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TRUST CHARACTER OF COMPANY LAW (AMENDMENT) OF JAPAN

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I. AMENDING PROCESS JAPANESE COMPANY LAW IN 1951

The Company Law of Japan were changed seriously by the law No. 167, 1949, "The Law Amending a Part of Commercial Law".

Present Company Law of Japan have been developed under the influence of the Contineutal Law, in which German Law was most powerful. It can be said that German legal theories have controlled not only the fundamental principles of the Japanese Company Law but also the interpertation of the specific articles.

Especially in case of the extreme consistency of legal organization theory and emphasis of the supreme authority of a shareholders' general meeting, the theory had easily lapsed into an abstract organization theory which overrid the interest of each shareholder and had a tendency of aggravating totalitarianism.

Anglo-American Company Law denies such an extreme organization theory when defining constitution of a company as trust relation. This fact is antiposal to the continental law, and especially to the German Law.

Since Japan's surrender, a large number of laws have been enacted as mentioned previously. It is significant to point out

that company law was legislated under the influence of the Anglo-American, mostly under the influence of the American Law.

It was great advantage to the Japanese for the economic recovery to adopt the system of the company which is a typical form of enterprises in America, because Japan wouldhave to depend of America's aid thereafter. These economic factors which gave strong influence over the revisions of the Japanese Company Law were incontestable.

However, we, as researchers of laws, take great interests in the fact that the company in Japan would be managed under the principle of equity by introducing trust idea in the sustem of the company.

Now I will explain the process of the amendment of the Japanese Company Law in 1951. According to the Japanese Company Law, payment in installment in case of buying stocks was prohibited in July, 1948, by the law, No. 148, 1948 and only full payment method was available. Under this full payment system, however, when a company needed its own fund after establishment of the company, there was no other way for them to issue new shares. Because ot these facts the company should have an extraordinary resolution of shareholders' general meeting for which they would face great difficulties.

Japanese government thought it necessary to adopt the authorized capital system, setting up a group of Preparatory Research Committee for the amendment of Comercial Law. Simultaneously, the government began to study non-par stock system now effected in America, in order to aquire funds more easierly. Thus, in 1949, relevant draft of law concerning authorized capital and non-par stock were developed.

Being advised by the authority concerned, the government would have to amend the commercial law along the line of strengthening of shareholders' right, strengthening of transferability of stocks, seeting a value on a shareholder's voting right and pre-emptive right, and recognizing the right of inspecting books and records.

Subsequently, the Preparatory Research Committee for Amendment of Commercial Law had heated consultations in the matter and produced a final draft for the amendment in August, 1949. The government announced the draft publicly on August 13, 1949

as a "Bill for Amendment of a part of the Commercial Law".

According to the preamble, the draft view points are as follows:

To adopt authorized capital system
To recognize issuance of non-par stock
To protect shareholder's right to inspect the books and records
To affirm transferbility of stocks
To gurantee pre-emptive right of new stocks
To respect voting right of a shareholder
To clearify resposibility of a director
To protect right of minority shareholders
To amend present regulations concerning foreign companies.

The government trasferred this draft to the Legislation Council to be reviewed. After much deliberation of article by article, the Commercial Law Commitee of this Council added new articles, involving curtailment of the power of a shareholders' general meetiug, adoption of system of Board of Directors, abolition of joint stock company with limited partnership (Kabushiki.goshi-gaisha) and the articles ammounting 71 in total.

Following to this draft made by the Commercial Law Commitee of the Legislation Council, the government drafted a revised bill for the amendment of the Commercial Law and produced it before the seventh diet in February, 1950.

The bill was passed with slight revision of the House of Representative and the House of Councilors respectively on May 2, 1950. This bill was promulgated as the law No. 167, 1950, on May 10 of the same year it was put into effect from July 1, 1951.

II. PRINCIPAL POINTS OF AMENDMENT & REASONS OF AMENDMENT

Now, I will introduce established thoeries about the principal points of the amendment and reasons of the amendment.

The principal points of the amendement are divided into three basic parts by leading professors in law:

1. To strengthen facilitation of procurement of company's fund by adopting the authorized capital system and non-par value share system,

2. To amend managing system of company such as establishing of a board of directors and strengthening of this board and consequent reduction of the power of a shareholders' general assembly and the power of auditor,

3. To strengthen shareholders' position, that is affirmation of shareholders' to apply for injunction against illegal actions of directors, right of representative suit, right of inspection of books and records and right of a shareholder's who is opposite to a resolution of amalgamation and transferring of the enterprise to the claim for the purchase his/her shares, at the same time, to facilitate transferrableness of stocks, to mitigate capacity of minority shareholders and to confirm liberty and respectfulness of a shareholdet's position, by making conditions of shareholders' general meeting more rigid, and ultimately to strengthening of a shareholder's position.

