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**Of Activist Mayors and Nuclear Reactors: The Osaka v  
Kansai Electric Saga and Japan's Curious Regime  
Governing Shareholder Access to Minutes of Board Meetings**

Alan K KOH  
Eiji TAKAHASHI

lawkky@nus.edu.sg  
takahashi@law.osaka-cu.ac.jp

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## OF ACTIVIST MAYORS AND NUCLEAR REACTORS

### **The *Osaka v Kansai Electric Saga* and Japan's Curious Regime Governing Shareholder Access to Minutes of Board Meetings**

Alan K. KOH & Eiji TAKAHASHI\*

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#### *Summary*

Shareholders of Japanese stock companies (*kabushiki-kaisha*) have certain information rights, but these rights depend on the specific variant of corporate form adopted. In companies adopting a variant with a board of directors (*torishimariyaku-kai*), shareholder access to minutes of meetings of boards of directors for the purpose of inspection and making copies thereof is subject to court permission. In this article, we introduce and analyze this regime of shareholder access, which has heretofore received scant attention in the English-language literature, within the context of shareholder information rights under Japanese law and in comparative perspective. We also discuss in particular the recent case of *City of Osaka v. Kansai Electric Power Company*, in which an anti-nuclear activist mayor used this regime of shareholder access successfully to obtain information from an electric power company on its nuclear power operations.

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\* Alan K. Koh is Sheridan Fellow (equivalent to lecturer (Japan) or visiting assistant professor (U.S.)) at the National University of Singapore Faculty of Law. Eiji Takahashi is Professor of Law at the Osaka City University Graduate School of Law and Politics. Alan Koh would like to thank the Centre for Asian Legal Studies of the National University of Singapore Faculty of Law for financial support, and the Osaka City University Graduate School of Law and Politics for hosting him during the writing of this article. We thank Samantha Tang, Justin Tan and Tan Zhongxing for their insightful comments.

All translations from Japanese into English are by Alan Koh unless otherwise expressly attributed. Except as cited in the footnotes according to J.Japan.L./ZJapanR's house style, Japanese names in this article are written in the last name-first name order that is proper to many Asian cultures.

Parts of this article draws on E. Takahashi, *Kabunushi teianken koushi yotei no shousuu kabunushi ni yoru torishimariyaku-kai gijiroku no etsuran seikyuu to kenri koushi no hitsuyousei* [A Minority Shareholder's Demand to Inspect Minutes of Board Meetings – In Anticipation of Exercising the Right to Make Shareholder Proposals – The Necessity of Such for the Exercise of Rights], in *Shihou Hanrei RIMAAKUSU 2015 (jou)* (Houritsu Jihou Bessatsu) 82-85 (2015).

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I. INTRODUCTION

It has been an eventful period in Japanese politics of late. In spite of the largest annualized GDP drop since the 2011 (the year of the Great Touhoku Earthquake) in the second quarter in response to the consumption tax hike from 5 to 8%,<sup>1</sup> 2014 ended with the resounding victory of the ruling Liberal Democratic Party (LDP) in the House of Representatives snap election, and the return of Prime Minister Abe Shinzou to power

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<sup>1</sup> C. Riley, Japan GDP growth collapses amid sales tax shock, CNN Money, <http://money.cnn.com/2014/08/12/news/economy/japan-gdp/> (accessed May 15, 2014).

with a two-thirds majority.<sup>2</sup> It would appear that in spite of criticism,<sup>3</sup> Abenomics – the central policy plank of the LDP – is set to continue.<sup>4</sup> On the company law front, it is against this economy-centric political backdrop that the corporate law reform effort finally saw fruition, ending a process that began in 2010 under the previous Democratic Party of Japan administration.<sup>5</sup> The Amendment<sup>6</sup> (the “2014 Amendment”) to the Companies Act 2005<sup>7</sup> – the contents of which have received academic treatment in this Journal<sup>8</sup> – entered force on May 1, 2015.<sup>9</sup> Japan observers may expect interesting jurisprudence to be forthcoming in the near future.

The National Diet is not the exclusive forum for politics. Despite significant movement on the legislative front and accompanying academic attention, much of Japanese company law has been left untouched by the 2014 Amendment. There are nonetheless developments of interest in these areas untouched by the legislative

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<sup>2</sup> The Japan Times, Abe tightens grip on power as ruling coalition wins 325 seats in Lower House election, Dec. 15, 2014, <http://www.japantimes.co.jp/news/2014/12/15/national/politics-diplomacy/abes-snap-election-pays-big-win> (accessed May 14, 2015).

<sup>3</sup> For an example, see T. Sawa, ‘Abenomics’ in the spotlight, Dec. 9, 2014, The Japan Times, <http://www.japantimes.co.jp/opinion/2014/12/09/commentary/japan-commentary/abenomics-spotlight/> (accessed May 14, 2015).

<sup>4</sup> For updates, see Government of Japan, abenomics, <http://www.japan.go.jp/abenomics/index.html> (accessed May 14, 2015).

<sup>5</sup> On February 24, 2010, then-Minister for Justice Chiba Keiko (DPJ) initiated the process with an inquiry to the Legislative Council, an official advisory body. After two and a half years of debate and consultations, the reform outline as prepared by the Company Law Subcommittee led by Professor Iwahara Shinsaku (then of the University of Tokyo; currently Waseda University) was submitted to then-Minister for Justice Makoto Taki (DPJ). For an account of the subcommittee deliberations in English, see generally G. Gotou, The Outline for Companies Act Reform in Japan and its Implications, 35 J. Japanese L. 13 (2013). For another account of the reform in context, see S. Kozuka, Reform After a Decade of the Companies Act: Why, How, and to Where?, 37 J. Japanese L. 39 (2014). For an analysis of the players in the reform process, see H. Morita, Reforms of Japanese Corporate Law and Political Environment, 37 J. Japanese L. 25 (2014).

<sup>6</sup> Kaishahou Ichibu wo Kaisei suru Houritsu, Law No. 90 of Jun. 27, 2014.

<sup>7</sup> Kaishahou, Law No. 86 of Jul. 26, 2005.

<sup>8</sup> The reforms track the Reform Outline very closely. For an introduction to the Outline, see Gotou, *supra* note 5.

<sup>9</sup> Kaisha-hou no ichibu wo kaisei suru houritsu no shikou kijitsu wo sadameru seirei [Cabinet Order Establishing the Effective Date of the Companies (Amendment) Act], Seirei Dai-16-gou [Cabinet Order No. 16], Kanpo [Official Gazette], Jan. 23, 2015, p. 2, available at <http://www.kantei.go.jp/jp/kanpo/2015/jan.3/h270123/g101230002.html>.

process in the courts of law, some of which concern longstanding core problems in the law of companies. Taking place against the backdrop of the ongoing political struggle over the future of nuclear power in Japan, a battle was fought – by local government against business corporation – in the Osaka courts over the perennial problem of shareholder information rights – specifically over the distinctively Japanese right of shareholders to apply to court for access to minutes of board meetings for the purpose of exercising their rights as shareholders.

