LEGAL POSITION OF MANAGING DIRECTORS IN JAPANESE COMPANY LAW

— *HISTORICAL PERSPECTIVE* —

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For the purpose of rationalizing the management structure of the company limited by shares (*kabushikigaisha*), the reformed company law in 1950 fundamentally changed the former directorial system. This system had originally been established in the former Commercial Code of 1890 which had provided a licence system for the incorporation of company. The Code was replaced by the present Commercial Code in 1899 which established the normative system for the formation of a company in Japan. This Code was amended in 1911 and 1938. Differently from other developed countries, it was expected from the beginning that the company limited by shares should be developed into the capital corporation in Japan; a company had to have more than three directors as a necessary organ of the company.[1)]

It was already recognized in the former Commercial Code that fundamentally different from an incorporated partnership with limited liability (*gōshigaisha*, equivalent to société en commandite or Kommanditgesellschaft) the company could not be represented by each of its shareholders; the existence of the directors as administrative organ was necessary to the company as well as its share capital stock. It was prescribed that "the general meeting of shareholders should elect more than three directors among the shareholders", and furthermore "the directors may appoint a

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1) The Former Commercial Code Art. 185, para.1; The Commercial Code of 1899 Art.165; The Revised Code in 1938 Art.255. This was in contrast with other developed countries.

managing director who mainly manages the company"[2] If each director were able to execute the business transactions respectively, it would be impossible to keep the unity of management in the company. In order to keep the unity of management, it was permitted to appoint a managing director and adopted the principle that regarding the important business affairs in the management the directors' meeting had to decide.[3] We have to pay attention not only to the consideration to ensure the unity of management but also to the theory that the plural directors delegate their managing powers which revert to the directors collectively to the managing director elected by themselves.

With regard to the representation of company in and out of court, the former Commercial Code prescribed that "the directors have an exclusive right to hold agency for the company over all the business transactions of company in dealing with the third parties and in legal proceedings", but their authority "should be restricted by the articles of incorporation or the resolutions of general meeting" and "whether several directors may carry out the transactions respectively or must carry it out all together or in groups" had to be prescribed by the articles of incorporation or the resolution of general meeting.[4] So the directors of a company limited by shares, different from the managing partners in an incorporated partnership with limited liability, had only the authority to bind the company within the limits of the articles of incorporation or the resolutions of shareholders; their authorities had been restricted by the prescriptions such as "the directors have no deciding power of agency exclusively" concerning certain matters or "they cannot carry out the business transactions respectively" as to the several directors.[5] This is the contrast to the case in an incorporated partnership with unlimited liability (*gōmeigaisha*, equivalent to société en nom collectif or offene Handersgesellschaft); "Each partner can execute the

2) The Former Commercial Code Art.185: the Draft Code by Roesler Arts.219 and 224. The Roesler's Draft had begun to be drawn up in 1881 and was completed in 1884. The Draft Code was decreed in 1889 as the former Commercial Code.

3) H. Rösler, The Draft Commercial Code, The First Book, 1884, p.397; T. Hasegawa & T. Kishimoto, *Shōhō Seigi* (Commentary on Commercial Code), 2nd Vol.1890, p.436.

4) The Former Commercial Code Art.186=143. The Draft Code by Roesler Art.222.

5) Hasegawa & Kishimoto, *op. cit.*, pp.297 and 300.

whole business affairs and also can proceed the power validly".[6] Namely, in an incorporated partnership, each partner has rights and duties of executing the business transactions in the capacity of partner as a rule and he *qua* partner has the agency of the whole business of the firm in terms of the character of partnership.

In a company limited by shares, however, the agency of the directors could be restricted completely and that restriction could be asserted to the third party as a general rule. The legal position of the directors were based on the delegation of the company, and so it was generally interpreted that neither any power nor any authority except the delegated matters they had.[7] Consequently, in the case of an incorporated partnership the restriction to the agency of partner could not be asserted to the third party absolutely, but as to a company it was prescribed that the restriction to the agency of the directors were effective and was not opposable to only the *bona-fide* third party.[8]

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The Japanese Commercial Code of 1899, however, apart from the legislations of foreign countries established the principle of respective representation, and prescribed without exception that "the directors should represent the company respectively"[9]. But, as to this system, the risk against the benefit of the company and large shareholders had been recognized strongly by the business world and foreign capital, and especially according to the demand of foreign capital induction the principle of the joint or collective representation was expected to be adopted.