Hereafter, I will explain the principal part of the amending law comparing the present law with the old law, article by article according to the established theories of Japan.

a) Adoption of authorized capital system and non-par value share system

According to the old company law of Japan, it was indispensable to make up a memorandum of the association when a person was establishing a company; and description of amount of capital was absolutely needed to be written in the memorandum. (3 & 4, Paragraph 1, Article 7, the former law)

Joint and stock company shall not be established until payments for the capital are fully paid with complete endorsement for the whole share equivalent to the amount of capital by promoters or the general public and official registration of the establishment finish. (Article 57 & 188, the Old Law)

In the amended law which adopted the authorized capital system, "Total number of shares to be issued by the company", "Total Number of shares, classification of par value or non-par value and its number on establishment of the company", "Sum of a share in case of issue of par value share" and "The lowest price of a share in case of issue of non-par value share" shall be clarified as the absolutely necessary articles instead of the

articles of "The amount of Capital" and "The Face Value of a Share" of the former law. (3, 6, 4, 7, Para. 1, Art 167, the present law)

And also included, "The total number of shares issued by the company on its establishment shall not be less than one fourth of the whole number of shares to be issued by them." (Para. 2, Art. 167, the present law) However, the article read, "To establish company legally, it shall be necessary for the whole number of shares to be issued upon establishment of the company to be subscribed completely by promoters or the general publicand to be fully paid still remains in the present law. (Art. 57 & 188, the present law)

By these amendments, the total number of share to be issued when establishing a company shall be limited to one fourth of shares issued by them totally and remaining three-fourth of shares may be issued freely and dividedly by a resolution of the board of directors. (Para. 2, Art. 280, the present law)

In case where they need their own fund after establishment of the company, it is left in case of company's free will whether they issue par-value or non par-value share. The chice shall be made according to a provision written in a memorandum of the Association. In case where there is no provision in the memorandum, the choice shall be made by consent of af all the promoters as long as the shares issued on establishment of the company (par. 2 Art. 28, the present law). and about the shares issud after establishment of company, the selection of issue shall be made by the board of directors. (Para. 2, Art. 280, the present law)

As I stated before, definition of the "capital" was remarkably changed compared to its definition written in the former law due to the amendment done to the articles concerning the capital.

By the old law, the amocnt of capital was clarified by the memorandum of the association and amount of capital would be purely same as the total face value of the whole shares. But by the revised law, the amount of capital shall not be decided by the momorendum of the association, because, the company shall clarify only the limit of totaln umber of shares in its memorandum of the association and in case of the following issue, within the limit, the board of directors may decide freely. Following to the adoption of non par-value share system, "shares" is not necessarily

correlated to "capital" from the theoretical point of view. Even in such a case, it goes without saying that actual value of non par-value shares issued till then constitutes the capital. (Para. 2, 2 Art. 284, New Law) Therefore, as to non par-value share, whole actual value on issue does not necessarily coincide with the capital and "shares" will resultantly not have connection with the "capital", because the amending law provides that the amount not exceeding one-fourth of total amount of shares issued may not be assigned to capital (Pa. 2, 2ar 284). All in all, the old theory, which was based strictly on the organisation theory, is expressed briefly by the paragraph, "company is an organization of the capital." and this theory was inclined to collapse gradually.

b) Establishment of a Board of Directors, Strengthening of its Power and subsequent Reduction of the power of a Shareholders' General meeting.

By the former company law, in case where there is several directors in a company, right of representing the company shall be executed by each director respectively unless a memorendum of the association or a resolution of a shareholders general meeting indicate another way; in another word each director has the complete right of representing the company. (Paragraph 1 & 2, Article 261, Old Law)

And management of the company shall be executed by a majority resolution of directors unless a memorandum of the association prohibit or indicate other wise (Article 260, Old Law)

By the amended law, management of the company shall be executed by board of directors which comprises of all directors. (Article 260, New Law)

a Representative of a company shall be a representative director who is decided by a resolution of the board of directors. (Article 261, New Law)

The idea of this board of directors as a representative council will necessarily be followed by the following fact:

Intentions of the board of directors shall be expreased by a formal meeting of the board of directors to which a majority of directors are requested to attend. (Para. 2, 2 Article 260, New Law)

Often the discussions by the board of directors, a record of

debates, in which process and points of the debates are requested to be inscribed with the signatures of attending directos. (Para. 3, Art. 260, the present law.) Therefore, directors who acted as independent organ of a company by the old law, lost their râison dêtre as the organ of the company and became only a member of the board of firectors by the new law.

The fact that a director shall be elected by the shareholders' general meeting and relation between a director and company shall be in conformity with regulation of mandate remains unchanged under the influence of new law. (Para. 1 & 2, Art. 254, Old Law; Para. 1 & 3, Art. 254, the present law) Under the new law, conditions of being a director and relation between a company and their directos are still unchanged, but as to power of a director, he may execute his right only as a member of the board of directors.

Though having no direct connection with the board of directors, there is an important new article about the position of a director as follows: As to duty of loyalty of directors, the new article states; "Directors shall be under obligation to observe laws and articles of a memorandum of the association and to perform their duties faithfully on behalf of their company." (2 Art. 254, the present law) This article gives a director poistion of trustee and clarifies the same spirit as duty of loyalty of trustee. Members of legal society in Japan cannot fully understand this significant meaning and seem to regard this duty of loyalty as the same as duty of due care of mandator. As to this point I will explain later.

As the amended law adopted system of the board of directors, this Anglo-American legal theory in which contains the principle, "Directors shall execute the management of a company as a group of directors" was poured into Japan. And the next important point is strengthening of the power of the board of directors.

Until then, in Japan, a shareholders' general meeting of comprehensive power ordered and controlled over all other organs of a company with its absolute authority over the management of the company being the highest organ of the company as it were the diet of democratic country and directors should perform their activities in accordance with a decision of shareholders' general meeting.

On the contrary, by the new law, a shareholders' general meeting may make up a resolution in limited matters defined by this law and a memorandum of the association; and authority of the shareholders' general meeting is limited to the definite matters decided by law and a memorandum of the association.

On the other hand, matters exclusively belonging to the power of the board of directors was decided by the law. Consequently, the board of directors is not an organ of a company which is completely inferior to a shareholders' general meeting; but the board of directors is a co-existent organ with a shareholders' general meeting.

