared to Japan.¹¹⁷ As the shareholder derivative action has a positive function in improving corporate governance, it is fine for it to be used more often. For better corporate governance in German enterprises in the future, from the legal policy perspective of making directors operate under an appropriate degree of tension caused by the possibility of liability for unlawful management, relaxing the conditions for bringing shareholder derivative suits or abolishing the leave procedure should be considered.¹¹⁸

115. European Commission, *Communication from the Commission to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward* (May 21, 2003), COM (2003) 284.

116. 135 BGHZ 244 (*ARAG/Gamenbeck*).

117. For an analysis of the reasons, see Klaus Ulrich Schmolke, *Die Aktionärsklage nach § 148 AktG [The Shareholder's Derivative Action under Article 148 of the Aktiengesetz]*, 40 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT 398, 406 *et seq.* (2011).

118. MATHIAS HABERSACK, STAATLICHE UND HALBSTAATLICHE EINGRIFFE IN DIE UNTERNEHMENSFÜHRUNG, GUTACHTEN E ZUM 69. DEUTSCHEN JURISTENTAG [STATE AND SEMI-STATE INTERVENTIONS IN BUSINESS MANAGEMENT, EXPERT'S REPORT E FOR THE 69TH GERMAN CONFERENCE OF JURISTS] at E 106 (2012). The resolution by the Commercial Law Section of the German

CONCLUSION

In conclusion, I make the following suggestions based on findings from this study:

First, as shown in the process of reception of principles of capital, the reception of German corporate law theory has had the effect of clarifying the logic underlying the Japanese stock corporation. Japan has made sense of the complicated fundamental principles of the stock corporation and corporate finance theory by relying on the strength of German law concepts. However, postwar Japan has introduced into its corporate law many systems that cannot be explained by citing German legal doctrine. The new problem for Japanese corporate law scholarship will be to discover and make clear a coherent theory that furthers the goals of its own corporate law.

Second, from a director protection perspective, Japan should incorporate the separation doctrine from German law and amend Article 339(2) of the Japanese Companies Act to clarify that, when the director is removed from his position, such removal does not automatically terminate his or her employment contract. Therefore, the director does not lose his right to claim compensation.

Third, the shareholder's duty of loyalty has been receiving attention as the latest example of the reception of German corporate law theory in Japan. However, the shareholder's duty of loyalty runs into problems when applied in the multi-level corporate group context. Instead, the protection of minority shareholders in a dependent subsidiary corporation should be accomplished through modification and reception of Article 117 of the *Aktiengesetz*.

Fourth, considering the possibility of conflict between the Konzern duty of direction and the subsidiary's directors' duty of loyalty, reception of the doctrine of the Konzern duty of direction into Japanese corporate law is not desirable for Japan.

Fifth, to increase predictability in the law, Japan should consider enacting the business judgment rule, as it is important to the management of legal risk in corporations.

Sixth, to encourage suits and improve corporate governance, Germany should consider relaxing the minority shareholder criteria for bringing shareholder derivative actions and re-examining the leave procedure.

Conference of Jurists on September 21, 2012, rejected Habersack's proposal to abolish minority shareholder conditions and leave procedures for shareholder derivative actions in German law by an overwhelming vote. The proposal for the abolishment of minority shareholder conditions received fourteen votes in favor, fifty-one against, and fifteen abstentions, whereas the proposal for abolishment of leave proceedings received eight votes in favor, fifty-seven against, and eleven abstentions.