ZEITSCHRIFT FÜR JAPANISCHES RECHT
JOURNAL OF JAPANESE LAW

SONDERHEFT / SPECIAL ISSUE 11 (2018)

Information Duties

Japanese and German Private Law

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Carl Heymanns Verlag

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Verlag / Publisher: Carl Heymanns Verlag – a brand of Wolters Kluwer Germany, Luxemburger Straße 449, D-50939 Köln, phone: +49 221-943 73-7000; Internet: www.heymanns.com; Customer Service: phone: +49 2631-801-2222, e-mail: info-wkd@wolterskluwer.de

Bezugspreis: Das Sonderheft kann über den Verlag zum Preis von 69,– € zzgl. Versandkosten bezogen werden. Mitglieder der Deutsch-Japanischen Juristenvereinigung e.V. können das Sonderheft zum Vorzugspreis von 59,– € zzgl. Versandkosten beziehen.

Subscription price: The special issue can be purchased from the publishers for € 69 plus postage. Members of the German-Japanese Association of Jurists may buy the special issue for the preferential price of € 59 plus postage.

Anzeigenverkauf / Advertisement Sales: Janosch Kleibrink, Phone: +49 221-943 73-7797, e-mail: janosch.kleibrink@wolterskluwer.com

Anzeigendisposition / Advertisement Disposition: Wolters Kluwer Germany, Advertisements, Karin Odening, Luxemburger Str. 449, D-50939 Köln, phone: +49 221-943 73-7760, e-mail: anzeigen@wolterskluwer.com. Price list No. 11, 1 January 2018.

Druckerei / Printed by: rewi Druckhaus, Reiner Winters GmbH, Wissen

ISBN 978-3-452-29117-2

www.ZJapanR.de

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Information Duties under Japanese Trade Law and Company Law

Masao Yanaga[*]

I. Introduction

With respect to trade law, the information duties of one party are intended to facilitate doing business in a quick and efficient manner and, to some extent, to protect the other party from unforeseen damages.

On the other hand, the information duties of a companies' management are considered a shareholder right. The most basic rights of shareholders include sharing in the company's profits as well as participating in the company's decisions, at least fundamental ones, by participating and voting in general shareholders' meetings in stock corporations.

II. Trade Law

The commercial register *(shōgyō tōki)* is one of the most important sources of information in Japanese trade law. The items to be registered pursuant to the provisions of the Commercial Code (hereinafter: ComC)[1] may not be duly asserted against a third party who has no knowledge of such items until after registration. The same applies after the registration if the third

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1 *Shōhō,* Law No. 48/1899, as amended by Law No. 91/2014.

party did not know that such items were registered, on justifiable grounds.[2] The items to be registered by non-corporate merchants are, however, limited, and most of the requirements relate to the power of representation. Generally speaking, non-corporate merchants are to register only in cases where they have appointed a manager (typically a branch manager). They are not even required to register their trade names.

Japanese courts and legal doctrine have recognised pre-contractual liability under a duty of good faith as *culpa in contrahendo,* or the breach of secondary obligation *(Nebenpflicht)*. *Culpa in contrahendo* means that contracting parties are under a duty to act in good faith during negotiations, so that a party who acts improperly in preventing the culmination of an agreement is liable to the injured party. It is recognised either in cases where the fault of one contracting party has prevented the formation of a contract or in cases where one party has failed to inform the other party of circumstances that might have prevented the other party from entering into the contract. While it can be categorised as a theory in contracts, most of the Supreme Court and lower court in Japan decisions appear to have regarded it as relating to torts.[3] In one case, the Supreme Court found that a bank and a construction company were liable, in light of the principle of good faith, for the failure to provide information that a planned building would be in violation of the Building Standards Act *(Kenchiku kijun-hō)* if part of the site were sold.[4] In another case it held that the seller and the construction company were liable for damages in tort due to their failure to supply information on fire shutters.[5]

Moreover, in consumer contracts, business operators are required to inform or disclose to some extent. Under the Consumer Contract Act *(Shōhsha keiyaku-hō),* a consumer may rescind their manifestations of intention to offer or accept a consumer contract if a business operator represents to the consumer the advantages as to important matters or things related to said important matters but intentionally fails to represent disadvantageous facts regarding important matters, and the consumer has thereby incorrectly understood that such facts do not exist.[6] The Act on Designated Types of Commercial Transactions *(Tokutei shō-torihiki-hō)* imposes on operators

2 Art. 9 para. 1 ComC.

3 A judgment of the Supreme Court, 22 April 2011 (Minshū 65, 1405), held that a party who has failed to inform the other party of information that might have prevented the other party from concluding the contract, in breach of the duty to inform arising from the principle of good faith and fair dealing, is not liable in breach of contract but might be liable in tort.