As I states before, even by the new law, a director shall be elected by shareholders' general meeting and the maintenance of his position will entirely depend upon the will of shareholders' general meeting. But a director after elected, may exclusively execute the authority subject to the board of directors as a member of the board. One of the largest power of the board of directors are the right of decision of issue of new shares (2, Art. 280, New Law) based on the authorized capital system and the right of decision of issue debentures. (Art. 290, New Law)

However, the shareholders' general meeting still has the authority over the following matters:

Change of a memorandum of the association
(Article 42, New Law)
Dissolution (No. 2, Article 404, New Law)
Amalgamation (Art. 408, New Law)
Transferring of whole or a prt of enterprise,
or lease of whole enterprise. (Article 245, New Law)

Judging from this fact, the authority of shareholder's general meeting can still stand comparison with the authority defined in the old law. But it goes without saying that the authority of shareholders' general meeting was reduced with the advance of the power of the board of directors.

c) Strengthening of the shareholder's position.

New articles of the amended law on the shareholders' position are divided into two kinds. One is an amendment on the right of managing a company deriving it from shareholder's position; and the other is new formulation of articles which was added to prevent

a company from infringing the right of shareholders.

As to the rights of managing a company are follows:

1. To make conditions of a shareholders' general meeting more strict.

Under the former law, method of resolution of shareholder's general meeting is divided into two kinds, method of ordinary resolutions and method of extraordinary resolutions.

In case of ordinary resolutions, a resolution shall be made by a majority voting right of shareholders who would attend the assembly. (Paragraph 1, Article 239, Old Law)

In case of extraordinary resolutions, such cases as change of a memorandum of the association and other certain important matters, a resolution shall be made by a majority votes of attending shareholders who shares value exceeds a half of amount of capital; in this case attending shareholders shall be the majority of shareholders. (Article 343, Old Law) and a shareholders shall have only one voting right for one share. But the voting rights of shareholder who has more than eleven shares shall be limited to a certain degree and a shareholder whose name has been registered within six months before the day of meeting shall have no voting right (Para. 1, Article 241, Old Law).

Under the present law, methods of resolution of shareholder's general assembly are also divided into two kinds: namely method of ordinary resolutions and method of extraordinary resolutions.

But in case of ordinary resolution, a resolution shall principally be made by a majority voting right of attending share holders whose shares exceed a half of all shares issued till then, i. e. a quorum is necessary in the ordinary resolution. (Paragraph 1, Article 239, New)

As to this article, however, a company may make contrary provision by writing its effect in a memorandum of the association. Therefore, a company may decide that, a quorum shall not be nec essary in case of ordinary resolution.

As to extraordinary resolutions, under the present law, a resolution shall be made by two-thirds majority votes of attending shareholders whose shares exceed a half of the whole shares issued by that time. (Article 343, New Law) Being different from the ordinary resolution, it is significant that the method of extra-

ordinary resolution, under the present law, shall not be changed even by an indication written in a memorandum of the association.

Connecting with the strict condition of resolution, I'll now state on the subject on numbers of a shareholder's voting right.

Under the former law, principlly that of a shareholder voting rights, althogh the principle of one vote for one share was recognized, a company may place a restraint on voting rights of a shareholder whose share exceeded eleven shares and may regard shareholders as having no voting right if they have not elapsed six months since the registration of their names on the list of shareholders. (Paragraph 1, Article 241, The Old Law)

The Present law denies the restraint on a shareholder's voting rights and made the principle, "A shareholder shall have one voting right for one share he/she has", be absolute. (Paragraph 1, Article 241, New Law)

As I have explained so far, amendments done upon the former law, such as making conditions of resolution strict, confirming that a shareholder shall have one voting right for one share, and etc., aim at the extreme respect of shareolders' voting right. This eventually aims at the strengthening of a shareholder's position in a company.

2. Mitigation of minority shareholders' capacity

Under a theory of juridical person, principle of majority decision is prepondent. But under the company law, for the purpose of preventing a violation of a majority decision, minority shareholders' right of request of calling shareholders' general meeting is recognized exceptionally regardless of majority shareholders' will. This is so called the right of minority shareholders. Under the former law, shareholders whose shares exceeded one tenth of the capital was able to exercise the right of minority of shareholders. (Article 237, the old law)

The present law, mitigating a capacity of minority shareholders, the shareholder who have continuously had three hundredth of shares issued more than six months, may be called minority shareholders. (Article 237, New Law) Anyhow, mitigation of this kind means strengthening of a shareholder's position

In order to relief a shareholder's right of infringement by a

company, the following rights are recognized:

3. Right of giviving an injunction to illegal matters by a director.

"In case where a director acts an ultra vires act or any other act against the law and the memorandum of the association and will probably cause unrecoverable damage to a company, the shareholders who have continuously had their shares more than six months may on behalf of the company request the director to forbid to act (Article 272, New Law)

The article of this present law designs strengthening of a shareholder's position, by adopting an injunction system of Anglo-American Law.

This article was newly employed by the present law. The article of the former law, in order to protect the minority shareholders against the infringements by the director, gives them the right of request to suspend the director's illegal actions and elect a proxy at a court after convoking shareholders' general meeting which aims at the dismissal of the director based on right of minority shareholders." (Article 272, Old Law; also in New Law, Article 270), but it does not give direct right of prohibiting director's act.

The present law permits shareholders who have continuously had their shares more than six months to appeal directly to a court. This fact shows a profound understanding on strengthening of a shareholder's position.

