Journal of International Relations and Foreign Policy
December 2018, Vol. 6, No. 2, pp. 1-21
ISSN: 2333-5866 (Print), 2333-5874 (Online)
Copyright © The Author(s). All Rights Reserved.
Published by American Research Institute for Policy Development
DOI: 10.15640/jirfp.v6n2a1
URL: https://doi.org/10.15640/jirfp.v6n2a1

A Comparative Analysis of Corporate Scandals under Japanese and American Corporate Law

Michael Anthony DeCesare[1]

Abstract

This paper focuses on corporate governance in both Japan and the United States and discusses ways in which their systems ought to converge. In particular, corporate scandals are examined in each nation with special attention being paid to the Olympus Scandal in Japan and the collapse of Bear Sterns in the United States. Discussing and analyzing these corporate scandals will reveal weaknesses in each of their systems and show how systematic failures caused these infamous scandals to fester and ultimately burst onto the global market. The importance of the study is highlighted is to show that neither the United States nor Japan have a system of corporate governance that is ideal nor there are noticeable flaws and shortcomings within each country. As globalization marches forward, it becomes more necessary to examine other countries' systems of corporate governance and in this way move towards a "convergence" of corporate governance. This paper finds that the Japanese system of corporate governance is moving in a way that seems to be more like that found in the United States. The inverse of this is true as the United States is also changing in a way towards the system found in Japan. The paper finds that while corporate governance is changing in both of these countries, they are not moving to mimic or imitate other systems of corporate governance. Indeed, close study of corporate governance within these two countries would indicate that they seem to be heading towards a convergence, a "hybrid model", ideally taking the most successful parts of each system. To put this all into perspective, it is first necessary to acquire a rudimentary knowledge of the basic tenants of corporate governance in both Japan and the United States. Practically, these findings will show that the current status quo of corporate governance is not ideal. Particular attention is paid to Olympus and Bear Sterns. Each of these scandals rocked the entire business world of their respective countries. Analyzing what went wrong and implementing policies to prevent or mitigate scandals like this from occurring again is necessary to understand. Theoretically, having many different systems of corporate governance is not ideal in an increasingly globalized world. This paper shows how convergence has been occurring and what should be done to further prod this process along.

Keywords: Convergence, corporate governance, Olympus, Bear Sterns, Japan

Chapter One

Introduction

1.1 Introduction

The definition of "Corporate Governance" and the ideas and laws that govern it depend entirely upon where one is located. The laws in norms you would find in a boardroom in Abu Dhabi would differ from those in New York City[2]. As the world becomes more globalized and international business becomes more of a commonplace, companies have had to adapt their practices and laws have had to change. However, there is no "international corporate governance" that all other laws can adapt to. Instead, there is a *convergence* towards others and in the process every country seems to be trending towards a specific place[3].

---

[1] Assistant Professor, Department of International Studies, Meiji Gakuin University, Japan, E-mail: decesare@ed.meijigakuin.ac.jp
[2]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988
[3]Van den Berghe, *Corporate Governance in a Globalising World: Convergence or Divergence?* (Springer 2002)

Two of the largest economies in the world – Japan and the United States have seen changes within their corporate governance in recent years. Major catalysts for these movements in these respective countries have been massive corporate scandals that have revealed the current system of corporate governance in these countries to be sorely lacking. These include the collapse of Bear Sterns in the United States and Olympus within Japan[4].The root and causes that led to these scandals differ within each country and both of these countries had very different forms of corporate governance. Moreover, the response to these underlying problems has differed. Yet the similarity lies in the fact that both of these systems failing have led the American system of corporate governance to be more Japanese and the Japanese system of Corporate Governance to be more American.[5]

The convergence between these two systems, insider and outsider, exemplified by Japan and the United States, respectively, can be observed "*de jure*" or "in form" or "*de facto*" which is "in function". *De jure* convergence refers to convergence on the international level.[6] Basically, there would be a growing wish of both investors as well as issuers to operate on the international level. Businesses tend to prefer companies that can effortlessly operate on the global stage with more international inclinations as opposed to any restrictions that may be placed from a system that is more nationalistic in its practice.[7]

Chapter Two

Corporate Governance in Japan

3.1Introduction

Corporate governance within Japan has long fascinated the corporate world and the academic world alike. The main features of Japanese corporate governance are the main bank system, long-term employment and cross-shareholding.[8] One of the distinguishing features of Japanese corporate governance is the effect of non-legal norms on Japanese corporate governance.[9] Of course, this is a two-sided sword as some Japanese norms certainly contributed to some of these scandals that occurred in recent history. One must look to Japanese culture to better understand "the way Japan has integrated foreign legal concepts, including those related to corporate governance, such as a separation between ownership and management, the organization of the firm and the way which management functions.[10]

3.2 Corporate Governance in Japan

One of the most notable aspects to corporate governance in Japan is that the shareholders do not have unbridled influence. Many other countries have systems of corporate governance that give the green light to corporations to focus on maximizing profits and ensuring that the shareholders accrue the highest amount of wealth. Japan, on the other hand, has a system that is concerned with stakeholders. This isn't to say that shareholders are ignored; it just means stakeholders have more power than they would in other systems of corporate governance.[11] One prime example of the stakeholder having more relative power is from Toyota Motor Corporation. The chairman of Toyota Hiroshi Okuda made it quite clear that despite being aware that the shareholders were the "owner" of the corporation, it would be irresponsible to run corporations solely for their interest.[12] He stressed it was imperative to forge good relations with the community which includes employees. This isn't unique to Toyota – it is a philosophy widespread among the Japanese corporate world. Yoshimori asked managers and executives from a number of countries about who the company belongs to.

---

[4] Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

[5]Dan Puchniak, 'The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law' [2007] 9(1) Asian-Pacific Law & Policy Journal 8-44

[6] Abdul Rasheed & Toru Yoshikawa, 'Convergence of Corporate governance: Critical review and future directions' [2009] 17(3) Research Collection Lee Kong Chian School of Business 388-404

[7] C.A. Mallin, *Corporate Governance* (4th edn., Oxford University Press, 2013)

[8] Caslav Pejovic, 'Japanese Corporate Governance: Behind Legal Norms' [2011] 29(3) Penn State International Law Review 484-486

[9]Luke Nottage and others, *Corporate Governance in the 21st Century Japan's Gradual Transformation* (Edward Elgar Publishing 2008) 20-41

[10]Caslav Pejovic, 'Japanese Corporate Governance: Behind Legal Norms' [2011] 29(3) Penn State International Law Review 484-486

[11]Franlin Allen, 'The Corporate Governance Model of Japan: Shareholders are not Rulers [2007]

[12]Toyota, 'Visions Define Toyota's Path' (*Toyota Traditions*, February 2009) <http://www.toyota-global.com/company/toyota_traditions/company/nov2008_feb2009_2.html>accessed 16 October 2017

Between two choices, they were asked if "executives should maintain dividend payments, even if they must lay off a number of employees" or if "executives should maintain stable employment, even if they must reduce dividends." Obviously a reduction in dividends would mean a loss of profit for the shareholders yet Yoshimori's survey indicated that a staggering 97% of Japanese management considered the company to belong to the stakeholders as opposed to the shareholders.[13]