The strictly political implications aside, in this (law) article, we take the opportunity offered by this literally nuclear saga to do two things. First, we introduce, analyze, and critique this unique Japanese regime of shareholder access (which includes rights to inspect and make extracts from minutes of board meetings), which we will hereinafter refer to as ‘shareholder access’ for convenience. Although it has received limited attention in the Japanese literature and virtually none in English, shareholder access is one of the few ways shareholders may obtain information with which to decide if and how to exercise their shareholder rights, and is therefore potentially of great importance going forward. Second, we analyze the culmination of the judicial portion of the nuclear power saga in the Osaka High Court decision of November 8, 2013, 2214 Hanrei Jihou 105,<sup>10</sup> in which shareholder access was sought by a shareholder for the purpose of exerting influence at a shareholder meeting, and in furtherance of a political agenda. We suggest that this decision (which is not groundbreaking jurisprudentially speaking), which involved the unprecedented politicization of an erstwhile relatively unknown shareholder right, may yet be the harbinger of changes in the way Japanese shareholders exercise their rights and

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<sup>10</sup> The judgment is final with no appeal or certiorari petition pending before the Supreme Court.

participate in corporate governance.

II. A MAYOR'S POWER STRUGGLE AGAINST A POWER UTILITY: THE OSAKA V KANSAI ELECTRIC

SAGA

1. Background

In the wake of the 2011 Great East Japan Earthquake and the ensuing Fukushima Dai-ichi nuclear accident, Japan's nuclear plants were progressively shut down.<sup>11</sup> In no small part due to loss of popular confidence in the country's nuclear infrastructure and its operation and management,<sup>12</sup> the future of nuclear power in Japan remains today a hotly contested political issue.<sup>13</sup> More interestingly for our purposes, this political dispute spilled over into the realm of company law when the city of Osaka – led by the controversial and arguably anti-nuclear<sup>14</sup> Mayor Hashimoto Toru – began to

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<sup>11</sup> On March 5, 2012, D. Batty, Japan shuts down last working nuclear reactor, 5 May, 2012, *The Guardian*, <http://www.theguardian.com/world/2012/may/05/japan-shuts-down-last-nuclear-reactor> (accessed May 14, 2015). For a scholarly treatment of the nuclear disaster and its aftermath by a multinational group of experts, see J. Ahn et al (eds.), *Reflections on the Fukushima Daiichi Nuclear Accident: Towards Social-Scientific Literacy and Engineering Resilience* (Cham, 2015).

<sup>12</sup> For an example of a commentary critical of the Tokyo Electric Power Company's mishandling of the nuclear disaster, see J. Adelstein, Japan's nuclear comedy just goes on and on, Aug. 31, 2013, *The Japan Times*, <http://www.japantimes.co.jp/news/2013/08/31/national/media-national/japans-nuclear-comedy-just-goes-on-and-on/#.VVmjevmqkp> (accessed May 18, 2015).

<sup>13</sup> See e.g. M. Fackler, Japan's Leaders, Pressed by Public, Fret as Nuclear Shutdown Nears, May 3, 2012, *The New York Times*, <http://www.nytimes.com/2012/05/05/world/asia/japans-leaders-fret-as-nuclear-shutdown-nears.html> (accessed May 14, 2015).

<sup>14</sup> The official position taken by Hashimoto's party as of June 2015, the Japan Innovation Party (Ishin no tou) is that while it aims for the eventual phase-out of nuclear power, it neither calls for the immediate elimination of all nuclear power, nor does it reject outright the resumption of nuclear power operations if necessary, provided that safety is guaranteed. Ishin no tou, Shouhizei, Genpatsu, Jieiken ni kansuru Kenkai [Policies on Consumption Tax, Nuclear Power, and Right of Self-Defense], Japan Innovation Party website, <https://ishinnotoh.jp/policy/policy3/> (accessed June 10, 2015). There is debate over Hashimoto's true convictions on nuclear power, but we refrain from making an assessment here.

intervene in the Kansai Electric Power Company (Kepeco) policy on and operation of nuclear power plants in the city's capacity as Kepeco largest shareholder.<sup>15</sup>

2. Osaka High Court Judgment of November 8, 2013<sup>16</sup>

a. Facts and procedural history

The respondent, Kansai Electric Power Co. Inc. (Kepeco), is an electric utility with 938,733,082 issued shares and statutory auditors. The applicant, the City of Osaka is a local government authority holding 83,747,966, or approximately 9% of Kepeco's shares. On February 1, 2012, Osaka demanded Kepeco disclose information related to the stable provision of electricity, measures to ensure the safety of nuclear power, and cost reductions, as well as minutes of board meetings during the previous five years. Kepeco refused to disclose the minutes.

Subsequently, on April 26, 2013, Osaka made demand on Kepeco to put proposals for amendment of the articles of incorporation and the election of directors to the shareholder meeting (89<sup>th</sup>) scheduled for June 26, 2013. At that shareholder meeting, Kepeco's board opposed Osaka's proposals, which were subsequently voted down. Osaka had initially demanded access to board minutes for the preceding five fiscal years (85<sup>th</sup> through 89<sup>th</sup>) for the purpose of making proposals at the June 26 meeting. The Osaka District Court ruled in Osaka's favor on June 19, but the meeting took place as scheduled on June 26 while appellate proceedings were still ongoing. In

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<sup>15</sup> For a contemporary report, see E. Johnston, Kepeco faces demand to exit nuclear power: Energy strategy body tells Osaka to put case to investors in June, Mar. 20, 2012, The Japan Times, <http://www.japantimes.co.jp/news/2012/03/20/national/kepeco-faces-demand-to-exit-nuclear-power/#.VVn5Hfmqgko> (accessed May 18, 2015).

<sup>16</sup> This section is translated from portions of the reported judgment.

response to Kepco's appeal, Osaka added to its demands the minutes for the subsequent fiscal year (90<sup>th</sup>).

As reported in the appellate judgment, Kepco argued, inter alia, that

- 1) Osaka's demands were not specific enough and therefore did not meet the test of necessity;
- 2) Osaka's application was for a political or administrative purpose;
- 3) It was not necessary for Osaka to have access to the demanded minutes in order to argue its proposal or to ask questions;
- 4) There is a reasonable prospect that Kepco would incur significant detriment from Osaka's improper use or public disclosure of the demanded minutes.

Osaka argued, inter alia, that

- 1) Osaka intended to make shareholder proposals regarding Kepco's nuclear reactor operations at the following (90<sup>th</sup>) shareholder meeting;
- 2) Access to relevant minutes of the board's deliberations over the company's nuclear operations was necessary for framing a proposal with content;
- 3) Access to the demanded minutes was necessary for explaining its proposal at the meeting and for submitting questions for the company to answer at the meeting;
- 4) Osaka will not use the minutes for other purposes or make them public, and therefore it cannot be said that there is a reasonable prospect that Kepco would suffer significant damage.

The Osaka High Court dismissed Kepco's appeal and ordered that Osaka be allowed access to the minutes it has sought, including those Osaka added to its demand during appellate proceedings.



b. Holdings

“1. Necessity of Exercising Rights as a Shareholder

...

In both its previous and future proposals, Osaka takes the view that there are serious problems at present with Kepco’s fundamental understanding of and attitude towards the nuclear power issues that are the subject of these proceedings. It is also recognized that Osaka, in a bid to address these problems, is considering making proposals regarding the amendment of Kepco’s articles of incorporation and director elections. It is clear that these proposals are proper subjects for the decision of the shareholders in general meeting.