4 Supreme Court, 12 June 2006, Hanrei Jihō 1941 (2006) 94.

5 Supreme Court, 16 September 2005, Hanrei Jihō 1912 (2006) 8.

6 Art. 4 para. 2 of the Consumer Contract Act.

the duty to provide material information, including information about the right of withdrawal (cooling-off), in writing, since a lack of parity has been found in entrepreneur–consumer transactions in terms of information access and bargaining power (i.e. psychological aspects or in the decision-making process). As the cooling-off period starts from the day of delivery of the document, the failure to provide the information leads to the client-consumer's unlimited right to withdraw from a contract.

In addition, some types of business – for example, insurance companies and real-estate agents – are required to make material information available to their clients by branch-specific laws and regulations. Under the Financial Instruments and Exchange Act (hereinafter: FIEA),[7] business operators offering financial instruments are subject to the statutory duty to supply information in writing before the conclusion of the contract as stipulated in the FIEA's conduct rules and implementing ordinances. As an example, the Supreme Court ruled that a commodity futures firm was liable for breach of contract in a case where it failed to provide information and notice to its client.[8]

Furthermore, a party is sometimes under an obligation to supply information even in business-to-business transactions. For example, there have been a number of cases in which the court has held that franchisors were liable for damages they caused to franchisees by providing false information or failing to provide adequate information[9] in accordance with the principle of good faith and fair dealing.[10] In addition, the Supreme Court found that the arranger in a syndicated loan had to supply the information to the participating institutions under the principle of good faith[11] but did

7 *Kin'yū shōhin torihiki-hō,* Law No. 25/1948, as amended by Law No. 63/2015.

8 Supreme Court, 16 July 2009, Minshū 63, 1280.

9 A general duty of disclosure is provided for in the Medium-Small Retail Business Promotion Act (*Chūshō ko'uri shōgyō shinkō-hō,* Law No. 101/1973) and the Implementing Regulation for the Medium-Small Retail Business Promotion Act (*Chūshō ko'uri shōgyō shinkō-hō sekō kisoku,* Ordinance of Ministry of Trade and Industry No. 100/1973). The Act is not franchise specific, but its articles 11 and 12 are of relevance to retail franchising.

10 See *e.g.* Nagoya High Court, Kanazawa Branch, 20 June 2005, Hanrei Jihō 1931 (2005) 48; Fukuoka High Court, 31 January 2006, Hanrei Times 1216 (2006) 172; Fukuoka High Court, 31 January 2006, Hanrei Times 1235 (2006) 217; Saitama District Court, 8 December 2006, Hanrei Jihō 1987 (2008) 69, Otsu District Court, 5 February 2009, Hanrei Jihō 2071 (2009) 6, Sendai District Court, 26 November 2009, Hanrei Taimuzu 1339 (2010) 113; Ōsaka District Court, 12 May 2010, Hanrei Jihō 2090 (2010) 50. *See* S. KOZUKA, The Franchisor's Duty to Provide Information before Concluding Franchise Agreement, International Journal of Franchising and Distribution Law 2(1) (2000) 13.

11 Supreme Court, 27 November 2012, Hanrei Jihō 2175 (2013) 15.

not uphold the general rules as to arrangers' duty to provide information nor the idea of what amounts to "material information" as delineated in the original decision.[12]

On the other hand, the Tōkyō District Court ruled[13] that

"the acquisition of a company by another company, which is a transaction between private parties, is subject to the principle of party autonomy, based on which the information collection and analysis for concluding an acquisition agreement are the individual responsibility of each of the parties. Thus, even if one of the contracting parties has suffered disadvantage due to insufficient information collection and analysis, the disadvantage should be borne, in principle, by the party itself. Accordingly, since it is common in cases where an acquisition involves a capital tie-up and business alliance agreement that the parties enter into the contract on even footing with each other, it is appropriate to present that the above-mentioned principles apply and cannot be modified to impose upon the other party the duty to inform or account unless special circumstances are found".

III. Company Law

Most of the items to be disclosed under the Companies Act (hereinafter: CA)[14] consist of information which matters for creditors in stock corporations *(kabushiki kaisha)* and limited liability companies *(gōdo kaisha)* or is primarily important for shareholders, bondholders and option holders. However, some are to be disclosed in the interest of the general public.