3.3 Japanese Board System

Understanding how the Japanese board system is comprised is vital to understanding how corporate scandals came about. Boards in Japan tend to be larger than those in other countries.[14] This means that the CEO of a company actually gets more power because the rest of the influence of the board gets diluted. For example, the CEO would have disproportionate power in who to nominate for various positions within the country. For a long time, it was normal practice for boards to be made up of all insiders and indeed, a board having an outside director was a rare occurrence. Moreover, until recently there was some reluctance to fully open up to foreign markets and outside directors.[15] Pressure from variety of angles including stakeholders, shareholders, newly enacted laws and general politics pushed the traditional model towards something more global and like something seen more in the west.[16] Some of the changes were only superficial though, as in the case of Olympus.[17] Placing a foreign citizen, in this case a British citizen, as CEO didn't do anything to hide the accounting fraud occurring in Olympus. However, it did lead to changes within all of Japan – just not in the way one may have expected it would.[18]

3.3.1 Tobashi

The word *tobashi* roughly translates to "fly away" and Olympus was certainly not the first company to engage in this practice.[19] Under the *tobashi* scheme, investment firms outside the company will illegally and surreptitiously take investments off of the books to hide losses from their client's financial statements regarding the financial health of the company. This type of practice is what causes these losses to "fly away", or disappear.This is usually done by shifting them between other portfolios, many of them "belonging to" fake clients. Around the beginning of the 1990s is when this term first became known and the practice revealed.[20] According to the Wall Street Journal, four major firms got exposed for engaging in this *tobashi* scheme one of them being Yamaichi Securities. In 1992, Yaimachi executives set up a *tobashi* scheme and this fraud would end up unsustainable and was discovered in 1997 with the company going under all together in 1999.[21]*Tobashi* is the product of very serious problems with disclosure in Japanese corporations. Sakai points out how lack transparency is a very serious issue within coporate governance in Japan, particularly around the time that the Olympus Scandal came to light.[22]

3.3.2 Olympus

---

[13] Masaru Yoshimori, "Whose Company Is It? The Concept of the Corporation in Japan and the West." Long Range Planning, Vol. 28, No. 4, pp. 33-44, 1995

[14] Toshihiko Hiura, 'Corporate Governance in Japan: Board Membership and Beyond' (Bain & Company, 24 February 2016)<http://www.bain.com/publications/articles/corporate-governance-in-japan-board-membership-and-beyond.aspx> accessed 24 August 2017

[15]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

[16] Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal

[17] Francine Mckenna, 'The Olympus Fraud Dissected' (Forbes, 2 01 2012) <https://www.forbes.com/sites/francinemckenna/2012/01/02/the-olympus-fraud-dissected/>accessed 3 August 2017

[18] Nikkei, 'Japan's corporate governance gets some long-overdue scrutiny' (*Nikkei Asian Review*, 6 July 2017) <https://asia.nikkei.com/magazine/20170706/On-the-Cover/Japan-s-corporate-governance-gets-some-long-overdue-scrutiny> accessed 3 September 2017

[19]Yoree Koh, 'At Olympus, High Times, Dark Shadow' (*Wall Street Journal*, 8 November 2011) <http://wsj.com/japanrealtime/2011/11/08/at-olympus-high-times-dark-shadow/> accessed 10 May 2017

[20]Dennis Elam, 'Olympus Imaging Fraud Scandal: A Case Study' [2014] 7(4) American Journal Of Business Education 325-332

[21]Yoree Koh, 'At Olympus, High Times, Dark Shadow' (*Wall Street Journal*, 8 November 2011) <http://wsj.com/japanrealtime/2011/11/08/at-olympus-high-times-dark-shadow/> accessed 10 May 2017

[22]Hirotsugu Sakai, 'The Japanese Corporate Governance System and Firm Performance: toward sustainable growth' [2003] 1(1) Research Center for Policy and Economy Mitsubishi Research Institute, Inc 3-20

One of the great corporate scandals in Japanese history was the relatively recent Olympus Scandal. It should be noted that prior to the scandal, Olympus was most certainly not in trouble, or at least showing any outward or blatant signs of trouble.

It was a company known and respected by much of the populace and also in the international realm. In fact, Olympus was known as a "success story".[23] Before, it had been a company that simply sold cameras and was seeing a decline in market share every year. However, it was able to stage a comeback and it rebounded and even was able to branch out into other industries, including the medical industry. In fact, Olympus had at one time 70% of the endoscope market on the global stage. In the end, the Olympus Scandal was a terrible failing of corporate governance a total of $1.5 billion losses was concealed over the course of 20 years and through three different company presidents.[24] Aronson writes about five different problems of corporate governance that afflicted Olympus.[25] The first problem he mentions is probably the most tangibly obvious. Shareholder losses to the tune of 1.5 billion and the loss of confidence in the public security markets (50% of stock market value) is obviously a huge problem from a corporate governance perspective. Another problem is that this scandal lasted 20 years and was hidden through three different company presidents. This meant that the CEO could essentially "choose" his successor as well as company directors which meant that the scandal could stay hidden in the dark and remain a deep secret for decades.

The third problem Aronson points out is the creating and implementing of complex schemes which made it possible to be undetectable to new accounting standards. The problem here is the financial advisors and their regulation. The fact that they were either complicit, or easily deceived is clear proof that their supposed role failed in spectacular fashion. Olympus also engaged in the filing of false securities reports. Moreover, if any questionable transactions were questioned, the accountants were swiftly changed. The corporate governance failing here involves the role of supposedly outside and independent audit firms and also the clear illicit behavior the internal company auditors engaged in. The last corporate governance problem was role of the board and independent directors. In ended up the case that information was not shared to the board of directors and there was also no oversight by the board.

In order to better understand how the Japanese corporate governance system failed so tremendously here and to better understand what policy prescriptions should be undertaken, it is important to go back to the beginning and briefly try to get an idea of what transpired. The mid 1980s were a good time for Japan economically and in particular the yen was quite strong. However, a strong yen was not necessarily the best for Olympus and so they tried *zaitech*, which is a type of financial engineering used to maintain their losses in the face of a strong dollar.[26] Unfortunately, Japan had a major economic crisis by the time the early 1990s rolled around and very few companies were left unscathed. Olympus, of course, suffered as well. This is at the time that the illegal practice of *tobashi* really came into use. The use of *tobashi* meant that companies could avoid disclosing losses. One of the most heinous offenders of this practice was Olympus.[27] They created new subsidiaries that were effectively under its control and sold bad assets which were causing losses for investors at prices that were artificially inflated. Olympus itself distributed the funds which allowed these subsidiaries to purchase these bad assets. This meant that Olympus did not have any bad assets are their financial statements sand thus investors were not spooked. This practice continued for a while until 2007 when new rules and regulations made it so Olympus would have to consolidate its financial statements with its subsidiaries.[28] Olympus remained unfazed and implemented the next part of its scheme. Olympus paid quite a bit of money in fees for M&A transactions. The excess money given this way was redirected back to Olympus to cover for accumulated losses.