Consequently, in 1911 it was revised that only if there was no provision in the articles of incorporation nor decision in the general meeting about the person who should represent the company exclusively (so-called managing director), or about that the several directors or the directors and managers

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6) The Draft Code by Roesler Art.118, and the Former Commercial Code Art.109.

7) Rösler, *op. cit.*, p.399; Hasegawa & Kishimoto, *op. cit.*, pp.304 and 437.

8) The Former Commercial Code Arts.111 vs. 186=144; the Draft Code by Roesler Arts.121 vs.222.

9) The Commercial Code Art.170, para. 1.

should jointly represent the company (so-called joint representation or mixed representation), the directors had to represent the company respectively.[10]

Later, in the revised Commercial Code of 1938, the principle of the respective representation of all the directors was adopted as a general rule. But, the managing director or the joint representation as well as mixed representation could be prescribed by the articles of incorporation or the resolution of general meeting. And, moreover, it adopted the system in which the directors who represented the company should have been elected by the co-optation among the directors based on the provision in the articles of incorporation.[11] As a matter of fact, we could see many examples of the articles which provided that the executive president and other managing directors had to be elected by co-optation. And it was generally interpreted that when there were several managing directors in the company, each of them had the authority to represent it respectively unless the articles otherwise provided. Besides, it was provided that, if there were any director who did not represent the company, the name of a representative director should be registered at the commercial register as well as the provisions in the articles of incorporation concerning the joint or mixed representation.[12]

On the other hand, according to the Commercial Code of 1899 the business affairs of the company were to be decided by the majority of the directors unless the articles otherwise provided, and the revised Code in 1938 maintained that provision.[13] Regarding the resultion by means of the majority, it was generally interpreted that all of the directors should have directed the business affairs unanimously and if they did not agree they should have executed according to the decision by the majority.[14] There was no restriction for forming the resolution by majority and it was not necessary that all the directors expressed their opinions at a meeting and decided by majority, but it was enough to decide by obtaining the approval of each director in turn. In fact, in most large companies the meeting of

10) The Revised Code of 1911 Art.170, para. 1.
11) The Reviced Code of 1938 Art.261.
12) *Ibid.* Art.188, para. 1, nos.10 and 11. And also, see Art. 12.
13) The Commercial Code of 1899 Art. 169. The Revised Code of 1938 Art.260.
14) J. Matsumoto, *Chūshaku Kabushikigaisha-hō* (Commentary on Company Law), 1948, p.140.

directors delibereted over the important matters, and the ordinary or daily business was left to the the decision of the executive president and other managing directors. The articles which provided as aforesaid were regarded as lawful under the prevailing view.[15)]

As to the legal structure of the directors as an organ of the company abovementioned, they had conflicts and contradictions which has influenced an interpretation of the present law, because they thought that the majority principle concerning the direction of company business was not compatible with the system of the respective representation. But I think the standard of classification between the system of the respective direction and the system of the collective direction should be based on whether the power of directing business affairs belongs to several persons collectively or to each person respectively. As to the provision that the business affairs of a company should be decided with the majority of the directors, the power of directing business affairs belongs to all the directors collectively (the principle of collective direction). The principle of collective direction is not inconsistent with the system of the respective representation, and so all the directors having the power collectively can, by way of delegating the power, make each of them to conduct outwardly and have the effect of the conduct revert to the company.

The view which takes the principle of respective direction on the business affairs of an incorporated partnership with unlimited liability is logical, for the incorporated partnership is the typication of a so-called personal corporation (individualistische Gesellschaft). But we should not take it for granted that we can apply this view to the management of a company limited by shares (so-called capital corporation). The direction of the company as a pure capital corporation is essentially corrective, and excludes the principle of respective direction which is found in the partnership and other personal associations. I have already stated the theoretical structure in the former Commercial Code of 1890 which distincted clearly the method of the managerial direction in an incorporated partnership from that of a company incorporated. In French law, before providing the system of the board of directors (conseil d'administration) the directors of a

15) *Ibid.* p.141.