Kepco is an electric utility company responsible for supplying the Kansai region, and as such is a company with strong public characteristics. On the other hand, Osaka has invested in Kepco using public money, acquiring approximately 9% of Kepco’s issued shares. Concurrently with having a major stake in Kepco’s fortunes, Osaka, as a local government authority, is also responsible for the lives, safety, and ordinary living of city residents. Although Kepco’s nuclear power operations is of social utility insofar as it contributes to the efficient and stable provision of electric power, it is also a business that must ensure that all possible safety measures are taken, and give appropriate and full consideration to safety and accident cost management. As the business decisions on these matters will determine the survival and prospects of Kepco as an electric utility, it is of great interest not only to the officers of Kepco, but also to its shareholders.

From the above, it is clear that Osaka’s making of shareholder proposals on

nuclear power issues, its explanation of reasons for those proposals, and asking of questions in advance, are necessary for Osaka's exercise of its rights as a shareholder. ...

Osaka's intention behind making the shareholder proposals at issue is to address the serious problems it perceives with Kepco's fundamental understanding of and attitude towards nuclear power issues. Consequently, in order for Osaka to make the relevant shareholder proposals, it is necessary not only for Osaka to have a clear picture of how Kepco came to its present fundamental understanding of and attitude towards nuclear power issues, but also to analyze the appropriateness of that process. To do so, it is insufficient for Osaka to consider only the consolidated opinion of the board, and we therefore find that it is necessary for Osaka to inspect and make copies of the relevant portions of board minutes at issue.

Considering that

- 1) an important part of the previous shareholder proposals by Osaka is the proposal to add provisions to Kepco's articles of incorporation defining the company's fundamental management policy in a bid to correct Kepco's fundamental understanding of and attitude towards nuclear power;
- 2) the proposal pertaining to director elections was a proposal to elect persons that in Osaka's opinion had the experience and knowledge necessary during a time of transition for Kepco's nuclear power business;
- 3) Osaka is contemplating making the same proposals at the next shareholder meeting as it did at the previous meeting for the purpose of correcting Kepco's fundamental understanding of and attitude towards nuclear power;
- 4) The process of how Kepco came to the fundamental understanding and attitude that Osaka has taken issue with should be made clear not only from

the consolidated opinion of the board, but also from the contents and process of deliberations by the board;<sup>17</sup>

Osaka's argument that the application is necessary for exercise of its shareholder rights is sufficiently specific, and we find in its favor. ...

Kepeco argues that since Osaka's application is founded upon policy and administrative purposes,<sup>18</sup> it is unnecessary for Osaka's exercise of rights as a shareholder. However, it is entirely expected that Osaka would consider policy and administrative purposes from its perspective as a local government authority when exercising its rights as shareholder, and just because Osaka does so does not make its exercise of rights as a shareholder objectionable. We therefore reject Kepeco's arguments on this point. ...

## 2. Reasonable prospect of causing the company significant damage

Kepeco contends that to grant Osaka access to the minutes at issue gives rise to a reasonable prospect that Kepeco would suffer significant damage. However, we take into the consideration the following. First, the portions of board minutes to which Osaka seeks access are limited. Second, based on Osaka's reasons as set out above, we find it necessary that the relevant portions be inspected and copied for Osaka's exercise of shareholder rights. Third, counsel for Osaka has given a written undertaking not to publicly disclose the contents of the board minutes sought without proper cause. In light of the above, we do not find that Osaka will use the documents at issue for a

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<sup>17</sup> Numbering added for ease of comprehension.

<sup>18</sup> [Translator's note] I.e. purposes other than the furthering of one's economic interests as a shareholder.

purpose other than that stipulated to, nor do we find that there is a reasonable prospect of significant loss to Kepco due to Osaka's going public with the documents.

In addition, we find that the 'proper cause' for public disclosure of the relevant documents alluded to above contemplates the situation that Osaka and its counsel may, in the course of exercising its shareholder rights, publicly reveal the contents to the extent necessary. Therefore, we cannot find that there is a reasonable prospect of significant damage to Kepco."

III. THE SHAREHOLDER'S RIGHT TO INSPECT AND MAKE COPIES OF MINUTES OF BOARD MEETINGS UNDER JAPANESE COMPANY LAW

1. The current regime

Under the Companies Act 2005 (as amended by the 2014 Amendment) regime, Japanese stock companies (*kabushiki kaisha*) have a bewildering array of possibilities and choices when it comes to organizational structure.<sup>19</sup> The choice of organizational structure is closely linked with the corporate formalities and record-keeping required by law, as well as shareholders' entitlements to such records. The relevant provisions are found under article 371 of the Companies Act. All companies with boards of directors (*torishimariyaku-kai secchi kaisha*) must keep minutes of board meetings at corporate headquarters for ten years (art. 371(1)), but depending on what other organs

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<sup>19</sup> The possible organs include directors (*torishimariyaku*), boards of directors (*torishimariyaku-kai*), statutory auditors (*kansayaku*), boards of statutory auditors (*kansayaku-kai*), accounting advisors (*kaikei sanyo*), accounting auditor (*kaikei kansa-nin*), board with three committees (audit [*kansa*], compensation [*houshuu*], nomination [*shimei*]) (*shimei-tou i'in-kai*) plus statutory officers (*shikkouyaku*), board with audit committee (*kansa-tou i'in-kai*: newly introduced by the 2014 amendment), and a number of combinations of one or more of the above.

have been adopted by the company, shareholder access to board minutes – which must be necessary for the purpose of exercising their rights as shareholders (article 371(2)) – differ. Whereas individual<sup>20</sup> shareholders of companies with boards of directors in general may demand access to board minutes during business hours at the company’s headquarters (article 371(2)), shareholders of companies with statutory auditors (*kansayaku secchi kaisha*),<sup>21</sup> boards of statutory auditors,<sup>22</sup> board committees,<sup>23</sup> or audit committee<sup>24</sup> must apply to and obtain permission from court to do so (article 371(3)). The court may not grant permission if it finds that the shareholder’s exercise of her right to access board minutes gives rise to a reasonable prospect (*osore*) that the company would thereby suffer a significant (*ichijirushii*) loss (article 371(6)). If the company refuses to allow access for no proper reason, officers of the company specified in article 976 are subject to fines of up to one million yen.<sup>25</sup>

## 2. The shareholder access regime in context

The astute observer would have noticed by this point – and perhaps be puzzled by – the very clearly defined scope of documents available for shareholder inspection, namely, minutes of meetings of the board of directors. What of other

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<sup>20</sup> Here ‘individual’ is used in the sense of a ‘single’ shareholder regardless of the size of shareholding.

<sup>21</sup> Note that companies can have both a board of directors and one or more statutory auditor, or just one or more directors (with no board) and one or more statutory auditors.

<sup>22</sup> Art 371(3) does not mention boards of statutory auditors, but it is safe to assume that the concept of ‘company with statutory auditors’ also encompasses ‘company with board of statutory auditors’.