4. Representative Suit.

By the present law, "A shareholder who has continuously had shares more than six months may request a company in written document to commence legal proceedings to call director's account. (Paragraph 1, Article 267, New Law.)

In case when a company does not take legal proceedings within thirty days after accepting the request of the shareholder, the shareholder may take necessary legal proceedings for the sake of the company. (Paragraph 2, Article 267, New Law)

By old law, if the resolution is not adopted in shareholders, general meeting, minority shareholders who have continuously had their shares which are more than one tenth of the capital and more than three months can make request to the company to take

legal proceedings against a director. (Article 268, Old Law)

However, a shareholder can not take further procedures to rescue the rights under the former law.

By the present law, every shareholder shall have the right of request to a company to take legal proceedings against a director, and if the company does not agree with the request the shareholders may appeal directly to a court.

This system was made after the pattern of the representative suit of America.

This idea of representative suit of America was based upon a thought that a shareholder has an equitable estate in the property of company.

In Japan, the idea of this kind is not yet recognized. But this new article is a strengthening testimony of a shareholder's position.

5. Right to inspect books and records.

As to right to inspect books and records of a company under the former law, it was limited to inspect an inventory of the company's property, a balance sheet, a report on business and a profit and loss report. (Article 281, Old Law)

But these books and record shows only an outline of an enterprise.

A shareholder who was given the right to call a director's account and also was given the right of request to forestall the director's illegal actions. And the shareholder whose power being strengthened to a great extent, should necessarily have right of knowing financial condition of the company more precisely. To this end, the present law gives the right to inspect books and records to the shareholder. The article is read as follow: "A shareholder whose shares exceed one tenth of whole shares of a company may request the company to inspect and take a copy of the books and records of the company." (Para. 1, 6 Article 293, New Law) "The request mentioned in the preceeding paragraph shall be produced in a written document." (Para. 2, 6 Article 293, New Law)

For the purpose of preventing an abuse of the right by those who are going to usurp a company, a company may refuse the request in accordance with a certain condition, that is, "In case

where a company recieve a request in accordance with the proceeding article, a director shall not refuse the request except in a case where there are reasonable reasons to be regarded as applicable to the following paragraphs:

a) In case where a shareholder request to inspect not for the purpose of confirming and exercising his/her right but in order to disturb management of a company or injure shareholders' common interests.

b) In case where the requested shareholder is carrying on the same business as the company, or is an employee, a shareholder a director of a company which is carrying on the same business as the company or a person who has shares for the sake of another company who has the same business.

c) In case where a shareholder request to inspect for the purpose of informing others of results of inspection and taking a copy of books and records with profit, or in case where a shareholder is a person who has informed others of result of inspection and taking copy of books and records with profit within two years before the date of the request.

d) In case where a shareholder request in inadequate time to a company to inspect and take a copy of books & records.

Reasons why the right to inspect books and records has been recognized in Anglo-American Law are based on a theory that a shareholder has right to inspect books and records of a company freely as his/her own, due to the fact that property of the company belong to a shareholder in equity." (7 art. 293)

Like this, this right does not only mean the strengthening of a shareholder's position or convinience of knowing financial condition of the company but also involves the new theory mentioned as above.

In Japan, adoption of this right is regarded in general as strengthening of a shareholder's right. But my further explanation in this matter should be done.

6. The right of a shareholder to claim for purchase of his/her shares

As to transferring of a whole enterprise of a company or an important part of the enterprise of the company, leasing of a whole enterprise, assignment of whole enterprise, contract entering

into complete partnership with others, changing and cancellation of a contract being applicable to these contracts, inheritance of a whole enterprise of other company and other actions in general, causing a substantial change of the company's property, the present law, as well as the former law, regulated these action shall be decided by extraordinary resolutions of shareholders' general meeting. (Article 245, New Law; Article 245, Old Law)

Though such a strict extraordinary resolution is needed, this resolution is to be decided by a majority. Consequently, protection of a minority shareholders was not attained properly. Therefore, the present law gives a shareholder the right of objection in written at the shareholders' general meetng, where a resolution is to be adopted, and a shareholder who opposed to the resolution in the meeting, may request a claim for the purchase of his/her shares after the resolution was adopted by fair price which is equivalent to the same price when the resolutions were not adopted. (Paragraph 2, Article 242, New Law)

However, in case where a resolution of dissolution of a company is made, this right to claim for the purchase of shares shall be extinct. (Proviso, 2, Art. 245, New Law) Because, after a resolution of dissolution is made, the company will necessarily enter in winding up proceedings and the shareholder can be distributed a part of the remaining property of the company in this winding up proceedings. This right is also applied to a case of amalgamation. (2 Art. 608, New Law) This right to claim for the purchase of his/her shares is not recognized at all under the former law. According to a principle of decision of the majority, even a shareholder who is opposite to this resolutions shall have to submit to his disadvantage caused by the resolutions. In America this right to claim for the purchase of a shareholder's share, who opposete to a resolution has been provided by law from the early times. And this idea is based upon a theory that a shareholder has the proper right in equity for property of a company and subsequently this right shall not be infringed by a simple decision of the majority.

However, Japanese legal researchers do not have any further notion of kind but explain strengthening a shareholder's position.

Members of the academic society of law in Japan explain the

amending points of the company law, 1951 as three classified points. And they also have some explaintions for the amendments from the following inspective point of view:

1. Expediency of procurement of fund of a company.
2. Strengthening of power of a director in management of a company
3. Strengthending of a shareholder's position

They are not going to investigate the relations between these three amendments or are not going to make a further research in studying of theoritical background of these amendments, unless substantile difference between a continental company law with an organization legal theory and the Anglo-American law without the organization legal theory is completely clarified. The enlightenment for the true object of the Amendments in Japan and resultant application of the amended law will not be expected.