1. Commercial Register (shōgyō tōki)

The fundamental source of information for the general public is the commercial register. Articles 907 through 938 of the CA govern companies' duty to register in the Commercial Registry.

A company is incorporated at the time of registration of incorporation and the principal items to be registered are as follows:

Stock corporation	Limited liability company	General partnership company	Limited partnership company
Objects			
Trade name (which should contain indication of the company's legal form)			
Addresses of the head office and branch offices			

12 Nagoya High Court, 14 April 2011, Hanrei Jihō 2136 (2011) 45.

13 Tōkyō District Court, 27 September 2007, Hanrei Jihō 1987 (2008) 134.

14 *Kaisha-hō,* Law No. 86/2005, as amended by Law No. 62/2016.

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</table>

	Stock corporation	Limited liability company	General partnership company	Limited partnership company
Trade name	xx	xx	xx	xx
Stated capital	xx			
Names and addresses…		xx	xx	xx

2. Shareholders' Rights in General

Information rights are considered to be a fundamental type of shareholder right in companies. This is especially true for minority shareholders or non-executive members of partnership-type companies. Access to information is a prerequisite for the effective exercise of the substantial rights or remedies available to those shareholders under the CA. In particular, information duties under the CA enable shareholders to participate in decision-making, supervise the management and, in some cases, apply to the court for injunctions. The information disclosed will sometimes be of assistance to shareholders who are considering whether to initiate a derivative suit against directors and officers.

The CA does not prescribe a very significant list of duties with regard to information supply for partnership-type companies and provides great autonomy to companies. In cases where a company is so private and small that the members are in close contact with the management, inspection of documents upon request and requests for reports are efficient ways to access information because they provide what members need and are flexible.

On the other hand, the Act presents more rigid and mandatory rules for stock corporations. This is partly because the number of shareholders might be so large that to supply information individually might be burdensome, costly, inconvenient and inefficient for both the corporation and shareholders, and partly because minority shareholders seldom have the bargaining power to demand information from the management. Theoretically, the articles of association may set out additional information duties for the company. However, this is rare in practice.

The CA stresses collective information instruments for stock corporations, while it emphasises individual information instruments for partnership-type companies.

a) Individual information

The provision of information to individuals is required in stock corporations as well. Though a shareholder may demand information at a general meeting, the right to do so has not been of primary importance for providing relevant information in practice, partly because both the management and most of the shareholders present at the meeting do not wish to spend much time at the meeting and partly because the answers given are not necessarily so detailed as to add information value. Irrespective of the effectiveness, the legislator stresses inspection rights in stock corporations.

Since 2006, the Implementing Regulation for the Companies Act[15] has increased the number of matters to be disclosed by the head office of a company before corporate reorganisation. Moreover, the 2014 amendments to the CA introduced ex ante disclosures for the acquisition of class shares subject to wholly call and reverse stock splits which generate fractions of less than one share, as well as squeeze-outs by the special controlling shareholder.

b) Collective information

This kind of information is required in stock corporations, not only to enable shareholders to make investment decisions – i.e. hold, sell or buy shares – but also to facilitate the improved exercise of voting rights.

3. Partnership-type Company

a) General partnership company (gōmei kaisha) and limited partnership company (gōshi kaisha)

In these types of companies, partners have individual information rights, but they do not have collective information rights unless the articles of association stipulate otherwise. This is partly because the partners might not be powerless vis-à-vis the management due to the frequent non-separation of ownership and control in these types of companies. The partners may therefore have less need for statutory and mandatory disclosures. Another reason for the more limited disclosure regulation is the need for flexibility in light of the particularity of each company and for reasons of cost-effectiveness.

As a default rule in cases where executive partners are specified in the articles of association, any partner, including non-executive partners, may investigate the state of the business and assets of the partnership-type company, even if he/she does not have the right to execute the business of the company.[16] While the articles of association may stipulate otherwise, they may not restrict the carrying out of investigations by a partner at the end of the business year or if the partner has substantial grounds to do so.[17]

Any executive partner is required to report on their fulfilment of their duties whenever there are requests by the partnership-type company or other partners, and must report on the progress and outcome of their duties

15 *Kaisha-hō sekō kisoku,* Ordinance of the Ministry of Justice No. 12/2006, as amended by Ordinance of the Ministry of Justice No. 1/2016.