<sup>23</sup> As originally enacted in the Companies Act 2005, the term ‘companies with committees [*i’in-kai secchi kaisha*]’ refers to the structure with three board committees plus statutory officers, and which is now called ‘*shimei-tou i’in-kai secchi kaisha*’ (literally, ‘companies with nomination and other committees’). For ease of exposition, we use the term ‘companies with board committees’ to refer to *shimei-tou i’in-kai secchi kaisha*.

<sup>24</sup> A form newly introduced by the 2014 Amendment, *kansa-tou i’in-kai secchi kaisha* will be referred to hereinafter as ‘companies with audit committees’.

<sup>25</sup> Art. 976(iv).

records that would be valuable to a shareholder deciding whether and how to exercise his rights? The answer lies partly in the fact that shareholders in Japan may inspect other corporate records but under regimes regulated separately and differently under the Companies Act.

a. Other shareholder information rights under Japanese law

First, individual shareholders (i.e., any single shareholder regardless of the size of their shareholding) may demand access to the shareholder register (*kabunushi meibo*) for inspection and the making of extracts therefrom during business hours by providing a reason.<sup>26</sup> Except for reasons as enumerated in the provision, the company may not refuse the demand.<sup>27</sup> The exceptions under which the company may refuse access include a) access for reasons other than the shareholder's safeguarding and exercise of his rights, b) access with intention to interfere with the company's operations or harm the common interests of the shareholders, or c) access for the purpose of providing the information obtained to third parties for profit.<sup>28</sup> Interestingly, shareholders who were competitors of the company could be refused access under the law prior to the 2014 Amendment,<sup>29</sup> but that exception was repealed on the basis that it is difficult to imagine a situation in which the company would suffer harm because a competitor obtained access to its shareholder register.<sup>30</sup> No permission of court is necessary.

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<sup>26</sup> Art. 125(2).

<sup>27</sup> Art. 125(3).

<sup>28</sup> Id.

<sup>29</sup> Art. 125(3)(iii).

<sup>30</sup> K. Egashira, *Kabushiki Kaisha-hou (dai-6-ppan)* (Tokyo 2015), p. 203.

Next, a qualified minority shareholder holding at least 3% of decision rights or issued shares may demand access during business hours to accounting records (*kaikei choubo*)<sup>31</sup> by providing a reason.<sup>32</sup> Exceptions similar to those applicable for individual shareholder access to shareholder registers also apply here, except that the exception for shareholders who are simultaneously competitors of the company is, unlike for shareholder registers, not repealed here.<sup>33</sup> Similarly, no permission of court is necessary.

It should be clear from the above discussion that the shareholder in Japan is not strictly confined to only the access regime for board minutes; he has several, albeit non-overlapping, options to choose from. Now that the domestic picture is a lot clearer, for some further perspective, it may be instructive here to contemplate briefly Japan's triad of shareholder information rights in comparative perspective.

b. Comparative perspectives

As is customary in contemporary corporate law scholarship, we shall look at Delaware. Delaware corporation stockholders may inspect corporate 'books and records' under section 220 of the Delaware General Corporation Law. The salience of this regime to shareholders derivative suits was reinforced by no less than the Delaware Supreme Court itself, which encouraged the practice:

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<sup>31</sup> There is some controversy over the scope of *kaikei choubo* and associated relevant documents. For a brief summary see Egashira, *id.* at 700-701.

<sup>32</sup> Art. 433(1).

<sup>33</sup> See also Egashira, *supra* note 30, at p. 703 (doubting).

“A stockholder who makes a serious demand<sup>34</sup> and receives only a peremptory refusal has the right to use the “tools at hand” to obtain the relevant corporate records, such as reports or minutes, reflecting the corporate action and related information in order to determine whether or not there is a basis to assert that demand was wrongfully refused.”<sup>35</sup>

Under this regime, a stockholder seeking to inspect the corporation’s books and records may apply to court for an order compelling inspection, but he must establish a proper purpose for doing so.<sup>36</sup> The stockholder may inspect only books and records “that are necessary and essential to accomplish the stated, proper purpose”.<sup>37</sup> For a document to be ‘essential’ it must at least address ‘the crux of the shareholder’s purpose, and if the essential information the document contains is unavailable from another source’.<sup>38</sup> For inspections of the stock ledger or list of stockholders, the burden of proof is reversed; it is for the corporation to show an improper purpose.<sup>39</sup>

It is not easy to measure the difficulty faced by a Delaware stockholder in obtaining ‘books and records’ against that of a Japanese shareholder attempting to inspect board minutes, given the ‘necessary and essential’ threshold which may seem even stricter than the Japanese standard of ‘necessity’. However, it is fair to see that in principle a Delaware stockholder does have – at least the possibility at law – of access

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<sup>34</sup> The demand aspect of derivative litigation, in which shareholders must serve a demand on the responsible body before commencing litigation on their own (usually served on the board directors but in Japan the addressees are often corporate auditors in Japan as that is the proper addressee for Japanese companies that are *kansayaku secchi geisha*) is similar in Delaware and Japan insofar as there is a rule that this is in principle a necessary step, but that is where the similarities stop, both in terms of the consequences of refusal of demand and non-compliance, and exceptions thereto. Detailed discussion of the differences must be left to a different forum.

<sup>35</sup> *Grimes v. Donald*, 673 A. 2d 1207, 218 (Del. 1996).

<sup>36</sup> 8 Del. C. sec. 220(c).

<sup>37</sup> *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002).

<sup>38</sup> *Espinoza v. Hewlett-Packard Co.*, 32 A. 3d 365, 371-372 (Del. 2011) (footnotes omitted).

<sup>39</sup> 8 Del. C. sec. 220(c).



to various corporate documents under one general, multipurpose provision, whereas the Japanese shareholder's options are individual, specific, and targeted rights.

On the other extreme, shareholders of the UK limited company have no self-standing right – whether unfettered or contingent on court permission – to inspect minutes of board deliberations.<sup>40</sup> Shareholder access to information would require some basis in other law, such as general rules of civil procedure which offers litigants access to documents that are subject to disclosure.<sup>41</sup> In this respect, UK shareholders lack what Delaware stockholders and Japanese shareholders share: shareholder inspection rights that are separate from, even if ultimately (by virtue of some requirement of 'necessity') linked to, substantive litigation.

Broadly speaking, therefore, the current Japanese shareholder access regime may be characterized as falling in between the United States, with its potentially extremely broad information rights, and the United Kingdom, which has extremely limited access. In this context, the Japanese *individual* shareholder's right of access only to board minutes – and even then contingent on court permission – may seem somewhat limited, but we must not forget the considerably greater range of rights available to a qualified minority shareholder with a shareholding of 3% or more. Nonetheless, if we accept that the board of directors, given its legal mandate to manage the affairs of the company, plays a vital role in running the company,<sup>42</sup> it is not

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<sup>40</sup> Cf. Companies Act 2006 (UK) sections 355-358 (regulating record keeping of members' meetings and decisions, and providing for members' inspection rights) with sections 248-249 (requiring the keeping of records for directors' meetings but containing no provision for access by members). Shareholders have access to discovery under general rules of civil procedure (see generally Part 31, Civil Procedure Rules 1998 SI 3132/1998 (UK)), but that is beyond the scope of this article.