Japanese academic society was not perfectly quiet in this matter. Some scholars indicated that the difference was based on more toward the contract theory than on the organization theory. And under the influence of Anglo-American Law, definition of the word "Company" was eventually separated from the constitutes of the company, the Anglo-American Company law lays emphasis on the idea that a company is a result of a collective contract made by an individual who is a member of the company.

But the contract theory of this kind, they won't be able to explain anything about the problem, because, if a company were a collective contract of members, it is possible to place strict restriction on the right of each member ot a company or if necessary, is possible to place further extrem restrictions on it for the sake the entire members of the company. Moreover, it is possible to restrain power from the director.

The whole contract theory is too obscure to explain the particular points of the amendments, therefore, we must search for another leading principle which will clarify the amending points accurately and synthetically in other theoritical field.

III. TRUST CHARACTER OF COMPANY LAW

A. Preface

In my opinion, we are confident that we cannot fully under-

stand the object of these amendments of the company law of 1951 in Japan except regarding these amendments formulated upon the trust theory.

Idea of this "trust" has been developed in England and remarkably progressed in America, and it can be said to understand the Anglo-American Law completely we must first first to understand the idea of the "trust".

In figuratively comparing, if the common law were the skelton of the Anglo-American Law, law of equity whch broughtup the idea of trust would be blood or muscle. Similar to the fact that a man can fully excercise his whole strength with full circulation of his blood, law of equity can give vivid effect to the common law to the fullest extent. The idea of "trust" is very familiar to the Birtish and Americans.

At the end of Meiji era, this trust legal theory was introduced to Japan as a form of Law of Trust for Mortgaged Bonds. Therefore, the idea of "trust" was thrusted away as one item of a special law and could not occupy an important role in the Japanese legal system. At the end of Taisho Era, the Trust Law under the influence of Anglo-American Law was enacted in order to supervise general trust business. For this reason, this law did not attract much attention of academic circle but was studied only by the researchers of the Anglo-American Law and business men.

Despite the fact, the idea of "trust" existed in the legal system, Japanese academic circle of law regrettably did not pay any attention to it. At the same time difference between the idea "trust" and "fiduciarishes rechtsgeschäft" of German Law was not enlightened.

Since Japan's surrender, almost all of the Japanese laws have been successively changed according to a character of Anglo-American Law. When the word, "trust" appeared in the preamble of the new Consitution, it attracted keen attention of Japanese academic circle. Even under such circumstances Japanese academic circle, controlled, and influenced by the German Law, cannot fully understand the particular points of the Anglo-American Law. We cannot blame their lack of knowledge on the idea of "trust". It is nutural that they cannot recognize the Anglo-American Company Law developed upon a profound basis of trust character

and put into effect, and is also not too strange that the Japanese academic circle regarded the amendments as one kind of appearance of a contract theory and did not bother on further research.

However, it goes without mentioning we must understand well the trust character of the Anglo-American Law since the funamental principles of Anglo-American Law was once used for the amending of the Japanese Company Law. Hereafter, I will explain the trust character of the Anglo-American Company Law and reasons why we can synthetically understand the amendiig points of Japanese Company Law only through full understanding of this trust character.

B. Specific Character Theory on an Artificial Person in England and Trust Character of Anglo-American Co. Law.

A theory of an artificial person has been developed in England to make position of the existing king or Bishop as eternal existence, separating it from the individuality of King or a Bishop; this development was not originated from an idea of gemeinschaft in the Continental Law. According to the idea of gemeinschaft in the Continental Law, a large number of persons constitute a specific organization and at the same time, a common object and a definite organization are to be indispensable elements. But in the British Law, these elements are not needed to separate the specific positions as eternal ones from an individual who occipies the positions. In this case, only an ideation that can formulate an idea of recognizing an eternate existance, apart from an individual as a human being, is requested. As for an idea of an artificial person in British Law, an element of an organization where a collective contract of a large number of individuals is not necessarily indispensable and idea of a corporation sole in which an individual can constitute legally an artificial person, is recognized.

On the other hand, they also recognize an idea of corporation aggregate in which a large number of individuals constitute a specific organization, gathering for a common object. Thus the British recognized there were two kinds of artificial persons. This fact sufficiently shows a substance of a theory of an artificial person in England. Of course, numbers of corporation sole are less than ones of corporation aggragate, but the fact that they

recognize the existence of a corporation sole shows clearly that the theory of an artificial person stands on a particular thoughts which differ entirely from the one in the Continental Law.

From this particular character of theory of an artificial person in England, there could not be any theory of existentialism of an artificial person or sharpening of an incorporation and organization theory.

In the modern age, corporation aggregate has occupied almost all of the artificial person and in special, existence of a company has been recognized as an unit of commercial activities. Even in this case, they regard that foundation of existence of the corporation aggregate is a contract of individuals who constitute the corporation aggregate.

Of course, even in England, the corporation aggregate proper has an independent existence, apart from individuals who constitute the corporation, and it acts in accordance with a resolution made by an individual who constitutes the corporation which has the character of eternity and immortality. The British thinks the corporation aggregate may sue or be sued in its own name and may have its own property and right at the same time. The difference between "company and a partnership" exists in this point according to thinking of the British.