Some accountants from the outside did object but were promptly replaced by a new accounting firm. The tragedy of all of this is that Olympus was actually doing fairly well at the end and the main business of Olympus was very profitable in thanks to entering the medical arena.

---

[23] Nathan Layne, 'Special Report: The masterminds of the Olympus coverup' (Reuters, 16 December 2011) <http://www.reuters.com/article/us-olympus-masterminds-idUSTRE7BF0FB20111216> accessed 20 May 2017

[24]Dennis Elam, 'Olympus Imaging Fraud Scandal: A Case Study' [2014] 7(4) American Journal Of Business Education 325-332

[25]Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal

[26]Francine Mckenna, 'The Olympus Fraud Dissected' (Forbes, 2 01 2012) <https://www.forbes.com/sites/francinemckenna/2012/01/02/the-olympus-fraud-dissected/>accessed 3 August 2017

[27]Dennis Elam, 'Olympus Imaging Fraud Scandal: A Case Study' [2014] 7(4) American Journal Of Business Education 325-332

[28]Francine Mckenna, 'The Olympus Fraud Dissected' (Forbes, 2 01 2012) <https://www.forbes.com/sites/francinemckenna/2012/01/02/the-olympus-fraud-dissected/>accessed 3 August 2017

The scandal was from a small office in the accounting department that handled investments. Nevertheless, investments are a big part of a company's finances. It is also important to note that the three presidents who oversaw Olympus during the time the *tobashi* scheme was going on all came from this accounting department and not the main business branch of Olympus.

This meant that the board of directors was effectively left in the dark as to the reality of the situation behind Olympus and its finances.[29] No information was ever disclosed to the Board of Directors and they remained under the impression business was booming and the company was running rather smoothly. Olympus continued to run smoothly and it was seemingly free of its long-concealed losses. This is when, in an effort, to globalize, they tapped a British man by the name of Michael Woodford. Eventually, Woodford would become a whistle-blower and the rest was history. In an ironic twist of fate, Olympus' move to become more globalized effectively undid all of its work it had accomplished engaging in *tobashi* schemes. Failures of corporate governance in Japan are also abundant in the "punishment" levied against the company. For example, once the story broke, Olympus lost 80% of its stock value. This should have been enough to get delisted on the Tokyo Stock Exchange (TSE) but they were effectively given a grace period to let them submit financial statements to keep them on. More absurd is that the TSE gave what is essentially s slap on the wrist with their fine of 100,000 dollars. It seems small but it turns out that this minuscule fine for major companies is actually the maximum fine that can be implemented.[30]

3.4 Aftermath of Olympus

Traditionally, the Japanese corporate governance model was very much dominated by "insiders".[31] For example, the Board of Directors was appointed by the shareholders as were the auditors. When the Commercial Code was revised in 2001, it required half of the auditory board to be comprised of outsiders.[32] This led to the precursor of the dual monitoring model. Here, the auditor also has consulting functions which would mean that they really don't challenge the decisions of the board. 2002, as mentioned previously, was the year a big revision came into the code.[33] This is where it was strongly recommend that larger companies bring foreigners into the fold by allowing foreigners to gain some control of the board of directors. This was the global trend and it was good to allow foreign companies easier access to Japanese companies which were traditionally more walled off. Nevertheless, this was a necessary step considering the foreign stockholding in Japan was increasing somewhat dramatically.[34]

The aftermath of the Olympus Scandal and other scandals along the same vein has forced some much-needed reforms.[35] Shinzo Abe, the prime minister of Japan, has pushed and implemented some reforms that encourage monitor firms to speak up when needed. One famous proverb in Japan is that the "nail that stands up gets hammered down".[36] There is an inclination within Japanese culture and subsequently Japanese business practices to not cause a scene. Therefore, any trend towards a system where monitor firms are encouraged to speak out is obviously contrary towards the traditional Japanese system and more in line with the more western system. Many asset managers are also in the process of signing up for new stewardship codes that help do just that. Governmental reform by pushing firms to have independent directors will reduce the tendency to have a board of directors that simply say "yes".[37]

The issue is that these new rules aren't exactly mandatory. They are technically optional but if they choose not to adhere to them, the firms must explain in great detail why. This is an area where the "push" needs to be more forceful, by making it mandatory or at least imposing strict penalties if not put in place. Outside directors are an area of global corporate governance that Japan has been reluctant to engage in. The fact of the matter is that Japan has

[29]Dennis Elam, 'Olympus Imaging Fraud Scandal: A Case Study' [2014] 7(4) American Journal Of Business Education 325-332
[30] Gregory Elders, 'Japan's corporate governance overhaul' (Bloomberg, 6 January 2017) <https://www.bloomberg.com/professional/blog/japans-corporate-governance-overhaul-2/> accessed 10 June 2017
[31] Caslav Pejovic, 'Japanese Corporate Governance: Behind Legal Norms' [2011] 29(3) Penn State International Law Review 484-486
[32] Commercial Code 2001
[33] Commercial Code 2002
[34] Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal
[35]Hirotsugu Sakai, 'The Japanese Corporate Governance System and Firm Performance: toward sustainable growth' [2003] 1(1) Research Center for Policy and Economy Mitsubishi Research Institute, Inc 3-20
[36] Caslav Pejovic, 'Japanese Corporate Governance: Behind Legal Norms' [2011] 29(3) Penn State International Law Review 484-486
[37] Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal

been hesitant to open its doors to foreigners since its creation as a nation-state. As a result, having an outside director is an area where Japan lags behind even some economies that are emerging and in their infantile stages. Nearly 40% of the largest Japanese firms lack an outside director.[38] The Olympus Scandal in a sense is a double-edged sword.

One could easily argue that it clearly expressed the need for having outside directors considering the widespread corruption and scandal that had occurred in the absence of one. On the other hand, the fact that this foreign director blew the whistle could spook other companies thinking that a foreign director would shake things up and not understand the Japanese corporate mentality. One of the cornerstones of "Abenomics" which is Shino Abe's economic policies is this push towards external directors.[39] Tokyo is competing with other cities such as Hong Kong, Seoul and Singapore for dominance in Asia as the "financial center".[40] Scandals such as the Olympus Scandal damage this goal as does the Japanese tendency to not put outside directors in.