<sup>41</sup> The term used is 'disclosure', not 'discovery' as in the United States. The disclosure and inspection regime is regulated under Part 31 of the Civil Procedure Rules 1998, SI 1998 No. 3132 (L. 17).

<sup>42</sup> This is by no means an uncontroversial proposition in and of itself. See *infra* notes 51-54 and accompanying text.

difficult to see the special importance of the contents of board deliberations (relative to other corporate records) to a shareholder seeking to exercise a variety of shareholder rights.

Before we delve into an analysis of the significance of this case – namely, the meaning of ‘necessary for the purpose of exercising rights as a shareholder’ and ‘a reasonable prospect that the company would suffer a significant loss’ – a brief excursus into the history of this provision is in order.

### 3. History

It is well-known that the extensive reforms to the Commercial Code (which then encompassed the law pertaining to stock companies) in the wake of the Second World War were made while Japan was still under Allied occupation, as is the fact that the reforms were motivated by a clear political agenda.<sup>43</sup> Among other things, the Allied authorities sought to break the control of traditional Japanese groups (Zaibatsu) over the Japanese economy by distributing corporate shares to the Japanese public.<sup>44</sup> The Commercial Code became a target of reform, as Allied-led law reformers found the legal protections it offered for investors inadequate. Greater legal protection was considered essential to a culture of active participation by individual investors in corporate matters which had not existed previously but which the reformers hoped to

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<sup>43</sup> For a general, contemporaneous introduction albeit one that does not touch precisely on the issue of board minutes, see T.L. Blakemore & M. Yazawa, *Japanese Commercial Code Revisions: Concerning Corporations*, 2 *Am. J. Comp. L.* 12 (1952). For an account by an American official who played a major role in the reform effort, see L.N. Salwin, *The New Commercial Code of Japan: Symbol of Gradual Progress Toward Democratic Goals*, 50 *Geo. L.J.* 478 (1962). See also generally H. Baum/E. Takahashi, *Commercial and Corporate Law in Japan*, in: W. Röhl (ed.), *History of Law in Japan since 1868* (Leiden, 2005) 381-395.

<sup>44</sup> For an account of the process with figures, see Salwin, *ibid.*, at 488-497.

create.<sup>45</sup> The institution of the board of directors (which was intended to make the ‘management more responsible to the shareholders’<sup>46</sup>) was introduced during these reforms, as was the requirement for board minutes to be kept and made available for shareholders to inspect and make extracts therefrom.<sup>47</sup> Until subsequent reforms, for some years shareholders had a general right<sup>48</sup> to demand access to board minutes at any time during business hours,<sup>49</sup> which was an unusual situation as a matter of comparative law.<sup>50</sup>

Whatever the merits offered by this regime of unfettered access, having matters such as corporate secrets on record and easily accessible to shareholders created obvious problems to which Japanese companies adapted. To avoid the dangers that might be caused by disclosure of sensitive information that might be contained in board minutes, Japanese companies adopted practices which minimized the role of the board meeting altogether. For example, business decisions came to be made within internal institutions such as the *joumukai* (senior management committee, a subgroup of senior directors who make important policy decisions<sup>51</sup>), a practice which was neither required nor regulated by the Commercial Code.<sup>52</sup> Deliberations at formal board meetings became formalities, and board minutes omitted details and important

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<sup>45</sup> *ibid.*, at p. 497.

<sup>46</sup> *Ibid.*, at p. 504.

<sup>47</sup> S. Morimoto, *Dai 371 jou* [Article 371], in: 8 *Kaishahou KONMENTAARU* 318 at 321 (Ochiai Seichi ed. Tokyo 2009).

<sup>48</sup> Subject to the caveat that such right may not be abused. See Tokyo District Court, October 1, 1974, 772 *Hanrei Jihou* 91.

<sup>49</sup> Art. 263(2), pre-1981 Commercial Code.

<sup>50</sup> I. Kobashi, *Torishimariyaku-kai no gijiroku* [Minutes of Proceedings of the Board of Directors], 86(1) *Minshouhou Zasshi* 34 (1982) at 39.

<sup>51</sup> We adopt the translation and description given in S. Learmount, *Corporate Governance: What Can Be Learned From Japan?* (Oxford, 2002) p. 128ff.

<sup>52</sup> T. Fujihara, *Comment on 1923 Hanrei Jihou* 130, in 573 *Hanrei Hyouron* 31, at 31 (2006).

matters.<sup>53</sup> These trends, together with the growth of the size of Japanese boards, led to the atrophy of the board as an institution.<sup>54</sup> A related problem was that of *soukaiya* (nominal shareholders and corporate racketeers<sup>55</sup>) using their right of access to board minutes to extort money from companies.<sup>56</sup>

Eventually, the Japanese Diet responded with the 1981 reforms to the Commercial Code, which were partly aimed at arrest of the board's decline and revitalization of the board.<sup>57</sup> Together with provisions specifying matters of exclusive board competence, shareholder access to board minutes was restricted and made contingent on court permission in an attempt to encourage fuller deliberations and records at board meetings.<sup>58</sup> The necessary procedural framework was also established at this time. In contrast with ordinary civil claims, litigation over demands for access is governed by non-contentious litigation procedure, a branch of civil procedure that is distinguished from ordinary civil procedure in matters such as the judge's power to make findings based on his own authority (*shokken*) without being bound by the pleadings of the parties,<sup>59</sup> but which in this specific context has special allocations as to burdens of proof (article 869) which will be discussed below in this article. Apart from amendments granting access to shareholders of parent companies and regulating the making and keeping of electronic records, the core of the regime –

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<sup>53</sup> M. Hayakawa, Dai 371 jou, in 4 Chikujou Kaisetsu Kaishahou 587 at 590 (T. Sakamaki & M. Tatsuta rep. eds. Tokyo 2008).

<sup>54</sup> Id. For a concise account of corporate boards and their evolution in English, see K. Noda, Big Business Organization, in: E.F. Vogel (ed.), Modern Japanese Organization and Decision-Making (Berkeley 1975) at pp. 117-123.

<sup>55</sup> On *soukaiya*, see generally M.D. West, Information, Institutions, and Extortion in Japan and the United States: Making Sense of Sokaiya Racketeers, 93 Nw. U. L. Rev. 767 (1999).

<sup>56</sup> S. Motoki, Kaisei Shouhou Chikujou Kaisetsu revised and expanded edition (Tokyo 1983) p. 131.

<sup>57</sup> S. Morimoto, Dai 371 jou, in 8 Kaishahou KONMENTAARU 318 at 321 (S. Ochiai ed. Tokyo 2009).

<sup>58</sup> Id.

<sup>59</sup> For a concise introduction to Japanese non-contentious litigation procedure in English, see A. K. Koh, Appraising Japan's Appraisal Remedy, 62 Am. J. Comp. L. 417, 427-429 (2014).

shareholder access with court permission – remained unchanged until the watershed Companies Act 2005.

The balance struck in 1981 between shareholder access to information (and therefore support of shareholder rights) and the company's interest in an engaged board and security of corporate secrets was maintained until the Companies Act 2005. Here, the legislature interestingly simultaneously took one step forward and one step back. The 1981 regime was retained, but only for the new companies with committees (introduced in 2002)<sup>60</sup> and companies with statutory auditors (the direct descendant of the classic stock company under the post-1950, pre-2005 Commercial Code). The step back towards the 1950 model of generally unrestricted access was for companies with a board of directors, but neither statutory auditors nor statutory committees – itself a throwback to the stock company as it (more or less) was before 1950. Although the step backwards is of interest from a comparative law perspective, we confine the scope of our commentary and analysis to the court-centered regime tracing its ancestry to the 1981 Amendment.