But this fact is recognized as a convenient way only to attain a specific purpose, the British will not discuss on the existence of ability of illegal activities of an artificial person, being different from the Continental Law, but will regard these illegal activites as the ones made by individuals who constitute the artificial person, regardless the existence of the artificial person. And they also regard establishment of corporation aggregate as one kind of simple contract. But, the Conginental Law regard the establishment of the corporation as a "Gesamtakt", namely opinions of many individuals concentrated on the common purpose.

But this legal theory of England, as to the case of establishment of a company, invested property is regarded as the property transferred to the company based on an idea of trust and a director should act for the sake of a shareholder as a representative of the company. According to the British a shareholder ought to have the right in equity on the property of a company. In other

word, under the Continental Law, an idea of establishment of company was developed from a contract viewpoint to an idea of collective activities; and the idea of a company which is an extreme abstract existence apart from an actual organization and also apart from individuals who constitute the company was expanded by the idea of the Continental Law.

In England, however, substance of an organization of a company has been studied by a theory of trust relation, respecting the character of an individual who constitutes the company. A theory on an artificial person in England is entirely different from an organization theory of the Continental Law. Therefore, the essential part of the Anglo-American Law cannot be understood unless we understand trust relation.

Indeed, as I stated before, as to the case of the corporation aggregate, it is an independent character apart from an individual who constitutes and organization. As long as this point concerned, there is no difference between the idea of an artificial person in the Continental Law and the one in the Anglo-American Law. But, we can easily find that many fundamental principles of the Anglo-American Law stand on the basis of trust relations. I will verify this fact in the following paragraphs.

a) Authorized capital system in England and America

According to this system, establishment of a company shall be finished after formation of a memorandum of the association, and subscription and payment for a certain number of share without full subscription and payment for the whole shares of the company. And the fund of the company will gradually be increased by future payments of shares which will be issued adequately by a director within limitation of specific number of shares decribed in a memorandum of the association. If a company should decide a amount of capital as a company material as the Continental Law indicates, this sort of system can be most dangerous.

Because, if we place a stress on the independente character and an idea of organisation of a company, it will give too much important authority to a director who is just an executive organ of a company. In this case, by the thinking of the Continental Law, these decision to be made by a director ought to be done by

a resolutiou of a shareholders' assembly and in the long run of the authorized system should be denied.

However, we can easily explain the authorized capital system if we use the theory of trust relation. According to this theory, is natural for a director to hold property of a company in trust provided by a company and shareholders and will manage the company by his/her own judgement. But even in Anglo-American Company Law, however, property of a company belongs to a company without any connection with a director and is not a director's own property.

Under the Anglo-American Law, an idea of independent character of a company is formally recognized but as to actual management of the company, a director acts as a substantial trustee. Judging from this fact, a director is regarded as a real trustee of the trust by the Anglo-American Law. Scholars of England and America often explain the theory that property of the company held in a director's hand and must be understood from the trust viewpoint by such a figurative thinking. However, though this thinking is figurative, the British legal theory is entirely different from the theory legal of the continental law in which a director is regarded as only an executive organ of the company. Because the legal theory of the Continental Law has depeloped along the line of sharpening abstractness of independent character of a Company.

Moreover, by the law of juridical precedent in England and American, in case where a director is sued against his/her misappropriation of a company's property, the British often used an expression of "breach of trust" and applied not only the theory of reparation for injury caused by negligence of duty but also applied the constructive trust theory which regarded restoration of the property and possession of the compensation as property of trust. This theory of constructive trust should be applicable to the trustees who violated trust business.

In England and America, especially in America, where the theory of business trust is being actually prevailed, it is more appropriate in actual cases to explain organisation of a company by the theory in which organisation of the company is regarded as one of trust relations between directors and trusters who are

members of the company.

This kind of authorized capital system in England and America are theoritically inconsistent with theory of the Continental Law, which places stress to the utmost on an independent character of a company by developing an incorporation theory as one of organization theories.

b) Position of a Director and a Board of Directors under the Anglo-Anmerican Law.

This also can be explained by the theory of trust. It is admitted opinion for theories of juridical precedent and academic theories to explain a director's position by a theory of trust in which a director shall be trustee of trust And this director's position of trustee of trust is not only explained in relation to a company but also in relation to a shareholder.

To be true to the fundamenal principle as a trustee of trust for the company, a director should act purely for the benefit of the company and at the same time, should strictly be requested not to gain his/her own profits. According to these fundamental principles, severe restrictions shall be placed on a transaction between a director and a company to which a director belongs and the transaction between the two parties may be avoided at all times by the company and it is strictly prohibited for a director to borrow money from the company; and property acquired by a director, availing his/her position shallfinally belong to the company. These legal theories depend upon the same spirit of a theory of trust which prohibited trustee's acquisition of right on the trust property anp regarded property acquired by the trustee, availing trustee's position, as trust property.

Between director and shareholder, a director shall be liable to all of shareholders to protect the intercst of shareholders equally. Therefore, the director should not look to his/her own interests or to interests of specific shareholders.

In case where, a director injure a shareholder's benefit or look to his/her own interests, a director should compensate the whole damage done for the benefit of all shareholders or should have profits acquired through such prohibited activities belonged to all shareholders.

A director's position as a trustee of trust was explained

already. Furthermore, a system of a board of directors clearly shows particular character of trust theory.

Under this system of a board of directors, power of management of a company belongs to a board of directors as a representative council and not belong to a respective director. This is a marked character of this system. The director can act legally effectively for the company only in a dully called meeting.

Thus, this system doesn't give executive right of business to a respective director but give it to a board of directors as a representative council.

This is a presentation of the trust theory that in case where there are several trustees, disposing trust business, all trustees shall have to perform the business, cooperating each other and trust property shall be joint-ownership of all trustees.

