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The 2013 Symposium on Corporate Governance in Japan

David Makman*

I. INTRODUCTION

The 2013 Symposium on Corporate Governance in Japan was organized by the University of California, Hastings College of the Law, the Japan Society of Northern California, and the Pacific Pension Institute.1 Our goal was to provide a forum where academics and practitioners could meet to exchange information and ideas relating to corporate governance. The Japan Society of Northern California and Pacific Pension Institute have been covering corporate governance issues together since 2001, and have held several conferences on the issue. The Symposium was the first joint program with the University of California, Hastings College of the Law in this area. In this article, I will discuss the background and structure of the symposium as well as provide an introduction to the papers that are presented in this issue of the journal.2

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2 The author would like to thank Professor Setsuo Miyazawa and Associate Dean Richard Boswell for their support in organizing the symposium and for their generous contribution of time, as well as Martha Vanderberg of the Pacific Pension Institute for her support and time. In addition, the author would like to thank Roslyn Foy of University of California, Hastings College of the Law and Eileen Tanaka of the Japan Society of Northern California for their skillful handling and coordination of all of the logistical tasks. Further, the author would thank Sumitomo Mitsui Trust Bank, Hibiya Station Law Offices, and Japan Airlines for their sponsorship, without which the symposium would not have been possible.
II. BACKGROUND

In 2007 and 2008, as the Western markets were reaching their over-leveraged peaks, there was a great deal of interest in the potential for using shareholder activism as a way to provide greater returns to shareholders. CalPERS had its “name and shame” policy in place, and Alan Greenspan advocated in favor of a strong market for corporate control—i.e., he argued in favor of letting the market mechanism shift corporate control to those investors that will manage the company most efficiently.

At the same time, Japan was starting to confront a demographic crisis in that more and more of the Japanese population was going to be retiring and forced to live off of savings. Given the demographic pressures in Japan, one could postulate that, over time, Japanese pension funds will need to get much better returns on their investments than they have in the past in order to make the necessary payouts to pensioners. Moreover, pensioners are likely to vote in elections. As such, demographics within Japan are likely to create steadily increasing domestic Japanese political pressure in favor of improving the returns to shareholders.

With this domestic political pressure in mind, an interesting development occurred in 2008 when the Asian Corporate Governance Association (“ACGA”) issued a white paper on corporate governance issues in Japan and thereby opened a dialogue between foreign investors and Japanese lawmakers over weaknesses that the ACGA see with Japanese governance law. This paper framed the dialogue between Japanese lawmakers and foreign investors at the time. Our symposium, occurring as it did in 2013, took place five years after the White Paper and provided an opportunity to assess the changes to Japanese law and the direction for the future.

The ACGA describes itself as an “independent, non-profit membership organization dedicated to working with investors,  

companies, and regulators in the implementation of corporate governance practices throughout Asia. Its 2008 paper is remarkable for at least the following five reasons. First, it was endorsed by a purported five trillion dollars of investment capital and, as such, represented a consensus and high degree of political coordination between a large number of non-Japanese investors. Moreover, the paper was not limited to non-Japanese support. To the contrary, its authors indicated that there was domestic support within Japan for the proposed reforms, though Japanese citizens were, for the most part, quoted anonymously in the paper.

Second, the paper was interesting because the companies that endorsed the White Paper were primarily long-term, conservative investors such as pension funds. Such investors are likely to hold their investments for the long-term, and therefore, as shareholders, have an interest that is arguably well-aligned with the long-term interests of the managers and employees of publicly traded companies. Pension funds, as long-term investors, also have good reasons to buy stocks worldwide in order to diversify and protect themselves from the political risks of having all of their investments concentrated in a single market or a single currency. In 2008, Japan was the second-largest economy in the world when measured by GDP. Now, it is the third largest. Therefore, it is only natural that pension funds worldwide would invest in publicly traded shares of Japanese companies. Further, in some countries, pension funds have a legal obligation to vote responsibly as shareholders. This obligation puts the pension funds in the position of monitoring governance issues as well as voting at shareholder meetings for Japanese publicly traded companies. For these reasons, pension funds are often well-informed investors that study and have sophisticated understandings of the differences between and among capital markets worldwide—including the legal differences.