#### 4. Interpretation: Draftsman's Intent<sup>61</sup>

According to the commentary by the draftsman of the 1981 Amendment, the inspection regime may be used by shareholders for the purpose of exercising any

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<sup>60</sup> For an introduction to the reforms that introduced this option (since then absorbed into the Companies Act), see D.W. Puchniak, *The 2002 Reform of the Management of Large Corporations in Japan: A Race to Somewhere?*, 5(1) *Australian J. Asian L.* 42 (2003).

<sup>61</sup> This section III.4 draws on work published as E. Takahashi, *Kabunushi teianken koushi yotei no shousuu kabunushi ni yoru torishimariyaku-kai gijiroku no etsuran seikyuu to kenri koushi no hitsuyousei* [A Minority Shareholder's Demand to Inspect Minutes of Board Meetings – In Anticipation of Exercising the Right to Make Shareholder Proposals – The Necessity of Such for the Exercise of Rights], in *Shihou Hanrei RIMAAKUSU 2015 (jou)* (Houritsu Jihou Bessatsu) 82-85 (2015).

shareholder right. This includes both shareholder's individual rights,<sup>62</sup> such as the right to vote at shareholder meetings or commence derivative actions, as well as qualified minority rights<sup>63</sup> exercisable by shareholders holding singly or collectively a certain percentage of shares, such as the right to seek judicial removal of directors.<sup>64</sup> The draftsman's commentary is also instructive in illuminating what would appear to be the primary purpose behind the new court permission requirement: preventing the leak of corporate secrets:

However, even in cases where [access to board minutes] is necessary for the exercise of shareholder or creditor rights, there could be a reasonable prospect that the company's secrets would be leaked because of the shareholder's inspection and copying of the minutes, and that this would cause the company significant losses, making the continued operations of the company difficult and causing harm to shareholders and creditors, thereby contravening the purpose of the inspection regime. Therefore, where inspection and copying would create a reasonable prospect that the company would suffer significant losses, the regime is designed so that the court may not grant permission in such circumstances.<sup>65</sup>

The skeptical observer could easily point out that all the company needs to do to fend

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<sup>62</sup> Individual rights 'tandoku kabunushi ken' may be exercised by the holder of a single share. They include the right to apply for an injunction restraining the issue of new shares (article 210 et seq) and the right to commence a derivative action (arts. 847 & 847-2).

<sup>63</sup> Shousuu kabunushi ken (literally 'minority shareholder's rights') are rights that may be exercised by shareholders holding singly or collectively a certain percentage. Examples include the right to put proposals to a vote of the shareholders in general meeting (arts. 303 & 305) and the right to apply for judicial dissolution of the company (art. 833). We have adopted the translation 'qualified minority rights' to clarify that these are not rights exercisable by holders of just a single share.

<sup>64</sup> S. Motoki, *Kaisei Shouhou Chikujou Kaisetsu* revised and expanded edition (Tokyo 1983) pp. 132-133.

<sup>65</sup> *Id.* at 132.

off shareholder inspection demands is to argue that all board minutes contain secrets and any leak thereof would cause the company significant damage. The draftsman's commentary may alleviate such fears, as the concept of 'significant damage' is intended to be a relative one:

What constitutes 'significant damage' is relative. In other words, where it is extremely necessary for the shareholder or creditor to exercise their rights, even if there should be some leak of corporate secrets, if the circumstances are such that the shareholders or creditors as a whole would actually benefit, the damage cannot be considered significant.<sup>66</sup>

The commentary is silent on what it means by 'extreme necessity' for the exercise of shareholder rights. However, it appears to be clear that minutes may not be accessed for any purpose unrelated to the exercise of shareholder rights – examples given included deciding whether to transfer one's shares, or pursuing civil litigation.<sup>67</sup>

Finally, the commentary also addresses the burden of proof. The applicant (i.e. the shareholder or creditor) bears the burden of showing a *prima facie* case (*somei*)<sup>68</sup> what is necessary for the exercise of the applicant's rights.<sup>69</sup> However, the commentary goes on to say that in order for the applicant to succeed in obtaining permission, the applicant must actually offer sufficient proof to convince the judge that

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<sup>66</sup> Id. at 133.

<sup>67</sup> Id. at 133.

<sup>68</sup> *Somei* is distinguished from *shoumei*; the latter is the burden of proving one's case to the point necessary to convince the judge that such a state of facts existed, whereas *somei* is a lower burden which requires only that the judge be convinced that it was probable that such a state of facts existed. An easy if rough comparison would be that with a preliminary hearing to dismiss versus trial.

<sup>69</sup> Id. at 133. This was as required by the then-article 132-8(1) of the old Hishoujiken Tetsuzuki-hou Non-Contentious Litigation Procedure Act], Law No. 14 of Jun. 21, 1898 (repealed). The current provision governing *somei* in company law non-contentious litigation is article 869 of the Companies Act.

inspection is necessary,<sup>70</sup> i.e. *somei* is not enough. To further complicate matters, the draftsman goes on to say that the applicant does not bear the burden of proving even on a prima facie basis that inspection would not cause the company significant damage. Instead, the burden is reversed, with the company bearing the burden of proving<sup>71</sup> that the company would suffer significant harm.<sup>72</sup> The draftsman was careful to point out that given the allocation of burdens of proof, it is advisable for corporate boards to be proactive in presenting the necessary evidence and making the appropriate explanations should they intend to argue that disclosure of the demanded minutes of board meetings (or parts thereof) would suffer significant damage, for the benefit of the doubt (should there be any) goes to the shareholder applicant.<sup>73</sup>

## 5. Jurisprudence

Prominent cases on the inspection regime have been few and far between. The leading case on the 1981 regime was the judgment of the Tokyo District Court of February 10, 2006.<sup>74</sup> The applicant in that case sought access to board minutes related to the company's setting up of another company. The district court granted permission for access to part of the records, but also purported to lay down general principles:

[We now consider] the issue of the necessity [of access to board minutes within the meaning of the relevant provision] for the exercise of shareholder rights. There are situations such as where the possibility of exercising

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<sup>70</sup> 'etsuran, tousha ga hitsuyou dearu to no kakushin wo saibankan ni esaseru shoumei ga hitsuyou'

<sup>71</sup> The original text simply uses '*risshou*', which does not make it clear whether it is of the *shoumei* or *somei* standard.

<sup>72</sup> S. Motoki, *Kaisei Shouhou Chikujou Kaisetsu* revised and expanded edition (Tokyo 1983) pp. 133.

<sup>73</sup> *Id.* at 133-134.