One of the interesting changes to the system of shareholding is that foreign banks now control over 30% of the shares in Japan Inc which is quite different from in the past where these shares would be held by friendly local banks.[41] The ramifications of this are obvious – the more control foreign investors have within Japan to assert their demands on how the company in run and how the makeup of directors is implemented. One major company, Fujifilm, was forced to surrender in its opposition to bring outsiders into the board and recently appointed two external directors.[42] He was forced to do this despite stronglyresisting due to fierce opposition from shareholders. The trend also spread to Toyota and Nippon Steel who brought in outside directors in the past couple years.[43]

3.5 Conclusion

The fact that the practice of *tobashi* was able to occur for so long at Olympus and other companies revealed massive shortcomings in corporate governance in Japan. Recent reforms such as the Japanese Corporate Governance Code set guidelines for whistle blowing as well as proper disclosure and the rights of stakeholders, all of which the Olympus scandal was clearly quite involved in violating.[44] The Code demanded that the board be well-balanced and should be diverse and experienced. This means opening itself up to outside-directors, foreigners and hiring from outside the company. Companies are pushed to hire at least two independent directors who have their focus on creating growth for the company that is sustainable. The rate at which Japanese boards are adding outside directors is indeed increasing. From what started as a relatively small number, in the post-Olympus world this has grown dramatically. By mid-2014, approximately 65% of companies listed on the Tokyo Stock Exchange had outside directors and by 2015 this had ballooned to about 90%.[45] There has also been a change to incumbency – instead of boards being all promotions from within, there is now a blend. In essence, "the balancing act between governance and operating execution may prove challenging for many Japanese corporations. But they require balance: between governance and execution, between the advice of inside and outside experts and between those with deep industry experience and those with knowledge in other areas."[46]

The open type corporate system of corporate governance is something that is more commonly seen in the United States or United Kingdom and is the direction Japan has been trending in.[47]Despite all of this and the slow but overall seeming progress being made on this issue, having outside directors is not a guaranteed remedy.

---

[38] Caslav Pejovic, 'Japanese Corporate Governance: Behind Legal Norms' [2011] 29(3) Penn State International Law Review 484-486
[39]Sophie Watson, *The Blackwell City Reader* (2nd edn, Wiley-Blackwell 2002) 428-431
[40]Masahiro Kawai, *Competition Among Financial Centers in Asia-Pacific* (ISEAS Publishing 2009) 179-181
[41] Hirotsugu Sakai, 'The Japanese Corporate Governance System and Firm Performance: toward sustainable growth' [2003] 1(1) Research Center for Policy and Economy Mitsubishi Research Institute, Inc 3-20
[42]Takahisa Toda, 'Big Japanese companies grapple with outside directors' (*Nikkei Asian Review*, 27 July 2015) <https://asia.nikkei.com/Business/Trends/Big-Japanese-companies-grapple-with-outside-directors> accessed 12 July 2017
[43] Gregory Elders, 'Japan's corporate governance overhaul' (Bloomberg, 6 January 2017) <https://www.bloomberg.com/professional/blog/japans-corporate-governance-overhaul-2/> accessed 10 June 2017
[44] Japan's Corporate Governance Code
[45]Kazuaki Nagata, 'New rules are pushing Japanese corporations to tap more outside directors' (*Japan Times*, 2015)<https://www.japantimes.co.jp/news/2015/04/27/reference/new-rules-pushing-japanese-corporations-tap-outside-directors/> accessed 16 August 2017
[46] Toshihiko Hiura, 'Corporate Governance in Japan: Board Membership and Beyond' (Bain & Company, 24 February 2016)<http://www.bain.com/publications/articles/corporate-governance-in-japan-board-membership-and-beyond.aspx> accessed 24 August 2017
[47]Hirotsugu Sakai, 'The Japanese Corporate Governance System and Firm Performance: toward sustainable growth' [2003] 1(1) Research Center for Policy and Economy Mitsubishi Research Institute, Inc 3-20

One disheartening example of this is the recent succession plan for the chairman, Atsutoshi Nishida. Toshiba had four outside directors which should make it a shining example for good corporate governance within Japan. However, the managers bypassed the board and went ahead with their succession plan despite opposition from the board and more specifically the outside directors.[48] The truth is with Japan, progress will be frustrating slow and easy to write off. But a look at the business practices of some of the largest global companies indicates that whether voluntarily or through pressure from shareholders, companies are moving towards the more Western system of having outside directors. Good corporate governance requires accountability and it is easier to have accountability when you have members and directors that come from the outside. Olympus was a great example of what happens when there is no accountability and opening up Japanese companies should prove to be beneficial for all parties – the board, the shareholders and the customers themselves.[49]

Olympus was not the first nor will it be the last corporate scandal involving security markets. Jeffrey Char goes into detail on how Japan's securities markets can be reformed.[50] Olympus is certainly the most famous scandal in recent history but prior to this there was a major scandal in 1991. Here, a large swath of Japan's securities companies secretly and illegally compensated some of their clients for losses incurred during trading.[51] This was at a time when the Japanese economy was on the ropes so there was a lot of anxiety and uncertainty in the market. Payments tended to be made indirectly, through backdoor channels and funneled through a series of different mediums including, at times, direct payment by cash. The effect of this practice should be obvious as Char notes, "promising to compensate trading losses and guaranteeing a target return reallocates risk from the investor to the securities company."[52] If one knows a venture is risky and that same person also knows that they will be compensated in the event the risk does not pan out, obviously they would be far more inclined to invest.

The Toshiba scandal in 2015 did come at a time when corporate governance in Japan was still reeling from the Olympus scandal. And, sure enough, it came at a time when the Tokyo Stock Exchange adopted a new code to westernize by allowing more independent directors, women and more streamlined training for board members. One of the aspects to this Company Act was that it gave more "rights" to the shareholders at the alleged expense of the stakeholders.[53] Japan is an interesting company in that it has long towed the line between the interests of the different stakeholders. In a system that was geared more towards shareholders, these shareholders could fire management if they were performing poorly and in addition to this they could "sell the firm in the market for corporate control created by public share ownership."[54] Now, Japanese culture and the stakeholder system would not like this type of uncertainty. This is why the system in Japan has been one that crosses shareholders with stakeholders which serve to keep the status quo for as long as possible. This also helps to explain why change in the system of corporate governance within Japan moves at a pace about as fast as molasses.[55]

Chapter Three

Corporate Governance in the United States

4.1 Introduction

American corporate governance is well-known throughout the world simply because of how internationally-reaching American businesses and corporations can be.[56] Built on law, contracts and self-responsibility, corporate

---

[48]Afp, 'Toshiba crisis shines light on Japan corporate culture' (NST Online, 14 March 2017) <https://www.nst.com.my/news/2017/03/220624/toshiba-crisis-shines-light-japan-corporate-culture> accessed 3 August 2017

[49]Gregory Elders, 'Japan's corporate governance overhaul' (Bloomberg, 6 January 2017) <https://www.bloomberg.com/professional/blog/japans-corporate-governance-overhaul-2/> accessed 10 June 2017

[50]Jeffrey Char, 'Reforming Japan's Securities Markets: The Loss Compensation Scandal' [2003] 10(3) Berkeley Journal of International Law 173-215

[51]Khondaker Rahman, 'Accounting Irregularities at Toshiba: An Inquiry into the Nature and Causes of the Problem and Its Impact on Corporate Governance in Japan'[2016] 5(4) Global Advanced Research Journal of Management and Business Studies 88-101

[52]Jeffrey Char, 'Reforming Japan's Securities Markets: The Loss Compensation Scandal' [2003] 10(3) Berkeley Journal of International Law 173-215

[53] Motomi Hashimoto, 'Commercial Code Revisions: Promoting the Evolution of Japanese Companies ' [2002] 1(48) NRI Papers

[54] Jeffrey Char, 'Reforming Japan's Securities Markets: The Loss Compensation Scandal' [2003] 10(3) Berkeley Journal of International Law 173-215