Third, the report was published in May 2008, which was right on the verge of the financial crisis of 2008-2009. At the time, a pension

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6 About ACGA. ASIAN CORP GOVERNANCE ASSN. http://www.acga-asia.org/content.cfm?SITE=CONTENT_TYPE_ID=21 (last updated Nov 19, 2010)

7 Lehman Brothers declared bankruptcy in September of 2008. As such, the ACGA White Paper is based on thinking in the investment community before the financial crisis.
fund called CalPERS had a “name and shame” policy in place that it used to criticize corporate governance in publicly listed companies. At least one study has shown that this policy led to increased returns for the companies that were “named and shamed” by CalPERS and the share price of those companies increased. As such, the view of many long-term investors outside Japan at the time was that management of corporations should commit to providing significant returns to their shareholders and that holding management to specific targets was an effective way to ensure better governance. Around this time, the Japanese Pension Fund Association joined the bandwagon when it announced that it would only vote in favor of reelecting board members of companies that were able to achieve a return on equity of eight percent. While that policy did not seem to have much support at the time, it has been readopted and reiterated recently.

Fourth, the writers took the position that “sound corporate governance” was “essential to the creation of a more internationally competitive corporate sector in Japan, and to the longer term growth of the Japanese economy and its capital markets.” The report then proceeded with an attempt to define the changes needed to create “sound corporate governance.”

Fifth, as mentioned above, the report came at a time when, due to demographics, increasing numbers of Japanese citizens were retiring and living off of their savings. As such, the number of people who were very concerned with returns on savings was increasing in Japan. Thus, the ACGA’s agenda is well-timed: The combination of foreign and domestic pressure should amplify pressure to increase shareholder returns, whether in the form of dividends or through growth. Indeed, looking at the developments over the last five years, one thing is clear: Today, investors are able to coordinate together and act in concert in ways that were not possible five years ago.

8 JUNKIN & TOTH, supra note 3
11 ASIAN CORP GOVERNANCE ASS’N, supra note 5, at 5
The issues that the ACGA identified were: (1) shareholders as owners (the ACGA urged that the rights of shareholders should be better recognized and protected); (2) utilizing capital efficiently (the ACGA urged that companies should be more disciplined); (3) independent supervision of management (the ACGA urged the increased use of outside directors); (4) preemption rights (the ACGA urged greater protection against dilution); (5) poison pills and takeover defenses (the ACGA urged the use of shareholder rights plans); and (6) shareholder meetings and voting (the ACGA urged improvements in the timing and process of shareholder voting). These issues were chosen with the aim of changing the investment environment in order create better returns to shareholders.

III. DEVELOPMENTS

With the above framework in mind, what follows is a brief, birds-eye discussion of some changes that have occurred in Japanese Corporate Governance in the five years since the White Paper.

With regards to the first issue, treatment of shareholders as owners, foreign investors appear to be looking for a change in Japanese corporate culture. That is to say, they would like to see an increase in the degree of attention that Japanese management pays to shareholders as owners. This author postulates that there are two ways to make such a change: either one can reward management who comply with the wishes of shareholders (including the interests of minority shareholders), or one can figure out a way to punish them for failure to comply. In other words, the rewards to management and/or the remedies available to shareholders will play the critical role in accomplishing any change. When dealing with minority shareholder interests, punishment for failure to comply may be particularly important.

In that regard, the Aderans case, where a shareholder vote resulted in a change of management, seems to have increased management awareness of the power of shareholders. Indeed, a

12 ASIAN CORP GOVERNANCE ASS'N, supra note 5, at 5-6
number of the presenters at the symposium were involved in the engagement between investors and management. They indicated that, since 2008, the amount of engagement between management and shareholders has increased substantially.

With regard to the second issue, capital efficiency, based on discussions with symposium participants, there are a significant number of Japanese publicly traded companies that could increase their profitability through improved financial strategy. So, the subject of increasing capital efficiency is regularly on the agenda when foreign shareholders engage with Japanese management. Some investors interviewed by this author have indicated that, in their opinion, the Japanese banking system is an obstacle to more efficient financing, and changes in banking regulation could have significant beneficial long-term effects. Those investors claim that the Japanese banks are too bureaucratic and not sufficiently profit-oriented.