company with limited liability (société anonyme) could not conduct and represent the company respectively, because the delegation to the directors of a company had essentially a collective nature, while the managing partners of an incorporated partnership were able to conduct and represent it respectively.[16] Similarly, regarding the business affairs of an incorporated partnership with unlimited liability in German Commercial Code, the respective direction is the principle and, corresponding to this the respective representation by each member is the principle.[17] As to the business affairs of a company limited by shares (Aktiengesellschaft), however, the collective representation was provided as principle from the former German Commercial Code through the time of the Commercial Code of 1897 to the Companies Code in 1937. Moreover, the reformed Companies Code of 1965 provides clearly the system of collective direction corresponding to the collective representation.[18] Here, it has been recognized that the election of several directors in a company always implies the collective delegation to them and in principle they can only conduct collectively.[19] In England, regarding the partnership, each partner conducts the business affairs as others' agent and is liable for the obligations of the firm personally and unlimitedly; while, regarding the company limited by shares, it is the principle in common law that if a company has two or more directors they should always compose a board, and each director is only a member of the body of directors to which the power of managing the company reverts collectively.[20]

As mentioned above, the principle of collective direction concerning the directors of a company limited by shares is accepted widely in the laws of foreign countries. Historically, it has been understood that the directors are

16) P. Pic et J. Kréher, Des Sociétés Commerciales, 3me Ed., Tome 2, 1948, Nos.2049 et 2050, and *cf. Ibid.*, Tome 1, 1940, Nos.495 et 496. See also, Loi du 24 juillet 1966 Arts. 13 et 14 concerning incorporated partnership (société en nom collectif).

17) Handelsgesetzbuch SS. 115 und 125.

18) Handelsgesetzbuch S.232; Aktiengesetz von 1937 S.71; Aktiengesetz von 1965 SS. 77 und 78.

19) W. Endeman, Handbuch des Deutschen Handels-, See- und Wechselrechts, Band 1, 1881, S. 577.

20) F. B. Palmer, Company Law, 5th Ed., 1905, pp.6 amd 7; Halsbury's Law of England, Simonds Ed., Vol. 6, Companies, by Cohen & Walton, 1954, p. 316.

in the position of exercising the control over the properties of a company like the managing partners of an incorporated partnership with unlimited liability, in spite of not assuming any personal liability for the debts of a company.[21] Similarly, in Japan the directorial system of the company has been the collectively constituent organ since the former Commercial Code of 1890. Such an organ consisted of the directors as a body has delegated its power of the direction which consisted in it collectively to each director respresenting the company respectively. That is the system of respective representation.

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In the revised Commercial Code of 1950, the business affairs of a company limited by shares should be decided by the board of directors (*torishimariyaku-kai*) consisted of all the directors.[22] At the same time, the Code provides that "the board of directors shall select a director or directors who represent the company (*daihyōtorishimariyaku*) among them".[23] Regarding the managing directors, they *may* represent the company collectively if there are several managing directors.[24] And it is prescribed that the name of the managing director or directors should be registered at the commercial register as well as the provisions in the articles of incorporation concerning the collective representation by managing directors.[25] Thus, the reformed law in 1950 abolished the former system of the respective respresentation by all the directors, and settled the managing director or directors to be a necessary organ of the company.

According to the traditional theory, the reason why the law prescribes that the board of directors should decide the business affairs of a company, would be to make it clear that the power to manage the company business is vested collectively in the directors as a whole. Then, various views have seriously been conflicted concerning how to understand the legal

21) Endeman, *a.a. O.*, S. 576.
22) The Commercial Code Art. 260.
23) *Ibid.* Art. 261, para. 1.
24) *Ibid.* Art. 261, para. 2.
25) *Ibid.* Art. 188, para. 2, nos. 8 and 9. see also *Ibid.* Arts. 12 and 262.

structure of the directorial system under the reformed law, as the core problem in the organization of company management.