16 Art. 592 para. 1 CA.

17 Art. 592 para. 2 CA.

without delay after carrying them out.[18] The articles of association may, however, stipulate otherwise.[19]

A partnership-type company must prepare annual accounts for each business year[20] pursuant to the provisions of the applicable ordinance of the Ministry of Justice (i.e. Companies Accounts Regulation[21]).[22] Annual accounts consist of a balance sheet and other statements prescribed by the Companies Accounts Regulation as necessary and appropriate in order to present the status of a partnership-type company's property. For general partnership companies and limited partnership companies, these accounts comprise a profit and loss statement, a statement of partners' equity, and notes to annual accounts if the company has decided to prepare them in accordance with the Companies Accounts Regulation.[23] Annual accounts may also be prepared in the form of electromagnetic records.[24] A partnership-type company must keep its annual accounts for ten years from the time of the preparation.[25] A partner in a partnership-type company may, at any time during the company's business hours, make a request to (1) inspect or copy the annual accounts, in cases where the annual accounts are prepared in writing, and (2) inspect or copy any items recorded in the electromagnetic records in a manner prescribed by the Implementing Regulation for the Companies Act,[26] in cases where the annual accounts are prepared in the form of such electromagnetic records.[27] While the articles of association may stipulate otherwise, they are not permitted to have the effect of restricting partner requests at the end of the business year.[28]

A partner may also inspect the register of corporate bonds.[29]

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18 Art. 593 para. 3 CA.

19 Art. 593 para. 5 CA.

20 While a partnership-type company must prepare a balance sheet as of the day of its incorporation pursuant to the provisions of the Companies Accounts Regulation (Art. 617 para. 1 CA), the balance sheet is not subject to inspection by partners in the same manner as annual accounts.

21 *Kaisha keisan kisoku,* Ordinance of the Ministry of Justice No. 13/2006, as amended by Ordinance of the Ministry of Justice No. 1/2016.

22 Art. 617 para. 2 CA.

23 Companies Accounts Regulation, Art. 71, para. 1, item 1.

24 Art. 617 para. 3 CA.

25 Art. 617 para. 4 CA.

26 Items in the electromagnetic record can be presented on paper or a display screen. Companies Accounts Regulation, Art. 226, item 30.

27 Art. 618 para. 1 CA.

28 Art. 618 para. 2 CA.

29 Art. 684 para. 1 CA; Art. 167 of the Implementing Regulation for Companies Act.

b) Limited liability company

The regulation regarding general partnership companies and limited partnership companies also applies to limited liability companies, with the exception of certain aspects.

Firstly, the Companies Accounts Regulation stipulates that limited liability companies are to prepare a profit and loss statement, a statement of partners' equity, and notes to annual accounts.[30]

Secondly, creditors of a limited liability company may, at any time during the company's business hours, make a request to (1) inspect or copy the annual accounts, in cases where the annual accounts are prepared in writing, and (2) inspect or copy of any items recorded in the electromagnetic records in a manner prescribed by the Implementing Regulation for the CA, in cases where the annual accounts are prepared in the form of such electromagnetic records.[31]

4. Stock Corporation

a) Individual information

The shareholders of a stock corporation may, firstly, inspect the articles of association,[32] the register of shareholders, the register of share options holders, and the register of bonds, as well as the minutes of shareholders' and class shareholders' meetings. Shareholders may also, with the leave of a court as necessary for the purpose of exercising their rights, inspect the minutes of the board of directors and of the board of company auditors *(kansayaku),* as well as those of the remuneration committee, the nominating committee, and the audit or audit/supervisory committee. In addition, the proxies, voting cards, and electromagnetic records of electromagnetic votes are to be made available for inspection by shareholders three months after a shareholders' meeting.[33]

Secondly, as discussed later in detail, shareholders may inspect the annual accounts (and interim accounts, if any), business reports, and supplementary schedules (including audit reports and accounting audit reports). They may also inspect the accounting adviser's reports, if any, at the office of the accounting adviser.

Thirdly, *ex ante* disclosure *(jizen kaiji)* and *ex post* disclosure *(jigo kaiji)* are required for absorption-type mergers, incorporation-type mergers, absorption-type demergers, incorporation-type demergers, share exchanges,

30 Art. 71 para. 1, item 2 of the Companies Accounts Regulation.

31 Art. 625 CA.

32 Art. 31 para. 2 CA.

33 Art. 310 paras. 6 and 7, Art. 311 paras. 3 and 4, Art. 312 paras. 4 and 5 CA.

and share transfers (hereinafter collectively termed corporate reorganisation), as well as for reverse stock splits *(kabushiki heigō)* which generate fractions of less than one share or the acquisition of class shares subject to wholly call *(zenbu shutoku jōkō tsuki shurui kabushiki)*. In addition, registration of the fundamental items is required, similarly to the case for the incorporation of a company, in the event of absorption-type mergers, incorporation-type mergers, incorporation-type demergers or share transfers.