The third issue, independent supervision of management, has been the most heavily-covered and disputed over the years. Foreign investors have put a lot of pressure on legislators and regulators in Japan to require independent outside directors at publicly traded Japanese companies. Many advocate that one-third of corporate boards in publicly traded companies should be independent outside directors. And, the use of outside directors in Japan is increasing slowly. For example, in 2013, Toyota made headlines by appointing an outside director.14 Canon followed suit in 2014, but the number of outside directors on Japanese boards is much lower than foreign investors would like to see.15

As to the fourth issue, there does not seem to have been significant legal changes in the area of preemption rights, though preemption rights have been identified in proposed changes to the corporations law.16 Lack of adequate protections in this area can serve

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16 Under the proposed new law, when a public company issues shares which enable a subscriber to execute fifty of all votes after issuance, the company would have give notice all
as an impediment to the market for corporate control, though it should be noted that preemption rights are not common in the United States. Japan does not have a very active market for corporate control, though management buyouts do occur, and this author has the impression that such buyouts are increasing in Japan.

With regard to the fifth issue, in the wake of the Bulldog Sauce case,17 the Ministry of Economic Trade and Industry published revised guidelines regarding poison pills.18 The new guidelines emphasized the role of shareholders as owners in their report. However, there has been no significant litigation involving poison pills since Bulldog Sauce. Use of poison pills in Japan has declined in recent years.19

Finally, as to the sixth issue, since 2010, all votes are counted at shareholder meetings, and the votes are publicly disclosed.20 This is a significant change because it is now possible for independent shareholders in a company to identify other shareholders (by obtaining shareholder ledgers), and to learn how those shareholders are voting. Moreover, cross-shareholding is decreasing, and there is a significant increase in the amount of institutional ownership of Japanese shares. In these circumstances, we can expect shareholders to become more demanding in the future. That said, the shareholder meetings are still all clustered together at the same time of the year, which creates logistical problems for investors that are unnecessary and should be changed.

current shareholders of the subscriber's name, address, the amount of votes, or any other matters provided by ordinance. In addition, when a current shareholder, who has over ten votes makes an objection to the issuance, the company would be required to have a resolution to issue the shares, except in urgent situations where the issuance is necessary for the company to continue its business. Act for Partial Revision of the Companies Act, MINISTRY OF JUSTICE, http://www.moj.go.jp/content/000116474.pdf (in Japanese) (last visited Oct 25, 2014).


IV. THE SYMPOSIUM

The purpose of the symposium was to provide a forum where academics and practitioners could exchange ideas and information relating to corporate governance. In addition, this being five years after the ACGA White Paper, it seemed to be a good time to assess progress and take a snapshot of the current state of governance law in Japan.

From the academic community, presentations were given by Professors Hideki Kanda and Bruce Aronson. Professors Setsuo Miyazawa, Abraham Cable, Jodi Short, Keith J. Hand, and Eric Sibbit, as well as Associate Dean Richard Boswell, all of Hastings, participated as moderators in running the Q&A discussion. Professors Kanda and Aronson have developed their presentations into papers, which are presented herein.

Professor Kanda has provided this journal with an overview of recent trends in corporate governance and Japanese law. Professor Kanda is a leading scholar in this area and is highly knowledgeable about the field of corporate governance. His summary reviews recent empirical studies and covers issues such as hostile takeovers, independent director requirements, listing of subsidiaries, and shareholder activism. He also discusses scandals and the various regulatory structures that affect corporate governance law in Japan.

Professor Aronson has provided this journal with a well-informed and interesting discussion of the hybrid model of governance that is developing in Japan, where corporate auditors (kansayaku) play an important role. He places this discussion in the context of three critical issues: the role of domestic institutional investors, the development of a standardized hybrid model, and the adjustment of Japanese corporate governance to the demands of globalization.

From the financial community, there were presentations at the symposium from investors, ESG experts, proxy advisors, a board training organization, engagement advisors, management advisors, and attorneys. Speakers were chosen for their expertise and to provide a wide range of perspectives on the developments in this rapidly changing area of law. They were also chosen because they worked actively in this field on the ground in Japan and, therefore,
had up-to-date and valuable insights.

The program is summarized below. The schedule was quite aggressive, and we covered a lot of material over a short amount of time.