[55]Van den Berghe, *Corporate Governance in a Globalising World: Convergence or Divergence?* (Springer 2002)

[56]Jonathan Macey, *Corporate Governance: Promises Kept, Promises Broken* (Princeton University Press 2010) 82-94

governance in the United States differs in many respects from that found in Japan.[57] One of the more notable aspects to corporate governance in the United States is its ability to change and adapt at a relatively quick pace. Holmstrom and Kaplan point out that corporate governance in the United States has changed quite a bit in the past twenty years.[58] This flexibility has allowed American companies to thrive in the global market yet the American system of government is not without its flaws as it has been rocked by massive scandals in the last two decades including the collapse of Bear Sterns in 2008.[59]

4.2 Corporate Governance in the United States

American corporate governance does differ from that of Japan. The New York Stock Exchange has guidelines that must be adhered to and first and foremost, independent directors are stressed.[60] Not only should boards have independent directors but they must constitute a majority of the board. The rationale for this is that is decreases the chance that there would be a conflict of interest.[61]Shareholder interests are placed in high regard and consequently the desire the maximize profit is the most important goal for a large swath of American companies. Referring back to the study by Yoshimori, only 24% of American firms believe that the stakeholders are more important than the shareholders with 76% believing that the shareholders should get priority and attention.[62] Juxtapose with Japan with near unanimous favoring of the stakeholder and you see quite a difference in attitudes in regards to stakeholders and shareholders.

The effects of having independent wield influence on corporate governance can be seen in one way through how the gatekeepers are monitored. One example of a "gatekeeper" is the audit firm and this "certifies the flow of information from managers to capital markets". The governance structure also means that firms that perform poorly have a higher chance of getting "taken over".[63] While hostile takeovers are practically unheard of in Japan, this is not the case in the United States.[64] The independence that is characteristic of corporate governance in the United States is thought to synergize well with other institutions which creates a system that is mutually beneficial. A system which is mutually beneficial will run smoothly and it is why many countries have looked to the United States as a standard in corporate governance especially with regards to the role of independent directors.[65]

4.3 American Board System

Jackson refers to the United States as being a "paradigmatic case of shareholder-oriented or market-based approach to corporate governance."[66] Ownership of such corporations is mess centralized and unlike in Japan, boards tend to be fairly small. The corporate boards are generally a blend of members that are insiders as well as outsiders or independent. The American board system is corporate governance is often referred to as the Anglo-American system of governance. Some notable features of this model include the single tier system of governance. Here, there is a single board and his board is a mix of both "insiders" and "outsiders".[67] Insiders are defined as directors or other high-ranking people in management who have extensive ties to corporate management. Outsiders are defined as people who have no direct relationship with the company or management.

---

[57]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

[58] Bengt Holmstrom & Steven Kaplan, 'Corporate Governance and Merger Activity in the US; Making Sense of the 1980s and 1990s' [2001] 15(2) Journal of Economic Perspectives 121-144

[59] William Ryback, 'Case Study on Bear Sterns ' (Toronto Centre, 2010) <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/02BearStearnsCaseStudy.pdf>accessed 1 April 2017

[60] NYSE Regulation

[61]David Block, 'One-Tier vs Two-Tier Board Structure: A Comparison Between the United States and Germany' [2016] 1(1) Penn Law: Legal Scholarship Repository 3-20

[62] Masaru Yoshimori, "Whose Company Is It? The Concept of the Corporation in Japan and the West." Long Range Planning, Vol. 28, No. 4, pp. 33-44, 1995

[63] Douglas Adams, 'An Unfortunate "Tail": Reconsidering Risk Management Incentives After The Financial Crisis Of 2007–2009 ' [2010] 81(1) University of Colorado Review 248-306

[64]David Block, 'One-Tier vs Two-Tier Board Structure: A Comparison Between the United States and Germany' [2016] 1(1) Penn Law: Legal Scholarship Repository 3-20

[65]Jonathan Macey, *Corporate Governance: Promises Kept, Promises Broken* (Princeton University Press 2010) 82-94

[66] Gregory Jackson 'Understanding Corporate Governance in the United States'

[67]David Block, 'One-Tier vs Two-Tier Board Structure: A Comparison Between the United States and Germany' [2016] 1(1) Penn Law: Legal Scholarship Repository 3-20

One key difference between two-tier systems of governance and the single model is that the CEO of a company also serves as Chair of the corporate Board. There is also power allocated to minority shareholders and they have clear rights in the American model. While management can certainly structure the strategy and debate of a policy that they want undertaken, ultimately it is the Board that needs to approve it. This type of system is also able to more quickly and efficiently respond to any conditions that may change in the market.[68]

The Board of Directors is elected directly by the shareholders. This gives a lot of power to the shareholders as they can dictate who gets on or off the Board. Boards typically have two kinds of representatives. First, there is the inside directors. These obviously are chosen within the company. The second type would be the outside director. These need to be independent from the company. It should be noted that the board I not the management team. The board acts as a *monitor*, ensuring that the interests of the shareholders, first and foremost, are prioritized.[69]

4.4 Bear Sterns

One of the biggest failures of corporate governance in a "western" system was the collapse of Bear Sterns and subsequent financial crisis.[70] The failure of this firm showed that there were numerous problems with the western model in corporate governance. In contrast to Olympus and many Japanese firms, Bear Sterns had a reputation for being aggressive when it came to taking risks. Bear Sterns had sponsored two differed hedge funds through its subsidiary. While this system was profitable at first, the housing market began to show signs of weakening around 2006. This caused the returns to suffer and the fund was leveraged at 35 times its initial investment. As this occurred, investors were obviously rather spooked and Bear Sterns would go on to deliberately mislead investors so they wouldn't flee in droves.[71]

The success of corporate governance within the United States was very much dependent on the supervision by the Securities and Exchange Commission or SEC.[72] The fact that alarm bells were not sounded at any time before the collapse is one of the most blatant failures of corporate governance in modern history. First and foremost, the SEC was keenly aware that Bear Sterns had a high number of mortgage-backed securities that continued to increase and in addition to this the SEC knew that these mortgages from Bear Sterns were risky. From a management point of view, Bear Sterns had been documented to be sorely lacking in several areas. For example, there was a shortage of expertise by risk managers and the SEC also failed to acknowledge the senior management's fumbling of the collapse of two hedge funds in the summer of 2007. The SEC also did not conduct a review for the most recent 10-K filings. This deprived investors of valuable information. When it came to the role of external auditors, the SEC allowed the firm to allow employees to engage in certain defined audit work. One may be inclined to question if the screw-ups at the SEC caused the collapse of Bear Sterns. The report notes that this was likely not the case but there were certainly steps that could and should have been taken to at the very least mitigate the damage to investors.[73] It should be noted, however, that the SEC lacks the authority to have force large investment banks, such as Bear Sterns, to "report their capital, maintain liquidity, or submit to leverage requirements." This is a problem right here – large investments banks shouldn't be given cover to hide various assets.[74] Lax supervision is a key problem with corporate governance in the United States.[75] Generally, there is supposed to be a consolidated supervisor due to the fact that Bear Sterns was a large investment bank with large operations in EC countries. However, this was absent in the United States due to the fact that the SEC lacked the teeth to enforce any tangible authority as a regulator of investment banks.