As a part of *ex ante* disclosure, the company (except for the absorbed company in an absorption-type merger) must keep the agreement regarding the action (in the case of a share transfer, the plan) and other fundamental information prescribed by the Implementing Regulation for the Companies Act[34] at its head office for a period beginning two weeks before the shareholders' meeting approving the agreement or plan until six months after the effective date of the act. The absorbed company is subject to the disclosure obligations until the date that the merger takes effect. These disclosure requirements are intended to assist the shareholders and company creditors to make informed decisions with regard to the particular action and take appropriate measures (voting at shareholders' meetings, raising objections, seeking injunctions or appraisals, etc.).

As part of *ex post* disclosure, the company (except for the absorbed company in an absorption-type merger and the consolidated company in an incorporation-type merger) must, following the effective date of the action and without delay, prepare documents or electromagnetic records stating or recording the items prescribed in the Implementing Regulation for the Companies Act,[35] and must keep them at the head office for six months. This kind of disclosure is required to enable the shareholders and company creditors to take appropriate measures (challenging the validity of the action, etc.). At the same time, it can be presumed the legislature expected the ex ante and ex post disclosure requirements to motivate the management of the companies to abide by the laws and regulations as well as the articles of association and give due consideration to the legitimate interests of stakeholders.

In order to protect minority shareholders' interests, ex ante and ex post disclosure are provided in the same manner for reverse stock splits which

34 For example, information on the appropriateness of the action under consideration for the shares and other relevant information about it, information on the appropriateness of the provisions for share options, the financial statements of the other party, information on the prospect of fulfilling obligations after the corporate reorganisation as well as on the post-disclosure events.

35 For example, the effective date, the history of the appraisal procedures and the procedures designed for protecting creditors, as well as information on material rights and obligations taken over by the company.

generate fractions of less than one share or the acquisition of class shares subject to wholly call.

Fourthly, shareholders may raise questions concerning the agenda or proposals at the shareholders' meeting. Directors, accounting advisors, company auditors, and executive officers are responsible for providing answers. When a shareholder poses a question, the chairperson will designate someone to answer the question (at the chairperson's discretion). While the questions are sometimes answered by several respondents, most questions will be answered by the president (chairperson) in practice. The CA and its Implementing Regulation[36] outline the justifiable reasons for refusing to answer.[37]

Finally, shareholders holding 3 per cent or more of the voting rights or the outstanding shares may inspect the accounts book and relevant materials.

A member of the parent company may, with the leave of a court, also inspect the subsidiary company's documents (including those in the form of electromagnetic records) for the purpose of exercising the shareholder's rights.[38]

b) Collective information

A stock corporation has to issue notice to its shareholders to convene shareholders' meetings. It has the statutory duty to send or make available certain documents to all the shareholders with voting rights at the general meeting without a specific request from the shareholders.

The first type of documents are annual accounts and reports, as discussed below.

The second type of documents are reference materials *(sankō shorui)*. A corporation that has 1,000 or more shareholders with voting rights should allow those shareholders who do not attend the shareholders' meeting to vote by mail. A corporation may decide that shareholders not attending the shareholders' meeting may exercise their voting rights via the Internet or other information and communication technology means. In such cases, the

36 Art. 71 of the Implementing Regulation for Companies Act.

37 (i) The items are not relevant to the subject of the shareholders' meeting; (ii) giving explanations will cause serious detriment to the common interests of the shareholders; (iii) preparation is necessary to provide an explanation of the items (except for cases where the shareholder has notified the company of the items a reasonable amount of time prior to the date of the meeting or cases where the necessary preparation is extremely easy to undertake); (iv) giving explanations would infringe the legitimate rights of the company or any other person; (v) the shareholder is repeatedly seeking explanation of essentially identical matters at the same shareholders' meeting; or (vi) there is a justifiable ground for not being able to explain other than (i) through (v).

38 Art. 31 para. 3 CA.

corporation's convocation notice should provide the shareholders with the documents stating matters of reference for votes (reference materials), in addition to accounting information and business reports, so that the latter, especially absentee shareholders, can make informed decisions. While it is true that annual accounts and reports as well as the accounting auditor's reports are essential with regard to the election or remuneration of directors, they are not necessarily sufficient for shareholders' voting decisions. Reference materials can help shareholders better understand and assess the items on the agenda.