Furthermore, the principle of a board of directors as a represetative council may permit that a respective director may perform business of a company without holding the meeting if all shareholders agree.

This fact is also as the same as the trust theory that as to execution of trust business, if all trustees agree, all trustees shall be able to act respectively.

c) Trust Character of Legal Theory of Anglo-American Law on shareholders' position.

Anglo-American legal theory on "shareholder's position" shows more clearly the trust character of a company. Properly speaking, it is natural for a respective shareholder's position to have the tendency of weakening gradually with the advance of a theory of incorporation.

Of course, even under the Continental Law, there was regulations which protected rights of a minority shareholders for the purpose of restraining a majority from violent decision by a majority. This right is provided in the Continental Law for the purpose of preventing "unavoidable evil" in the incorporation theory and not properly aims at protection of right of minority shareholders itself.

But right of a shareholder in Anglo-American Law, is based on the following thoughts, namely, though a shareholder leave contribution to a company in trust with a director the shareholder has right in equity on property of the company and in case where

real damage or possible damage is done to property of the company, namely trust property, the shareholders may request a relief based on the right in equity.

As I stated before, in Anglo-American Law, too, the property of a company is a separate and independent artificial person's property and is dealt separately from right of the shareholders.

But, there were several cases judged that a shareholder had proper equitable estate on property of a company. Moreover, there was a following judgement if a director would once act illegally to accomplish his/her fraudulent purposes under the cloak of independent character of the company, the theory on independence of a company would not be applied immediately and a shareholder's right on property of the company would be appeared.

As to a shareholder's position, Anglo-American Company Law is based upon the fact that a shareholder left management of a company to the will of the director within their ordinary authorities, but, in an emergency, a shareholder who has an equitable right on porperty of the company, may exercise remedial right in equity. Cases for remedial right are not a few. For example, in case where a director act against his/her duty, resultantly causing damage to property of a company and the company does not take a legal proceedings against the director to call his/her account, a shareholder may sue at court irectly against the director. This is so called representative suit.

The reason why this remedial right is recognized is that though a property of a company belongs to the company, a shareholder has quitabl right on the property. This thought is entirely same as trust law indicate in case where trust property is infringed by the third party, and a truste of trust does not take legal proceedings against the third party directly. Taking another example, in case where such resolutions as amalgamation of company, transferring of the whole enterprise, changing of an object of an enterprise, which will cause an important change to a company, are adopted, a shareholder who is opposite to the resolutions may exercise right to claim for purchase of his/her shares, and another example is the right to inspect records and documents of a company. These are also an apperrance of the legal theory of this kind.

The reason why this right is given as an indeprievable right of a shareholder is completely due to a theory of trust that shareholder is a real owner of property of a company and a director holds the property in trust as a trustee. Records and documents of the company shall not be possesed privately and exclusively by the director and the reports of trust business done by the director as the trustee of the shareholder; and consequently the shareholder, may inspect freely these records and documents. This fact is an expression of trust theory, too. And the followings facts are also presentations of this legal theory: the fact that shareholder may obtain an injunction to restrain director of the company from commiting breach of duties and act illegally or unfairly, the fact that a shareholder be given remedial right in equity as an independent party of a contract with a company.

And the most important fact is the one concerning right of subscription for new shares. As a director is a trustee of trust, the director is requested not to act against benefit of the shareholder and the shareholder shall have equitable right on the property of the company which is take deemed as trust property. For this reason, and because issue of new share means increase of a present shareholder's right, it is properly natural for the present shareholder to have right for subscription for new shares.

Any action taken by a director which gives pre-emptive right for new share to a person who is not the shareholder of the company is a violation of duty of as a trustee according to this theory.

Furthermore, we must be attentive to the fact that in such cases as explained above, the illegal or unfair actions by the director shall be materialized only by breach of prust. This theory shows obviously that a shareholder's remedial right is under a limitation of the trust theory.

C) Amendment of Japanese Company Law

In the amendment of Japanese Company Law, we can easily find many principles adopted trust characters, when comparing the amended regulation of Japanese Company Law to the Anglo-American legal theory. However, Japanese academic society of law is not going to pay careful attention to this matter. For

instance, when adopting the authorized capital system the academic society interprete this matter as the amendment aiming at expediency of procurement of a company's own fund.

It is not necessary to adopt the authorized capital system if its only purpose is to aim at the expediency of procurement of its own fund. If it is for this purpose, payment in installment of share system, by which complete subscription for the whole shares equivalent to a total amount of capital shall be requested in the first step of establishment of a company but as to real payment at that time, the company need only one fourth of the total amount of capital and thereafter a shareholders' general meeting may decide the adequate date for the payments on the capital.

In this case if one considers that authorized capital system which leaves procurement of a company's fund to the will of a director is better than the payment in installation for share system, due to the fact that it is too complex in taking necessary proceedings for a company to procure its own fund, he abandon legal theories of the Continental Law which place an emphasis on character of capital organization of company.

According to this theory, however, it cannot fully enlighten substance of the authorized capital system.

It is not started for the purposeof rendering to expedite procurement of the fund by leaving a selection of data and method of the procurement its own fund to the will of the directors. But leaving the selection to the will of directors is based on a theory that a director can hold property and management of company in trust with shareholders. Therefore, it is not thoroughly understood if one deem that the fact of the authorized capital system has been adopted only for the purpose of expediency of procurement of a company's fund.