<sup>74</sup> Reported at 1923 Hanrei Jihou 130.



shareholder's rights can be said to be non-existent; a reason such as exercising the shareholder's right to put questions to the board at a shareholder meeting or commencing a derivative action in the abstract, without more, qualifies as such. There are also situations where the demand is for access to board minutes that are irrelevant to the intended exercise of shareholder rights. In situations such as the above, permission for access should not be granted.<sup>75</sup>

This decision puts a gloss on the necessity requirement: it is insufficient for the applicant to plead in the abstract that access is necessary for the exercise of a shareholder right, and the applicant should prove that there is some probability that he would ultimately exercise the shareholder right in the furtherance of which access is sought.

Under the Companies Act 2005, the leading case is the decision of the Fukuoka High Court of June 1, 2009.<sup>76</sup> The applicant, a shareholder of a bank, sought access to board minutes related to the bank's involvement in a M&A transaction of another company. The Fukuoka High Court ruled:

Looking at the applicant's actions as a whole, it is appropriate to hold that the applicant is, under the pretence of exercising his rights as a shareholder, attempting to gather evidence for the self-interested purpose of litigating the M&A transaction. It is obvious that the respondent [bank] board's deliberations over whether to pursue the deal is a corporate secret. There is also a reasonable prospect that inspection and copying of the relevant portions of the records would be a great blow to the future operations of the

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<sup>75</sup> 1923 Hanrei Jihou 130 at 136.

<sup>76</sup> Reported at 1332 Kin'yuu Shouji Hanrei 54.

respondent. We recognize that there is a reasonable prospect that the shareholders of the respondent as a whole would also suffer significant detriment as a result. Therefore, as the present application either does not satisfy the article 371(2) requirement of ‘necessary for the purpose of exercising rights as a shareholder’, or amounts to an abuse of the right [to demand access], we cannot grant permission.<sup>77</sup>

This case is instructive insofar as it seems to exclude litigation against another company from the scope of the requirement that access be ‘necessary for the purpose of exercising rights as a shareholder’.

#### IV. THE OSAKA HIGH COURT JUDGMENT OF NOVEMBER 8, 2013: ANALYSIS AND CRITIQUE

We approve of the decision.

This case was the first to address squarely – and give the judicial stamp of approval to – the qualified minority shareholder right to put proposals to the shareholder meeting as a right that may ground an application for access to board minutes, and is therefore of use as a precedent in this regard. We analyze here the issues of interpretation addressed by the court and highlight the implications the decision has for future shareholder activism.

##### 1. “Necessity”

On the interpretation of the ‘necessity’ requirement, the Osaka High Court did not grant permission on the sole basis of assertions of exercising the shareholder right

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<sup>77</sup> 1332 Kin’yuu Shouji Hanrei 54 at 57.

of making proposals in the abstract, but instead paid close attention to and took into consideration various facts that together establish a high probability of the applicant exercising his rights as shareholder as planned, as well as the specificity with which the applicant identified the portions of board minutes it wished to inspect. This is in line with the approach taken by the Tokyo District Court in its decision of February 10, 2006 (summarized above). Previously, academics had suggested that the requirement of necessity had little relevance in practice, going on the reasoning that since the exercise of any shareholder right can ground a shareholder application for access, shareholders could simply make up some kind of excuse.<sup>78</sup> However, since the applicant must specify in his application the portions of board minutes he wishes to inspect, the shareholder right that he seeks to ultimately exercise must by its nature identify the relevant portions of board minutes for inspection.

We would expect that an electric utility, and especially one running nuclear power plants, possesses many corporate secrets that the company does not wish to make public knowledge.<sup>79</sup> The court attempted to balance the interest of the company in protecting its secrets and the interest of the shareholder in inspecting minutes of the company's board meetings by considering Osaka's intentions – which included safeguarding the health and lives of citizens within its jurisdiction from the risks created by nuclear power plant activity – in exercising its shareholder rights. The court permitted inspection only of the portions of the minutes covering board deliberations post-Great Eastern Japan Earthquake on the reactivation or retirement of Kepco's

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<sup>78</sup> Morimoto, *supra* note 47, at 324-325.

<sup>79</sup> They need not be purely commercial; for example, security arrangements at nuclear power plants – which may very well be the subject of board meetings – have obvious national security dimensions and should not be subject to disclosure without adequate safeguards.

nuclear power plants. We approve of the court's approach, and find its reasoning – that Osaka needed the details contained only in the board minutes in order put forward proposals changing the fundamental business policy of the company and for the election of persons with appropriate expertise as directors – persuasive.

2. “Significant damage”

On the issue of the prospect of significant damage to the company, we also agree with the court's finding that there is no such prospect. The court went beyond simplistically concluding that just because the applicant is a local government authority there is no danger of a leak of sensitive corporate information. Two points are of interest here. The first is what the court considered in coming to the conclusion that the applicant did not intend to use the information sought for a collateral purpose, and therefore there was no reasonable prospect of significant loss to the company. The court took into account its findings that the portions that were the subject of the applicant's demand were indeed necessary for the applicant's exercise of his shareholder rights, and that counsel for the applicant had given a written undertaking to court not to publicly reveal the contents sought without a proper purpose. In coming to the conclusion that inspection was ‘necessary’ for Osaka's exercise of its shareholder rights, the court appreciated that ‘necessity’ should be judged relative to the ‘prospect of significant damage’. As the court's relative approach to necessity is consistent with both prevailing academic opinion and the intent of the draftsman of the 1981 Amendment which first introduced the court-centered regime, we respectfully approve.

The second point is that the terms of the undertaking furnished by Osaka and its counsel did contemplate that under *some* circumstances the contents of the board minutes accessed would be made public – and this was accepted by the court.<sup>80</sup> This is significant because the court is really saying that under certain circumstances companies must simply bear with the consequences of disclosure.<sup>81</sup> As the legal requirement for companies to keep minutes of board meetings is one that by its very nature presupposes access subsequently by parties other than participants at the meeting,<sup>82</sup> this should not surprise. In similar vein, we argue that future courts – and companies – should be slow to make non-disclosure by the shareholder a condition for granting access, as this would substantially undermine the ability of shareholders to use information obtained through inspection to exercise ‘voice’ rights such as the making of shareholder proposals and asking of questions at shareholder meetings, rights which presuppose shareholder communication with other shareholders at (or possibly before) a meeting. The court’s conclusion not only accords with the draftsman’s intent that the damage caused by disclosure of corporate secrets cannot be considered significant if shareholders and creditors may ultimately benefit,<sup>83</sup> but also with the spirit of the shareholder access regime and goes some way in support of shareholder voice. We therefore agree.

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<sup>80</sup> 2214 Hanrei Jihou 105 at 108.

<sup>81</sup> Accord M. Kimura, Comment on Osaka High Ct Nov. 8, 2013, in: 1479 JURISUTO 103, 104 (2015).

<sup>82</sup> *Ibid.* There could be other reasons for keeping minutes, such as for directors to refresh their own memory, but that does not by itself justify a legal requirement to keep minutes. After all, if minutes are for personal use, directors could keep their own records for personal use. We thank Justin Tan for this point.

<sup>83</sup> See text accompanying supra note 66.