The failure of Bear Sterns highlights the failure of the external auditors. Having an external auditor is something very much part of the Western system of corporate governance. The fact that the SEC allowed Bear Sterns to do some of the auditor's supposed work is very much problematic. Weak supervision is something that needs to be addressed in corporate governance because it is abundantly clear that firms cannot supervise themselves in any

---

[68] C.A. Mallin, Corporate Governance (4th edn., Oxford University Press, 2013)
[69]Ruth Sullivan, 'Board make-up becomes a governance issue' (Financial Times, 4 March 2012) <https://www.ft.com/content/2ec7014e-631a-11e1-9245-00144feabdc0>accessed 13 June 2017
[70]William Ryback, 'Case Study on Bear Sterns ' (Toronto Centre, 2010) <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/02BearStearnsCaseStudy.pdf>accessed 1 April 2017
[71]Robert Pozen, Too Big to Save? How to Fix the US Financial System (John Wiley and Sons 2009) 134-136
[72]Jill Fisch 'The Overstated Promise of Corporate Governance' (2010). Faculty Scholarship. 1045. University of Penn Law Review
[73] William Ryback, 'Case Study on Bear Sterns ' (Toronto Centre, 2010) <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/02BearStearnsCaseStudy.pdf>accessed 1 April 2017
[74] Robert Pozen, Too Big to Save? How to Fix the US Financial System (John Wiley and Sons 2009) 134-136
[75]Jonathan Macey, *Corporate Governance: Promises Kept, Promises Broken* (Princeton University Press 2010) 82-94

capacity. If there is weak supervision, as is the case here, a bank can take needless or overly ambitious risks and in doing so will fail to maintain sufficient capital against the "constellation of risks it faces." Investment banks prior to the financial crisis would attempt to make it look like they were being supervised by "submitting" to a program called the Consolidated Supervised Entities (CSE) program. This program was not mandatory and supervision was not aggressive. Fortunately, the CSE program was killed after the financial crisis but there still remain risks of similar toothless programs cropping up again.[76]

4.5 Aftermath of Bear Sterns

Fisch discusses how corporate governance is not working in the United States because there has been a severe erosion of confidence when it comes to how decisions are made and overseen within US corporations.[77] The collapse of Bear Sterns is the main example. Fisch details how corporate governance at Bear Sterns was something akin to what you might find in the world of *The Great Gatsby*. The Board of Directors would only meet about once every two months and this left the oversight mostly to Bear's executive committee which of course was comprised of all insiders.[78] Moreover, several members of the audit committee served on other audit committees of other companies which is clearly a conflict of interest. The crux of the argument in Macey's *Promises Kept* is that corporate governance has been comprised by the interference of regulatory interventions.[79]The rationale behind this claim is that the mechanisms that are most effective are limited while those that are not so effective are encouraged. Macey also makes a good point by saying that relying too much on the board of directors is a mistake.

Corporate boards are not some incorruptible entity because they are "still subject to capture as a result of management ties, cognitive biases, and social norms that undermine directors' ability to exercise independent judgment. Directors are, for example, bound by norms of collegiality that make it difficult to question management". This is true and another failure is in the accounting industry. We saw this in Japan but it is also prevalent in Western countries.[80] The Sarbanes-Oxley Act is an act that expanded requirements for public accounting firms among other things.[81]Alas, there was structural weakness in American corporate governance even with the Sarbanes-Oxley Act being passed a decade prior. Macey describes the SEC as anemic but Fischer points out that this may be overly kind.[82] Indeed, a glance at the facts laid out in the Bear Sterns case detailed above reveal shocking weakness to an embarrassing degree. While the failures of the SEC were well detailed with Bear Sterns, it is also important to bear in mind that this is not the SEC's first colossal misstep. The massive Ponzi scheme by Madoff was shocking in its own right but it was even more so because the SEC not only received legitimate allegations regarding the practices of the company that were improper and odious, but outright ignored that information. To be fair, and as Fischer touches upon, one should no attribute the recent financial crises completely to a failure in corporate governance. For example, there was a definitive weakness when it came to capital market discipline. The markets themselves were unable or unwilling to truly ascertain the riskiness of financial firms. Bear Stern's openly admitted to being a company that took risks. Despite this, it seems that a failure in corporate governance was certainly the driving force much as it was in Japan.

The case of Enron showed how accounting rules and regulations can be twisted and warped to muddy what they are doing and how risky the nature of their transactions actually are. One of the problems is how to value "toxic assets". This isn't a problem unique to the United StatesJapan struggled with them too which is why some corporations tried to conceal them.[83] Interestingly, Fisch points out that incentives to actually provide full and accurate disclosures is not good.[84] The fact of the matter is that they have limited accountability for any information they put out that is misrepresented.

---

[76] William Ryback, 'Case Study on Bear Sterns ' (Toronto Centre, 2010) <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/02BearStearnsCaseStudy.pdf>accessed 1 April 2017

[77] Jill Fisch 'The Overstated Promise of Corporate Governance' (2010). Faculty Scholarship. 1045. University of Penn Law Review

[78] William Ryback, 'Case Study on Bear Sterns ' (Toronto Centre, 2010) <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/02BearStearnsCaseStudy.pdf>accessed 1 April 2017

[79]Jonathan Macey, *Corporate Governance: Promises Kept, Promises Broken* (Princeton University Press 2010) 82-94

[80]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

[81] Sarbanes-Oxley Act 2005

[82]Jonathan Macey, *Corporate Governance: Promises Kept, Promises Broken* (Princeton University Press 2010) 82-94

[83]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

[84] Jill Fisch 'The Overstated Promise of Corporate Governance' (2010). Faculty Scholarship. 1045. University of Penn Law Review

The problem isn't that the Sarbanes-Oxley Act is worthless, it's that it is not strong enough. Under this act and the law in general, and corporations or corporate officials who put out disclosures that are incomplete and inaccurate face limited accountability. Additionally, they have top legal teams who are able to wiggle out of these problems by using some loopholes or omissions within the Act. Therefore, if losses would be significant under full and accurate disclosure, why not misrepresent yourself and take a small fine or a slap on the wrist? Studies have shown that the SEC has done very little in uncovering corporate fraud and this is why financial crises reach the breaking point that they do.[85] These crises don't and shouldn't come without warning and it is the SEC's job to nip problems in the bud before they reach the point that they do. One problem with the SEC is that it is bound to a messy political system.