In the present amendment, the Japanese academic circle of the law seems not to understand completely the fact that a position of a director is to be same as to that of a trustee. We can find the following articles in the amended company law that "Relation between a company and directors shall be treated in conformity with regulations of mandate (Par. 2, Art. 254, the Old Law) and "A director shall have to observe laws and ordinances, a memorandum of the association and a resolution of a shareholders'

general meeting and shall be liable to carry on their duties faithfully for the benefit of the company. (2 Art. 254.) Likewise, duty of loyalty of fiduciary in fiduciary relation was described clearly in the Japanese amended company law as the most fundamental principle.

However, the Japanese academic circle simple explains this matter as to the regular duty of cxercising reasonable care, because the relation between a company and a director is a relation of mandate. In Anglo-American Law, however, trustees' duty of loyalty in trust relation is entirely different from duty of exercising reasonable care in relation of beneficiaries. The former is a theory that fiduciary should act only for the benefit of a fiduciar's benefit and shall strictly be prohibited to procure any advantage at the expense of a benficiary, but the latter is a theory that an executor shall be requested to exercise reasonable care in the conduct of his business.

Therefore, in Anglo-American Law, a director, namely, a trustee shall have to be liable to exercise reasonable care as a good executor and at the same time, shall have to be under duty to serve whole heartedly for the benefit of a company and a shareholder and to endeavor to his/her best for the benefit of a company and a shareholder, without looking to his/her own interests.

Because, the Japanese academic circle wants full recognition of the particular character of trust relation in Auglo-American Law, it cannot fully understand the newly amended articles concerning duty of loyalty of a directorr.

And the present amended company law of Japan has formed a system of the board of directors. This article in the present company law has also its foundation in a legal theory that in case where there are several trustess, they are requested to carry on business collectively.

Similar to this case, in case where there are several directors they can exercise their authority effectively only when convened as the board.

But the Japanese academic society doesn't understand this theory at all.

Strengthening of a shareholder's position which is an essential part of the amended law has its foundation in equitable right of

a shareholder, namely as a beneficiary of the trust; and this fact is also not fully understood in Japan.

As I explained before, the amendments of Japanese Company Law, such as recognition of a shareholder's right of representative suit to call for a director's account, (Art. 267, the Present Law) confirmation of right of obtaining an injunction against director's unfair actions (Art. 272, Present Law) and formulation of a shareholder's right to request to inspect records and documents of a company, followed the articles on a shareholder's position in Anglo-American Law.

Therefore, the strengthening of a shareholder's position must be studied synthetically, corresponding to the regulations on the authorized capital system and on the duty of loyalty of a director.

Japanese academic society still has negative attitude towards this representative suit. The main reason seems to lie in the fact that such strengthening of a shareholder's position may leave enough ground for useless troubles to be put on management of a company and may bring interference of those who are going to usurp the company.

In representative suit system in Aglo-American Law, however, this right is exercised with strict limitations. Only in case where a shareholder tries his/her best to request a company to take legal proceedings against directors or officers who are in charge and the shareholder has no other effective remedy, he/she may sue at a court.

And, according to legal precedents, in case where there is no blamable facts on the part of a company though the company took no legal proceedings against the director or in case where it is recognized profitable and appropriate for company not to take the legal proceedings, the shareholder's request to sue against a director at a court shall be rejected.

On the other hand other legal precedent shows that in case where a shareholder request a company to take legal actions for the benifit of other competitive company, supported by the competitive company and receiveing instructions of the competitive company, the shareholder's request to take legal actions against a director is rejected.

Thus, if we know we have more room for using an idea in

equity we have no reason to fear the abusement of the representative suit system. And an injunction shall be issued only in case where probable irrecoverable damage be done and it shall not forbid any unfair actions made by the director.

Thinking over these factors, we need not fear an injunction as we have guarantee of impossibility of issuing the injunction under the pretext of a trifle flaw.

As to the exercising of the right to inspect books & records of a company in England & America, it is said the right shall not be freely exercised for unjust purpose without limitation.

And in the amended law or Japan, this effect was clearly described. By this article, abusing of this right shall be effectively restrained.

Thinking over like this, strengthening of a shareholder's position shall not disturb management of a company but shall perhaps result rational situation where management of the company will stand on the sound basis of trust relation in which a shareholder stands as a beneficiary in relation to a director and principle of justice and equity is predominant.

We can easily find that the amendments are much better than the legal theories of the Continental Law where a shareholder's right is tread down by a director's dictatorship with sharpening of the incorporation theory.

Nevertheless, it is because of misunderstanding of the substantial legal theory of Anglo-American Company Law that scholars of the Japanese academic society of the law fear the strengthening of a shareholder's position will result disturbance of management of a company.

According to the present amendments, the character of Japanese Company Law was completely changed to the law which has the trust character as well as the Anglo-American Law.

But, the Japanese academic society of the law only classified these points of the amendment to three major parts and is not going to enlighten to the fact, synthetically speaking, that the particular character of these classifications was originated from the trust character. As long as they have such attitude on amended regulations of the company law, in a word of exaggeration, it is like waiting for the pig to fly.

Under the influence of the Continental Law, it is very hard for the Japanese scholars to understand fully the Anglo-American Law which stands antipodal and has an entirely different legal system comparing to the Continental Law.

It is indispensable prerequisite for us to go further in the step research of the spirt of the common law and equity in Englandin in order to understand completely the Anglo-American Company Law.

I sincerely hope that the Japanese scholars in law will promptly attain the complete understanding of the AmericanAnglo-Company Law overcoming this prerequisite and an established legal theory which involves full knowledge of trust character on the interpretation and application of the amended law will be appeared.

(end)