### 3. Implications for shareholder activism

Finally, we suggest that the decision creates interesting and potentially significant implications for shareholder activism. Previously, the shareholder activist would have had to contend with the Fukuoka High Court's June 1, 2009 decision discussed above. According to the Fukuoka High Court, shareholders may not demand access to board minutes for the purpose of furthering a personal agenda, as that would either fail to satisfy the necessity requirement, or amount to an abuse of shareholder rights, or possibly both, as the reasoning was not entirely clear.<sup>84</sup> If that principle is applied to the facts of *Osaka v Kansai Electric*, it seems that the city of Osaka should not have been allowed to make such demand in order to further the personal [political] agenda of its head, the mayor. The Osaka High Court, however, arrived at a different conclusion. The Osaka court first recognized the public character of the city of Osaka and its responsibilities to city residents, and that Osaka therefore has a direct interest in Kepco's decisions over nuclear power because of the determinative impact such decisions would have on the future of Kepco's operations and consequently the city residents under Osaka's responsibility. The court also went further, addressing and rejecting directly Kepco's argument that Osaka's political motives behind its demand for access to board minutes did not satisfy the necessity requirement. Given the seemingly divergent approaches taken by the Fukuoka and Osaka High Courts, guidance from the Supreme Court in the future would be helpful.

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<sup>84</sup> For an incisive critique of the conflation of the issues of abuse (of shareholder rights) and 'necessity', see Y. Kimata, Comment on Fukuoka High Ct June 1, 2009, in: 2011 Shouji Houmu 110, 113 (2013). Professor Kimata suggests that the court used vague language on this point because it felt that the conclusion would have been the same under either ground. Ibid.

In the interim, we suggest there are broadly two ways we can interpret the Osaka High Court decision. The first, narrower view is that the Osaka High Court appears to be legitimizing the use of shareholder information rights by local government authorities to further agendas of intense public interest such as nuclear power policy within the framework of exercise of recognized shareholder rights at a proper forum, such as the use of shareholder proposals and asking of questions at general meeting. To succeed in obtaining court-ordered access to the requisite board minutes, the government shareholder would probably have to act in furtherance of an agenda receiving widespread public support, and back up its demands with specific reasons, which would probably entail credible plans for exercising its shareholder rights – burdens which Osaka discharged admirably in the present case. Under this view of the decision, the politicization of company law would be very confined, as few matters are likely to command public support as much as an anti-nuclear agenda in the wake of an unprecedented nuclear disaster – and it is highly unlikely that the political will and determination necessary to pursue such an agenda – embodied in this case by Mayor Hashimoto – would come by often in local government bodies. In this context, the *Osaka v Kansai Electric* saga may be a once-off event of little lasting impact on the grand scheme of Japanese corporate law and governance.

The second view, by contrast, is that the Osaka High Court decision may be indicative of a judicial attitude more welcoming of shareholder activism in general, albeit one also constrained by the necessity of pursuing activism through established company law channels and means. Shareholder activists may respond to the improved prospects for shareholder access to board minutes – and just as if not more importantly, the perception of such – by making demands for access more frequently.

There may, however, be a corresponding backlash from companies. They might once again adopt defensive measures such as sanitizing the minutes of board meetings, adopting internal decision-making structures more opaque to shareholders, or otherwise minimizing the formal role of the board in corporate governance – a repeat of the situation between 1950 and 1981.<sup>85</sup> Whether the shareholder access regime will grow into a major shareholder tool in the ongoing war for better corporate governance is impossible to tell at this early stage, but we invite observers – both foreign and local – to stay tuned.<sup>86</sup>

#### V. CONCLUDING REMARKS

In spite of fairly frequent and intense legislative activity in the realm of company law, much of the field is still necessarily relegated to gradual development through the accretion of precedent and academic commentary. *Osaka v Kansai Electric* is the first reported High Court case that specifically addresses – and approves of – the intention to make a shareholder proposal at a future shareholder meeting as a purpose that meets the ‘necessity’ requirement for court permission to inspect board minutes. This is a gloss that is consistent with legislative intent and should offer clarity to shareholders seeking to be better informed when making shareholder proposals.

Mayor Hashimoto’s quest did not have a happy ending. At the 90<sup>th</sup> annual

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<sup>85</sup> We assume here that the court-centered regime post-1981 has had some success in reversing the atrophy of the board as an institution. Should our assumption be wrong, i.e. company boards are today still the mere shadows they often were pre-1981, then the Osaka High Court’s decision would do little to worsen matters.

<sup>86</sup> *Quaere*: how receptive would the Japanese courts be to access by shareholders motivated by reasons that are not so uncontroversially public interest as a city government’s in the health and safety of residents? It is possible that the range of stakeholders that are permitted access would reflect the attitude of Japanese courts towards corporate social responsibility and stakeholder theory. Although further engagement with the theme of CSR/stakeholder theory is beyond the scope of this article, further scholarship would be welcome. We thank Tan Zhongxing for suggesting this angle.



shareholder meeting held on June 26, 2014, all proposals by Osaka (and the City of Kyoto) were voted down as the major shareholders such as financial institutions rallied around Kepco management.<sup>87</sup> While the Mayor's political career appears to have been prematurely terminated by his failure to obtain popular support for his controversial Osaka Metropolis plan in the referendum of May 17 this year,<sup>88</sup> the future of the City of Osaka's engagement with Kepco would probably turn on the attitude of his successor towards nuclear power. Nonetheless, that a local government body would turn to company law – and receive a High Court's blessing in doing so – on a controversial issue could be a milestone in Japan's changing attitudes towards shareholder activism. Hashimoto's (and Osaka's) success at both first instance and on appeal should be of some encouragement to shareholders seeking to engage companies and their management on a more active, informed basis. As Delaware's experience with stockholder's inspection rights suggests, the profile and incidence of corporate litigation can change quickly in response to judicial attitudes.<sup>89</sup> Whether and how corporate boards and the courts respond to the challenge of shareholder demands for access after the Kansai Electric saga will shape the role and importance of the regime, and possibly the face of Japanese corporate governance.

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<sup>87</sup> Asahi Shimbun, Kanden, Datsu-genpatsu uttaeru kabunushi tei'an hiketsu – Hashimoto Shichou wa Kei'eijin Hihan [Proposals by Kansai Electric Shareholders Seeking Abolishment of Nuclear Power Voted Down – Mayor Hashimoto Criticizes Management], Jun. 26, 2014, Asahi Shimbun, <http://www.asahi.com/articles/ASG6R5S7NG6RPTIL01J.html> (accessed May 19, 2015).

<sup>88</sup> E. Johnston, Hashimoto announces exit from politics after Osaka rejects merger plan in referendum, May 17, 2015, The Japan Times, <http://www.japantimes.co.jp/news/2015/05/17/national/politics-diplomacy/osaka-referendum-rejects-merger-plan-possibly-ending-hashimotos-political-career/#.VVmLoPmqgko> (accessed May 18, 2015).

<sup>89</sup> Justice Holland (delivering the opinion of the Delaware Supreme Court) observed in a leading Supreme Court case on stockholder's inspection rights that inspection litigation has increased tremendously over the span of just over a decade. *Seinfeld v. Verizon Communications Inc.*, 909 A.2d 117, 120 (Del. 2006). For an extensively researched and comprehensive source detailing the evolution of section 220 (stockholder's right to inspect corporate books and records) litigation from the 1990s to the mid-2000s, see S. A. Radin, *The New Stage of Corporate Governance: Section 220 Demands – Reprise*, 28 *Cardozo L. Rev.* 1287 (2006).