The SEC is dependent on congress for funding which means navigating the political landscape. If corporations are stuffing congressmen's campaign coffers, they may be disinclined to adequately fund oversight intuitions such as the FEC. Independence for funding from congress would be a good solution here. *Promises Kept* offers a good backdrop of corporate governance within the United States and how it has failed recently. Auditors not only need to be truly independent, but they cannot have any conflict of interest.[86] One of the differences between Japan and the West is the role of outside directors. But if outside directors lack accountability and can be influenced, that is certainly problematic. Recent laws to address this issue cannot be riddled with loopholes and weakness. These corporations have top-notch lawyers that can easily maneuver through these holes.[87]

One thing is certain – the American system of corporate governance has changed and banks are no longer the main mechanism that monitors and replaces management. Professor Gilson says that there a number of banks which play absolutely no role in corporate governance.[88] A decline in shareholder primacy and hostile takeovers as well as are of course obvious features of the Japanese bank model system. Baird and Rasmussen note "uncanny" similarities between the man bank model of Japan and America in the current era.[89] First, when it comes to large loans, these are typically arranged by a major bank which holds the biggest portion of the loan in shares and also does the bulk of monitoring on the particular client company. The rationale is straightforward – the banks can purportedly keep a watchful eye on the company because the cash that goes in to the company is cycled through via the bank. The banks will have actual numerical data at their hands and can thus wield control and influence over the corporation. This is done in Japan as well although it should be noted that Japan has one main bank which does this but the fact that the United States has less and less banks that engage in this shows a trend towards the Japanese model. One of the more incorrect assumptions about the relationship between banks and the corporations that the banks lent loans to is that if the banks don't use the first opportunity to lay the hammer of bankruptcy down. Rather, the bank will try to exert its influence to try and help the company succeed as it would be mutually beneficial for all parties for the corporation to thrive. This inclination towards improving performance and climbing out of the hole is a feature of the Japanese system.

The American system is very similar here because of how the loan agreements tend to be structured. For example, there are clauses that allow the forcing of restructuring and possibly even replacing the CEO if the company is in trouble financially. Under the Japanese system it is commonplace for banks to appoint a "turnaround specialist" that would ideally try and help the company make changes to succeed. The consistent shareholder system. Japan has essentially little to no controlling shareholders and instead the vast majority of their shares are held by stable shareholders that are very much friendly towards management. From the 1980s through the 1990s these shareholders held just under 50% of the shares in the market. Comparing this to America in the 1980s and 1990s, it is a fact that "institutional investors increased their share of ownership of all American stocks to approximately 50%."[90] This also affected corporate control. Stable shareholders obviously would generally strongly support management and have a strong support for stability. Thus, hostile takeovers were basically unheard of in Japan.

---

[85] William Ryback, 'Case Study on Bear Sterns ' (Toronto Centre, 2010) <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/02BearStearnsCaseStudy.pdf>accessed 1 April 2017

[86]Jonathan Macey, *Corporate Governance: Promises Kept, Promises Broken* (Princeton University Press 2010) 82-94

[87]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

[88] Ronald Gilson, Choice as Regulatory Reform: The case of Japanese Corporate Governance" [2010]

[89]Douglas Baird & Robert Rasmussen, Private Debt and the Missing Lever of Corporate Governance' [2007] 6(19) Vanderbilt Law and Economics 3-32

[90] Jill Fisch 'The Overstated Promise of Corporate Governance' (2010). Faculty Scholarship. 1045. University of Penn Law Review

While they were more common in American corporate governance, the fact of the matter is that hostile takeovers have decreased in recent history and are becoming less and less of an event. Baird and Rasmussen put it succinctly when they said that members on a board in an American company seldom worry about the "distant threat of a hostile takeover, but pay attention when the business's banks come calling."[91]

4.6 Sarbanes-Oxley

One of the most critical pieces of legislation that pertains to corporate governance in America is the Sarbanes-Oxley Act.[92] This act was enacted in response to massive corporate scandals, such as Enron, among others.[93] Considered to be the most important security legislation since the Security and Exchange Commission, the Sarbanes-Oxley Act deals with many different aspects of Corporate Governance. One of them is oversight and transparency.[94] Auditors need to be independent and the oversight board that was created registered and oversaw these independent auditors. Defining what exactly an "independent" auditor was cleared up as well with severe restrictions on conflicts of interest. For example, the auditors could no longer give different services such as consulting to the clients they were in charge of auditing. Prior to this Act, high-ranking executives could avoid much of the responsibility for any inaccuracies and omissions from company financial reports. This changed with Sarbanes-Oxley as now executives were forced to take more responsibilities for this behavior. Enhanced Financial reports were also another key aspect of the Sarbanes-Oxley with internal mechanisms implemented to ensure timely reports that are accurate and sound. Coates describes the main goal of the Sarbanes-Oxley Act as fixing the auditing of U.S. public companies. Ideally, independent auditors were supposed to be one of the key features of American corporate governance. But recent scandals revealed this to be not the case. This was beneficial for shareholders as reliable information would ensure that the risk of losses from fraud, lies and theft would be diminished.[95]

Macey argues that this act does not have enough teeth in addressing the problem of firm capture and the absence of sufficient reputational constraints[96]. So, this means that a "cartelization of the industry prevents a market-based response" to quality auditing services. Inconsistencies and loopholes in the standards for reporting transactions that are off-balance, toxic or derivatives have suffered from a lack of transparency and the blame does seem to fall on the accounting industry. One such example of the weakness of Sarbanes-Oxley is the facts surrounding Huron Consulting.[97] In 2009, this company declared that it had problems regarding its own internal controls when it came to financial reporting. What ended up happening was that this company was forced to restate three years of financial statements and it had to announce its reported income was 50% less than what was initially reported. Blunders such as these show why the Sarbanes-Oxley Act may not be as strong as people seem to think it is.

4.7 Conclusion

While we've seen ample evidence of some sort of trend towards the Japanese model moving towards the more Western model of corporate governance, the inverse is also true as there is a convergence that also seems to be affecting American corporate governance and how it seems to be slowly trending towards a system that is more in line with the Japanese model. Dan Puchniak writes about how there seems to be a misconception that American corporate governance has reached its final form. Puchniak writes that while everyone is fretting and under the impression that the world is moving towards the American system, America is trending apart from it and ironically, "the current American system of corporate governance-with its ineffective hostile takeovers, increase in concentrated shareholdings, and bank monitoring, appears to have moved towards the Japanese main bank model."[98]

---

[91]Douglas Baird & Robert Rasmussen, Private Debt and the Missing Lever of Corporate Governance' [2007] 6(19) Vanderbilt Law and Economics 3-32

[92] Sarbanes-Oxley Act of 2002.