The majority view wholly transmitted the conceptional composition of the former law, separates the management of a company's business affairs into the decision of the will and the execution itself of that decision.[26] On this standpoint, the supportors of the majority view understand that the decision of the will regarding the business affairs vests in the board of directors exclusively and only the execution itself of that decision belongs to the managing directors. Thus, they interprete that this power of decision should be delegated to the managing directors by the articles of incorporation or the resolution of the board of directors, because the power of the decision regarding the business affairs inherently vests in the board of directors; and solely with that delegation, the managing directors can first decide the will concerning the business transaction. Under this view it may be inferred that the delegation of the power for the decision of the will concerning the ordinary and usual business is implied with the selection of the managing directors.[27] If we depend upon this conceptional composition, the managing directors would not have even the power of decision of will on the ordinary and usual business transactions. And so, we should be obliged it to interprete that their conducts can not help being invalid as a legal act (Rechtsgeschäft), by reason that the act does not base on the decision of the will, not only when there is no decision by the board of directors for giving the power concerning the affairs beyond the ordinary or usual business, but also when there is no delegation regarding the affairs within the ordinary and usual business transactions.

We should interprete, if we reconstruct in terms of ours, that all the powers of decision concerning the business affairs of a company belong exclusively to the board of directors, and those powers are delegated to the managing directors. But if we consider in accordance with the theory of the

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26) T. Suzuki & T. Ishii, *Kaisei Kabushikigaisha-hō Kaisetsu* (Comments on the Revised Company Law), 1950, pp. 141 and 157; J. Mazuda & C. Suzuki, *Jōkai Kabushikigaisha-hō* (Commentary on Company Law), 1st Vol., 1951, p.280. *contra:* K. Ōsumi & T. Ōmori, *Chikujō Kaisei Kaisha-hō Kaisetsu* (Comments on the Revised Company Law), 1951, p.258.

27) T. Suzuki, *Kaisah-hō* (Treatise on Company Law), Revised Ed. 1965, p.131; S. Tanaka, *Kaisha-hō Shōron* (Treatise on Company Law), 1st Vol. 1967, p.467.

delegation of power, the managing directors need the general or special delegation in regard to the affairs of the ordinary or usual business transactions, as the results that the powers of decision belong exclusively to the board of directors. This theory makes the legal position of the managing directors very unclear and unstable in the company, as for the problem of the management's situation in the reformed law; this theory is also the late thought considering the fact that all the powers of decision are not inherently held by them. The theory which permit the managing directors to be in the position to do only the ministerial acts is against the common tendency of the separation of the direction from the administration in the management structure of modern companies.

In order to rationalize the management structure of a company limited by shares, the reformed law in 1950 reduced the powers of the general meeting of shareholders and concentrated broad powers into the directors, and kept the balance by adding a board system to the directors for the purpose of ensuring the careful and adequate exercise of the powers of the directors. The board system needs, as a corollary of its nature, not only a person who executes its resolution, but also a person who decides by himself and executes the daily business which should be constantly dealt with. Namely, as the result of the introduction of the board system, the managing directors necessarily should execute the resolution of the board and should decide and execute the ordinary and regular business of the company. Accordingly, it should be understood that the managing directors have an inherent or original power to do all the acts in and out of court concerning the regular business management (so-called direction), and within the sphere of that powers, the managing directors do not need the delegation from the board of directors. In other words, under the traditional theory of the delegation of power, the legal position of the managing directors is only that of subordinate agent (mandataire substituée) based on the doctrine of voluntary delegation, and their powers are merely dependent on the given delegation. We should pay attention, however, to the facts that this is not different from the structure of management organ in the former French Companies Act of 1867, and moreover the weakest point in it is the dispersion of the responsibility among the directors (administrateur-délégée)

and the factual irresponsibility of them.[28] The notion that the managing directors are the delegates of the board of directors, no longer represents the reality.

4

In order to grasp the responsibility of the directors in a company limited by shares more precisely and more effectively, it is necessary to make exact the division of duties and functions between the managing directors and the board of directors.

Under the present positive law in Japan, we cannot regard the managing directors an organ perfectly separate and independent from the board of directors, and the managing directors still have a character being attached to the board of directors. The managing director or directors are elected among the members of the board and at any time dismissed by the board of directors. As an ideal matter, however, we can find a perfect differentiation between the managing directors and the board of directors. For the purpose of realizing this, we should throw light on the specialization concerning the capacity and the power of each organ.