The reference materials should include the proposals, the grounds for the proposals, and the summary of the company auditors' reports, if any, to be delivered at the shareholders' meeting. The additional information to be included is stipulated in the Implementing Regulation for the Companies Act and includes proposals for the election or dismissal of directors, accounting advisors, company auditors or accounting auditors (hereinafter collectively termed company officers); the non-re-election of accounting auditors; and the remuneration (including retirement benefits) of company officers. It also includes materials related to the approval of annual accounts, reverse stock splits which generate fractions of less than one share, the acquisition of class shares subject to wholly call, agreements or plans for corporate reorganisation, and the assignment of business and other contracts prescribed in Article 467 of the CA.

With a few exceptions, a company may provide information on a website instead of sending it as reference materials, as long as the articles of association allow for this and no objections have been raised by a company auditor, the audit and supervisory committee, or the company's audit committee.

There are also other types of collective information which are not related to or are less related to the general meeting. Firstly, disclosure is required with regard to the issuing of shares or share options. In public corporations the board of directors may, in principle, decide to issue new shares or share options or dispose of treasury stock.[39] However, after the board of directors determines the terms and conditions for the subscription of shares or options, the company must notify the shareholders of these terms and conditions, or post a public notice, at least two weeks before the date of payment so that the dissenting shareholders are given the opportunity to file an enjoinment against the issue or disposal.[40] Even in public corporations the

39 In private corporations, an extraordinary resolution must be passed at the shareholders' meeting for the issue of new shares or share options as well as the disposal of treasury stocks.

40 In cases where a securities registration statement is filed at least two weeks in advance or in certain cases prescribed by the Implementing Regulation for the

shareholders' meeting must approve[41] large private placements of shares or share options through which the subscriber of newly issued shares or disposed treasury stock becomes a new parent company by holding more than half of the shares as a result of the issuance or the disposal. In this case, the issuer company must disclose the name of and other information about the subscriber so that shareholders can raise objections to the issuance or disposal to that subscriber.[42]

Secondly, in the case of squeeze-out by the special controlling shareholder, ex ante disclosure and ex post disclosure are required, similarly to the case for corporate reorganisation, reverse stock splits which generate fractions of less than one share, or the acquisition of class shares subject to wholly call, as discussed above.

c) Appointment of inspector

Shareholders holding 3 per cent or more of the voting rights or the outstanding shares may file a petition with the court to appoint an inspector to investigate the corporation's affairs and assets.[43] While the inspector prepares and submits a report to the court,[44] he/she also provides a copy of the report to the corporation and the shareholders who filed the petition.[45] Therefore, the appointment of the inspector is, on the one hand, an instrument for individual information.

Though other shareholders do not have the right to access the report, the court shall order the directors to (i) call a shareholders' meeting within a defined period of time and/or (ii) notify shareholders of the result of the investigation if it finds this to be necessary. In this case, the investigation by an inspector also functions as an instrument for collective information.

Companies Act, e.g. those cases where it is unlikely that the protection of shareholders is at risk, the provision of notice to shareholders or of public notice is not required.

41 The approval of the shareholders' meeting is even required in public corporations in cases where the shares are offered on "particularly favourable" terms for the subscriber.

42 In cases where objections have been raised by shareholders holding 10 per cent or more of the voting rights, the allotment to the subscriber must be approved by an ordinary resolution of the shareholders' meeting. This approval is not required, however, in cases where the financial condition of the company has worsened so dramatically that there is an urgent need for fundraising via the issuance or disposal of shares to keep the company in operation.

43 Art. 358 para. 1 CA. The inspector may investigate the affairs and assets of subsidiaries of the corporation necessary for carrying out its duties (Art. 358 para. 4 CA).

44 Art. 358 para. 5 CA.

45 Art. 358 para. 7 CA.

While a shareholders' meeting may appoint an inspector to investigate the corporation's affairs and assets in cases where the shareholders' meeting has been convened by shareholders,[46] there is no explicit provision regarding how shareholders may access the results of the investigation.

d) Corporate governance

While the FIEA and listing rules require companies to provide extensive information on their compliance with the Corporate Governance Code and/or their corporate governance, the CA requires only that listed companies without an outside director as a board member disclose "the reason why [the] appointment of an outside director is unreasonable for that company" in their business reports and reference materials, and at the annual general meeting (AGM).[47] The Implementing Regulation for the Companies Act requires public companies to disclose the total amount of remuneration of directors, company auditors, officers, accounting advisors and external auditors[48] – as well as the policy for deciding the remuneration, if any[49] – in the business report. It requests that stock corporations state the gist of the decisions made by the board of directors regarding the internal control system,[50] as well as the fundamental policy for controlling shareholders and anti-takeover measures, in the business report.[51]

5. "Collective Information" as a General Principle?