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<td>Registration</td>
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<td>Richard A. Boswell, Associate Dean for Global Programs, UC Hastings College of the Law</td>
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<td><strong>Introductory Remarks: Issues for Discussion</strong></td>
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<td><strong>Moderator:</strong> Setsuo Miyazawa, Professor, UC Hastings College of the Law and Aoyama Gakuin University Law School</td>
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<td><strong>Remarks</strong>: Masato Suzuki, Consul and Director, Japan Information Center, Consulate General of Japan in San Francisco</td>
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<td><strong>Speaker:</strong> David Makman, Partner, Makman &amp; Matz LLP</td>
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<td>9:30 a.m.</td>
<td>Session 1: Legislative Process &amp; the Corporate Law Amendment</td>
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<td><strong>Moderator:</strong> Setsuo Miyazawa, Professor, UC Hastings College of the Law and Aoyama Gakuin University Law School</td>
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<td><strong>Speakers:</strong> Hideki Kanda, Professor of Law, University of Tokyo, Bruce Aronson, Professor, Hitotsubashi University</td>
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<td><strong>Discussion + Q&amp;A:</strong> Eric Sibbitt, Partner, O’Melveny &amp; Myers LLP, Adjunct Professor, UC Hastings College of the Law</td>
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<td><strong>Speakers:</strong> Hiroshi Komori, Associate General Manager, Stock Transfer Agency Business Advisory Department,</td>
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<td>11:45 a.m.</td>
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<td>1:00 p.m.</td>
<td><strong>Session 3: A View of the Japanese Market &amp; Shareholders’ Rights from the Foreign Perspective</strong>&lt;br&gt;<strong>Moderator:</strong> David Makman, Partner, Makman &amp; Matz LLP&lt;br&gt;<strong>Speakers:</strong> Kouji Yamada, Professor, Mission Value Partners Adjunct Professor, Hitotsubashi University Sarah Ingmanson, Executive Director, Banking Strats, Investment Banking Division, Morgan Stanley&lt;br&gt;&lt;br&gt;<strong>Discussion + Q&amp;A:</strong> Hideki Kanda, Professor, University of Tokyo</td>
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<td>2:00 p.m.</td>
<td><strong>Session 4: Engagement &amp; Training Issues</strong>&lt;br&gt;<strong>Moderator:</strong> Sarah Ingmanson, Executive Director, Banking Strats, Investment Banking Division, Morgan Stanley&lt;br&gt;<strong>Speakers:</strong> Nicholas Benes, Representative Director, The Board Director Training Institute of Japan (BDTI) Stephen Codrington, CEO, Codrington Japan&lt;br&gt;&lt;br&gt;<strong>Discussion + Q&amp;A:</strong> Sarah Ingmanson, Executive Director, Banking Strats, Investment Banking Division, Morgan Stanley</td>
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<td>3:00 p.m.</td>
<td>Coffee Break</td>
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| 3:15 p.m.    | **Session 5: Market for Corporate Control**<br>**Moderator:** Keith Hand, Associate Professor of Law, UC Hastings College of the Law<br>**Speakers:** Mangyo Kinoshita, Partner, White & Case LLP Michael J. Mies, Partner, Skadden, Arps, Slate,
Meagher & Flom LLP
Discussion + Q&A:
Bruce Aronson, Professor, Hitotsubashi University

4:15 p.m.  Session 6: Interactions between Management & Investors
Moderator:
Keith Hand, Associate Professor of Law, UC Hastings College of the Law
Speakers:
Atsushi Matsunaga, Manager, IR SR Research Unit, IR Japan, Inc.
Marc Goldstein, Head of Research Engagement, ISS (Institutional Shareholders Services)
Discussion + Q&A:
Abraham Cable, Associate Professor, UC Hastings College of the Law

5:15 p.m.  Closing Remarks
Moderator:
Setsuo Miyazawa, Professor, UC Hastings College of the Law and Aoyama Gakuin University Law School
Speakers:
Hideki Kanda, Professor, University of Tokyo
Bruce Aronson, Professor, Hitotsubashi University
Eileen Tanaka, Interim Head, Japan Society of Northern California

The materials from the symposium are available on the worldwide web, both on the Hastings website21 and on the website of the Japan Society of Northern California.22 We look forward to further developments in this area, including the new Japanese Stewardship Code, which should be in place by the time that this issue is published.