First of all, the capacity of the managing director himself besides that of a director *qua* a member of the board of directors, should be established. Recently, the theory which recognizes the existence of a legal relationship between a managing director and the company, separated from the one between a director and the company, becomes influencial.[29] In English company law as well, the theory which recognizes the managing director as a "primary organ"[30] is becoming. But, as yet in Japan we find a view which still denies the existence of the legal relationship between a managing director and the company.[31] This is the theory which ignores the division of the duties between the managing director and the other ordinary directors, and therefore goes against the idea and tendency of the separation between the

28) K. Yamaguchi, *Kaisha-torishimariyaku-seido no Hōtekikōzō* (Legal Structure of Company Directors), 1973, p.103.

29) K. Ōsumi, *Kaisha-hō-ron* (Treatise on Company Law), 2nd Vol. 1959, p.114.

30) L.C.B. Gower, The Principles of Modern Company Law, 2nd Ed. 1957, p.131.

31) *cf.* Yamaguchi, *op. cit.*, p.229.

managing directors and the board of directors. It seems that such a theory is suitable only to the limited private company (*yūgengaisha,* equivalent to société à responsabilité limitée or Gesellschaft mit beschränkter Haftung) which each director *qua* director has inherently the power to manage the company or the principle of respective representation and execution by each of the directors before the amendment in 1950.

Secondly, under the majority view that all the powers of decision concerning the business affairs of the company vest in the board of directors and the powers can be delegated to the managing directors by a resolution of the board or the articles of incorporation, and then the managing directors are able to determine about the execution of the resolution only after that delegation, it is natural result that the managing directors should obey to the decision by the board of directors if there were a resolution. On the contrary, under the view of which the managing directors have inherently all the powers concerning the ordinary and regular business transactions of the company, we should look for the reason about the binding force by the board of directors in the supremacy of the hierarchic system of the company structure. Needless to say, it is natural that the resolution of the board of directors binds the managing directors about doing the execution of the resolution of the board, as the powers of exercising the office just originate in the authorization from the board of directors. But I doubt whether the board of directors can interfere or direct with regard to the exercise of the inherent power of managing directors. Under the present positive law of Japan, as long as the board of directors has all the power to manage the company, it is one of the interpretations that the board of directors should put the managing directors under its superintendence and control, and can interfere and direct them.[32] Moreover, there is no provision in Japanese company law according to which the managing director should direct the company "unter eigener Verantwortung" like in the German new Company Code of 1965[33] or should undertake the direction "sous sa responsabilité" like in the French new Company Code in 1966.[34] Nevertheless, so long as the definition in

32) Ōsumi, *op. cit.*, p.118.
33) Aktiengesetz von 1965 S. 76, para. 1.
34) Loi du 24 juillet 1966 Art. 113, para. 1.

the division of powers in the management organization is thought to be indispensable for the establishment of the directors' responsible system, we should interprete that the power for executing the ordinary and regular business affairs which belong to the direction, reverts exclusively to the managing directors, the organ of direction, and that the board of directors should be principally restricted its responsibility to the control over the results of managerial direction by the managing directors.

The theory which gives higher priority to the hierarchy of organization over the principle of taking a division of the organs' powers, comes to presence even under the law of France where the managing directors are still in a position of the delegates of the board of directors (conseil d'administration).[35] Under the company law of England alike that of France, it is pointed out that the circumstances may be brought about; the circumstances are that the board of directors cannot interfere in the exercise of the powers by the managing directors based on the model articles of association which express the will of legislator, providing that the board of directors may entrust a part of its powers to the managing directors *to the exclusion of* its own powers.[36]

On the other hand, even when a company limited by shares does not have a formal dualist structure like in Germany (Vorstand and Aufsichtsrat), the division of directors into executive and non-executive groups can operate so as to produce a similar separation of function with the non-managing directors exercising the supervisory funciton in regard to the conducts of direction by the managing directors. This phenomenon has been observed for a fact in Japan as well as in France and England.[37] But, it is clear that an informal separation of function does not provide the same guarantees as a formal separation. Moreover, in many cases the non-managing directors do not have supervisory funcitons at all, and would find it very difficult to exercise such functions even if they wished to do so, by reason of their dependence in fact upon the leadership by the managing

35) J. Noirel, La Société Anonyme devant la Jurisprudence Moderne, 1958, p.255.

36) Gower, *op. cit.*, pp.131 and 132.