New information technology might change the landscape. If shareholders could access the information database on the company's website, they could effectively exercise their right to inspect. While it would not be appropriate to allow shareholders to access the books and records in general, there seems to be no serious problem with allowing them to access the annual accounts, group accounts, business reports, and auditors' reports, as well as the minutes of the shareholders' meetings. In addition, ex ante disclosure on corporate reorganisation and squeeze-out would no longer be an unattainable ideal if shareholders could access the information via the Internet. Some of the information that is subject to inspection would become collective information in substance because the company would not need to respond and the information would available to all the shareholders.

46 Art. 316 para. 2 CA.
47 Art. 327-2 CA.
48 Art. 121, item 4 and Art. 126, para. 2 of the Implementing Regulation for Companies Act.
49 Art. 121, item 6 of the Implementing Regulation for Companies Act.
50 Art. 118, item 2 of the Implementing Regulation for Companies Act.
51 Art. 118, item 3 of the Implementing Regulation for Companies Act.

IV. REPORTING

Firstly, in a corporation with a board of directors, the annual accounts (and the group accounts, if any) and business report that have been approved by the board of directors must be provided to the shareholders in the convocation notice for the annual shareholders' meeting. Any audit reports and accounting audit reports must also be provided in a similar manner. These requirements do not, however, apply to corporations without a board of directors. A company may provide a statement of shareholders' equity, notes to annual accounts and group accounts, and the company auditors' report, as well as the accounting auditors' report on the latter, on a website instead of sending them to shareholders, as long as the articles of association allow for this. With a few exceptions, a company may also do the same with information to be included in the business report, as long as the articles of association permit this and no objections have been raised by a company auditor or the company's audit and supervisory committee or audit committee.

Secondly, a corporation with a board of directors must keep the annual accounts, business reports and supplementary schedules (including audit reports and accounting audit reports, if any) at the head office from at least two weeks before the date of the annual shareholders' meeting for a period of five years for inspection by shareholders, creditors and members of the parent company. In corporations without a board of directors, the disclosure must be made one week before the date of the annual shareholders' meeting. These documents must also be made available for inspection for a period of three years at the branch offices. The annual accounts and other documents may be prepared and disclosed in the form of electromagnetic records. Corporations are not required to keep group accounts for inspection. This is because most of the corporations that prepare group accounts submit their securities report to the prime minister, while this is not the case for corporations that are not subject to the FIEA.

The shareholders and creditors may request to inspect, or to receive a transcript or extract of, the documents to be disclosed at any time during the corporation's business hours. In cases where it is necessary for a member of the parent company to exercise their rights, the member may seek the permission of the court to inspect the documents. Annual accounts and supplementary schedules may be inspected at the office of the accounting adviser, if there is one.[52]

Thirdly, directors are required to provide the annual accounts (and the group accounts, if any) and the business report as well as audit reports and

52 Art. 378 CA.

accounting audit reports, if any, to the AGM. The annual accounts are to be approved or reported at the meeting. The group accounts, where applicable, and the business report as well audit reports and accounting audit reports are to be presented at the AGM.

Fourthly, the corporation must give public notice of its balance sheet without delay following the approval of this document at the shareholders' meeting. A large corporation must give public notice not only of the balance sheet but also of the profit and loss statement. For a corporation that gives this public notice via publication in the official gazette or in a daily newspaper which reports on current affairs, a summary of the balance sheet (for a large corporation, a summary of the balance sheet and the profit and loss statement, hereinafter the same) is considered sufficient.

Corporations may give public notice of the annual accounts via an electronic public notice if their articles of association so stipulate. In this case, a corporation is required to continue posting the balance sheet information for five years from the conclusion of the annual shareholders' meeting where the approval took place. In addition, corporations which specify publication in the official gazette or a daily newspaper which reports on current affairs as their method of public notice may also make the information contained in the balance sheet available to the general public via an electromagnetic method for five years from the conclusion of the annual shareholders' meeting instead of giving public notice.

As an exception to the above, companies that have submitted the securities report pursuant to the FIEA are not required to give public notice of the balance sheet under the CA. This is because the information included in the annual accounts has already been disclosed in more detail in the securities report.