37) *cf.* Commision of the European Communities, Employee Participation and Company Structure, 1975, p.20.

directors. Hence, it is necessary to make exact the division between the managing directors and the board of directors. Some kind of a dualist structure has been made available on a mandatory basis as to the large companies and stock quoted companies in Japan.[38] The supervisor or supervisors (*kansayaku*) are charged with the control over the activities of business affairs by the directors on behalf of the shareholders.[39] Being elected by the general meeting of shareholders, however, also the supervisor or supervisors are in fact subject to the managing directors who have the power to propose the candidate for supervisor to the general meeting.[40]

The Japanese company law has no limit concerning the number of the managing director, and then does not prevent not only more than half of the members of the board but all of them from becoming the managing directors. The law only prescribes that several managing directors *may* represent the company collectively.[41] It is the prevailing view in Japan that when there are several managing directors, each of them *can* represent the company respectively. But I insist on securing the unity of the managerial direction and preventing the dispersion of the responsibility. Though it is usual practice in Japan that even if there are several managing directors the directorial unity would be maintained by means of the leadership relation among them, in the eyes of the law the company is still bound by the conduct of each managing director who represents it respectively. Furthermore, the practice which leaves the unity of direction to the inside autonomy under the articles of incorporation of the company, may make the respective responsibility vague in law. It is not necessarily clear whether the principle of respective direction corresponding to the system of the respective representation is generally adopted by the prevailing view. Hereupon again, I think, the power of directing business affairs of the company belongs to all the managing directors collectively; the principle of collective direction is not inconsistent with the system of respective repre-

38) The Exception Act on the Company Supervision concerning the Commercial Code in 1974 Art. 1.

39) The Commercial Code Art. 274.

40) But, *cf. Ibid.* Art. 275–3: "A supervisor may state his opinion on the appointement or removal of an supervisor at the general meeting of shareholders."

41) *Ibid.* Art. 261, para. 2.

sentation, so all the managing directors having the power collectively can by way of delegating the power make each of them to conduct outwardly and have the effect of the conducts revert to the company.

5

In Japanese company law, the standard concerning the duty of care required to a director or a managing director is "the care of good administrator (*diligentia boni patris familias*)"[42], which is the degree of care required objectively to the person in profession or status of certain kind.

The board of directors should have the duties of control over its delegated and authorized matters to the managing directors, and over the matters relative to the direction by the managing directors having the inherent power, because of its higher rank in the hierarchy of a company organization. There is, however, a difference between the extent and contents of the duty of care charged on a member of the board of directors and that of a managing director. Because, but for this difference, there would be no significance recognizing the differentiation between the two organs and their functions. Accordingly, also the degree itself concerning the duty of care required to the managing director of a company limited by shares should be higher than one of the other non-managing director of a company or director of a limited private company. Above all, I think, the requisite of ability as a professional of the company management should be imposed upon the managing director.

Now that the non remuneration principle of the managing-directorship is already anachronism in proportion as the advance of the separation of the direction from the administration in the management structure of modern companies, and so long as the remuneration should be fundamentally balanced with the responsibility, it will be recommended that the degree concerning the duty of care should be elevated as a corollary of high remuneration. Especially, as the opposite that the managing directors have an inherent and exclusive power in regard to the direction of a company, it is

42) *Ibid.* Art. 254, para. 3=The Civil Code Art. 644.

necessary that the requisite of professional ability in the capacity of a managing director should be imposed upon him, without leaving the problem concerning the responsibility of managing director to the autonomy within the company any more.[43] Under English company law, the degree of ability required to be exercised by a director is merely that which can reasonably be expected from a person of *his* knowledge and experience.[44] Accordingly, provided only that he is honest, a person with no knowledge or experience of business may safely accept a position as director. In other words, the ability which a director is required to have, is not the one which should be objectively required of professional. It has been pointed out, however, that there is no reason why a managing director in the capacity of professional would have a judicial indulgence which the layman director had been granted in the past. Although the objective standard concerning the ability required to be exercised by a manaing director has not been yet established, it is acknowledged that the position of managing director is becoming professionalized through the increasing legal recognision and, with the development of a class of company's managers a trend towards establishing the objective standard can be seen.[45] In American company law as well, there is a theory that the director of saving bank has tacidly shown an implied warranty for fitness to his office, and he cannot excuse himself for not having that quality.[46] In fact, the tendency for the application of the legal maxim "Imperitia culpae adnumeratur" has been emphasized to be called into question.[47]