V. Conclusion: Three Material Weaknesses in the Japanese System

1. Poor Enforcement

Firstly, failure to disclose ex ante material information on planned corporate reorganisation or squeeze-out might result in the suspension or nullification of these activities. Failure to issue individual notice or to post public notice in cases of issuance of shares or options, corporate reorganisation or squeeze-out might have the same consequence. It is the prevailing view of the lower courts, however, that failure to provide annual accounts or audit reports does not lead to the revocation of resolutions appointing directors or setting the ceiling for directors' remuneration but only to the revocation of those resolutions approving annual accounts or distribution of surplus which

are closely related to the failure to disclose. This applies to cases where shareholders' questions have not been adequately addressed. With regard to the duties of directors and other corporate organs to provide information at a shareholders' meeting, there is no enforcement of disclosure.[53]

Secondly, claim for damages is not effective to enforce information duties because it is quite difficult for the plaintiff shareholders to prove the amount of damages arising from non-disclosure.

Thirdly, although misrepresentation or failure to register, disclose or explain are generally subject to administrative fines, the Ministry of Justice has never been too keen to impose such fines, except in the case of failure to register the appointment of directors and other organs. In particular, it is said that more than 99 per cent of corporations have not complied with the requirement to post public notice of their balance sheets, but the Minister of Justice once responded in the Diet that she was not willing to improve the situation.[54] For comparison, the misrepresentation of group accounts or the failure to prepare group accounts does not even result in administrative fines under the CA.

Fourthly, the courts have been inactive in enforcing information duties. For example, the Tōkyō High Court ruled that a shareholder is not entitled to require the company to allow him/her to inspect its business report and supplementary schedules or to prepare them in cases where the it has failed to do so.[55]

Fifthly, there is no external enforcement mechanism by supervisory authorities in regard to the disclosure requirements under the CA. Even the enforcement by the Securities and Exchange Surveillance Commission under the FIEA is confined almost exclusively to ex post actions.

2. Failure to Make Good Use of ICT

Generally speaking, shareholders of Japanese companies do not have the right to require the companies to make information available electronically. Accordingly, they have to visit the principal office of the company to obtain detailed information – for example, ex ante information on planned corporate reorganisation or squeeze-out. The Implementing Regulation allows companies to disclose the retirement bonuses for directors at the head office only instead of in the reference materials. Under the CA, even the articles of asso-

53 For fear of abuse by corporate racketeers *(sōkai-ya),* the information duty at a shareholders' meeting was deliberately not couched as a right of shareholders but rather as a duty of company organs.

54 An answer given by Ms Chieko Noono at the Legal Committee of the House of Councilors (Minutes of the Legal Committee of the House of Councilors, 162nd Session, No. 23 (14 June 2005) p.14).

55 Tōkyō High Court, 11 November 2015 (ne) No. 4114 of 2015, unreported).

ciation are not required to be posted on the company's website, they are available via the EDINET (Electronic Disclosure for Investors' Network) site as one of the accompanying documents[56] to a securities report under the FIEA.

While the commercial register can be accessed via the Internet, the items registered are quite limited, as explained above, and do not include annual accounts and so on.

3. Ungoverned Selective Disclosure

Japanese company legislation had no explicit regulation covering selective disclosure befor the 2017 amendments. As Japanese insider trading regulation under the FIEA is based on "disclose or abstain", companies were free to decide whether and to whom they provide information or access to company documents and records as long as the recipient of the information does not make use of it in securities trading.[57] As shown above, shareholders' statutory individual information rights are quite limited outside the shareholders' meeting. Moreover, if there are hundreds of questions from shareholders, they cannot be answered during one shareholders' meeting. In addition, it appears that the management (and most shareholders) prefer not to spend much time on Q&As at shareholders' meetings. This may result in a lack of parity among shareholders because the management sometimes talk with significant shareholders outside the shareholders' meeting. It is difficult in practice to prevent large shareholders from engaging informally in more intensive information exchange with the management.

56 The notice convening the shareholders' meeting and reference materials for the purpose of the Companies Act are included and are thus accessible via the Internet, though on an ex post basis.

57 The Law amending the FIEA (Law No. 37 of 2017) was enacted and the FSA has invited public comments on the draft ordinances, in response to a report of the Fair Disclosure Rules Task Force under the Working Group on Financial Markets, the Financial System Council at the Financial Services Agency (December 2016) (English summary: *http://www.fsa.go.jp/en/refer/councils/singie_kinyu/20170303-1/01.pdf*). The regulations are designed to close a gap in the information available to different investors. They require companies sharing non-public material information with "certain parties", professionals at securities and asset management firms such as brokerage analysts, to immediately disclose it publicly as well, on their website or by any other means. The press are excluded from the scope of "certain parties" in order to encourage corporations to continue to talk to the media and to protect freedom of speech.