Thus, the thought which leaves the problem of the fitness of managing director concerning his business judgement to the *laissez-faire* relief for the shareholders who have chosen that director, should be abandoned. Therefore, not "the diligence, care and skill which ordinary prudent man would exercise under similar circumstances in his personal affairs", but "care which

43) In England, it had been said "if the shareholders invest their money in some peanut, they shall accept a monkey as dividends". It means that the shareholders sowe in case of the election of directors, and so they should reap what they have sown. But the law left it completely to the shareholders' *laissez-faire. see,* however, L.S. Sealy, The Director as Trustee, C.L.J. 1967, p.101.

44) *Re* City Equitable Fire Insurance Co. (1925) Ch. 407.

45) Sealy, *op. cit.*, p.101.

46) Hun v. Cary, 82 N.Y. 65 (1880).

47) *see* Yamaguchi, *op. cit.*, p.19.

ordinary prudent managing director would exercise when he is managing the company" should be required as to the degree of care. For example, the German law had required a managing director (Vorstandmitglied) of company limited by shares to exercise "the care of ordinary businessman (die Sorgfalt eines ordentlichen Geschäftsmann)".[48] This was the same care which the present law has required from a director (Geschäftsfühler) of a limited private company.[49] That was generally interpreted as the care which an ordinary merchant had to exercised as regards a commercial business.[50] In the furtherance, however, the Companies Code in 1937 required "the care of ordinary and sincere managing director (die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters)", which was succeeded to the new Companies Code of 1965 as the same.[51] This acknowledged a peculiar type of the duty of care to the managing director of company limited by shares.[52] We should pay notice that the higher duty of care is required of a managing director by the alteration from the word "businessman" to "managing director".

The changing process in foreign laws concerning the standard of the duty of care required from the managing directors of a company shows that in proportion to the increasing importance of the company limited by shares in social and economic life, the degree of that duty has gradually been elevated. Above all, it is noteworthy that the standard concerning the duty of care is classified according to each profession or status. This classification would be impossible if a peculiar type of the duty of care were not settled as to the company's managing director. In order to settle the responsibility of the managing directors for a company more precisely and more efficiently in Japanese company law, it is necessary to make exact the differentiation of powers and the division of duties among the directors. However, in Japan there is no legislative trend towards the dualist structure of company's organs within the context of the Fifth Draft Directive of the European

48) Handelsgesetzbuch S.241, para. 1.
49) Gesetz betr. GmbH. S. 43, para. 1.
50) Staub's Kommentar zum Handelsgesetzbuch, 11 Aufl. Band 1, 1921, SS. 862 und 1004.
51) Aktiengesetz von 1937 S. 84, para. 1, Satz 1; Aktiengesetz von 1965 S. 93, para. 1, Satz. 1.
52) Godin & Wilhelmi, Aktiengesetz von 6. Sept. 1965, Kommentar, Band 1, 1967, S. 462.

Communities[53]; the so-called two-tier board system has not been introduced into Japan. And the directors have the duty to exercise their powers in good faith in the interests of the company as a whole. In other words, a director of the company owes the duty of loyalty to the company which has the effect that he must regard to the interests of the shareholders generally.[54] After all, the directors have the duty to exercise their powers *bona fide* for the purpose for which they were conferred, *i.e.*, for the benefit of the shareholders as a whole who compose a company exclusively under the Japanese company law. Nevertheless, it will be essential to divide the company's management organ into the managing directors as an organ of the direction and the board of directors as an organ of the administration in accordance with the separation of the direction from the administration in the legal structure of modern companies.

53) Proposition d'une cinquième directive tendant à coordonner les garanties qui sont exigées dans les Etats membres, des sociétés, au sens de l'article 58, paragraphe 2, du traité, pour protéger les intérêts, tant des associés que des tiers en ce qui concerne la structure des sociétés anonymes ainsi que les pouvoirs et obligations de leurs organes, présentée par la Commission au Conseil le 9 octobre 1972.

54) The Commercial Code Art. 254–2: "the directors shall be obliged to obey any law or ordinance and the articles of incorporation as well as resolutions adopted at a general meeing of shareholders and to perform their duties faithfully on behalf of the company".