[93]John Coates, 'The Goals and Promise of the Sarbanes-Oxley Act' [2007] 21(1) Journal of Economic Perspectives 91-116

[94]Julia Hanna, 'The Costs And Benefits Of Sarbanes-Oxley' (*Forbes*, 10 March 2014) <https://www.forbes.com/sites/hbsworkingknowledge/2014/03/10/the-costs-and-benefits-of-sarbanes-oxley/> accessed 16 August 2017

[95]John Coates, 'The Goals and Promise of the Sarbanes-Oxley Act' [2007] 21(1) Journal of Economic Perspectives 91-116

[96]Jonathan Macey, *Corporate Governance: Promises Kept, Promises Broken* (Princeton University Press 2010) 82-94

[97] Reuters, 'In Huron scandal, shadows of Arthur Andersen' (Reuters, 4 August 2009) <http://online.wsj.com/ad/article/ironmountain/SB108733358162637847> accessed 17 October 2017

[98]Dan Puchniak, 'The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law' [2007] 9(1) Asian-Pacific Law & Policy Journal 8-44

When it comes to the bank model in corporate governance, Japan was adamant against change for a while until years of stagnation and disappointing outlook caused the system to change. When it did, the no-fail bank policy was phased out. Since the lost decade of the 90s, the outlook has improved. How much of this is due to changes in corporate governance is up for debate but empirical evidence does seem to indicate that Japan not acting sooner helped contribute to its lost decade. This contrasts with America which was very flexible and able to change with the times. As the world gets more globalized, it makes more sense that there will be a convergence as opposed to the rest of the world moving towards one particular system of corporate governance. Over the course of the past few decades, several key components of corporate governance in the American system have diminished.[99] Some of the key elements of the American system included shareholder primacy and dispersed shareholding. One these two key issues it is fairly undeniable that the American system has drifted more towards the Japanese model. The point to drive home is that America's success in the economic world was due to its ability to adapt, not some inherit or intrinsic system that is the "ideal" system. One of the key concepts is shareholder primacy. What this means is that shareholders have the fate of corporations in their hands as they wield tremendous power them. Legally, shareholders do have this power under American corporate law but there is a caveat in the sense that voting reads from shareholders are weak. While they are supposed to be able to elect directors to the board, this right is muddled by the fact the existing board nominates the next board and there is a slew of other technical snags that restrict or limit the voting rights of shareholders. These restrictions seem to increase with new laws being passed. When all of this is put into consideration, the current American system on shareholder primacy resembles the Japanese model more than the "supposed" American system.[100]

Chapter Four

Corporate Governance Convergence

5.1 Introduction

It has been demonstrated that the systems of corporate governance within Japan and the United States are both flawed in their own ways. This is why there has been a convergence between the two systems of corporate governance.[101] Japan has been drifting towards the model seen in the United States and vice-versa. However, it is paramount that they convergence in a way that is not only beneficial to the company, but to the entire system of global trade as a whole. Corporate governance convergence is difficult to measure. That is because there is a difference between following the law and following the spirit. Olympus is a great example. In an effort to "internationalize", they put a foreign man in charge of the company. But his influence at the company was limited and it has been stated he was more of a prop to show for international businesses than a CEO.[102] There is also a difference between a guideline or suggestion and being codified into law. Having legal teeth is crucial for changes to take place. Convergence is inevitable but the way convergence occurs can differ depending on what steps are taken and this can have implications for corporate governance in both Japan and the United States.[103]

5.2 Convergence

Often referred to as the next stage of globalization, convergence is the logical next step to the international harmonization of trade practices and information technology standards. Convergence is the mix of good corporate governance practices.[104] The reason for this change among corporations is the desire to make them more attractive to investors. A recent slew of scandals has also caused a loud and inevitable demand for change within the current systems of corporate governance.

---

[99]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

[100]Dan Puchniak, 'The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law' [2007] 9(1) Asian-Pacific Law & Policy Journal 8-4

[101]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

[102]Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal

[103]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

[104]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

In both Japan and the United States, corporations have seen their systems change in seven main areas. These can be viewed as the "ingredients" of convergence.[105] The first is transparency. This mostly comes from the influence of stakeholders, more prominent in Japan than the United States. There is a call for transparency in the day-to-day operations of the company and a desire to bring decisions out of the shadows. The second way is diversity. In the past this meant gender and ethnicity but in today's globalized world this expands to bringing on different nationalities as well as a variety of professional experience. This ties into the next area, global directors. Bringing in directors that are seen as global make the company much more attractive to investors. Olympus did this when they brought on Woodward. Risk management is another area and has become much more vital following the global economic crisis. Essentially, there is a desire to have more "specialists" in areas of significant influence including those who are savvy in areas of technology, law and finance. Another major way in which convergence has occurred is the splitting of the CEO and chairman role. In the United States, you would often see the CEO and chairman as one person. This has been changing towards the two-tiered model where they would be split and less centralized. Independence is another key role where people should be appointed from outside the company. This has been a feature of the United States model and is now being practiced more by Japan. Finally, there is a push for professionalism. With more of an emphasis on particular expertise as well as independence within the board, there is a trend towards greater liability for the director with all of these being meant to make the role of the directors more professional as well as accountable. Convergence seems to focus on these areas more or less and adhering to these areas is an indication you are converging.[106]

5.3 Convergence between the two systems and the future

When comparing Japanese and American decision-making in corporate governance. Harrigan explains the affect the SEC has had on corporate governance within the United States and how it is both a blessing and a curse. On one hand, the policies imposed by the SEC would theoretically calm shareholders in the sense that they have oversight and can deal with problems quickly should the need arise but on the other hand this gives way to "shareholder value maximization" and corporate boards may lack loyalty and sell off businesses having a rocky performance to people who could turn it around. Harrigan mentions that due to shareholder capitalism, "financial considerations shape an increasing number of corporate directors' perceptions concerning what constitutes attractive investment opportunities and which businesses to retain in the corporate family."[107]

Another difference in structure and independence involves audit committees. According to a study, about 90% of U.S. companies in the sample strongly agreed that their firm's audit committee was independent.[108] Clearly, this perceived sense of independence wasn't just the norm for companies but that it was also important. When Japanese companies were asked this question, they pretty much said the opposite. For American companies, the independence that audit committees have is of obvious importance and it becomes a sticking point and indeed, has become mandated by the SEC and publicly-traded firms in the United States must adhere to this requirement or they get in to dicey legal areas. In Japan, it has been increasingly urged that firms have the makeup of their audit committees be at least half being outside directors but as pointed out, firms have been slow to embrace this recommendation.

Chadha and Agrahal discovered that independent directors with a lot of financial knowledge and experience under their belts are valuable in providing useful and fair oversight over a firm and its accounting practices.[109] Going back to Olympus, this type of accounting advice and oversight would have been much needed to avoid the utter catastrophe that was the Olympus scandal. An interesting question from the study was if there should be a financially literacy test or requirement for members of a firm's audit committee. The vast majority of the US respondents said that they should while about 86% of the Japanese respondents demurred. Obviously this indicates that Japan places less importance on financial literacy when it comes to their auditors which of course are problematic.[110]

---

[105]Egon Zehnder, 'The Convergence of Corporate Governance Practices' (*The Next Stage of Globalization*, 2017) <http://www.egonzehnder.com/the-focus-magazine/topics/the-focus-on-convergence/expertise/the-next-stage-of-globalization.html> accessed 17 September 2017

[106]C.A. Mallin, Corporate Governance (4th edn., Oxford University Press, 2013)

[107]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

[108] Revision of the Commission's Auditor Independence Requirements SEC 17 CFR Parts 210 and 240

[109] Anup Agrawal and Sahiba Chadha The Journal of Law & Economics Vol. 48, No. 2 (October 2005), pp. 371-406

[110]Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal

The power of corporate auditors also has diverging views in Japan and the United States.[111] Whether or not a Japanese law similar to that of Sarbanes-Oxley would change the discourse in Japan is uncertain but more American companies agreed with the idea that the data regarding the company's performance data be allowed to be viewed by investors. Again, this is something that could have been implemented to stop Olympus from occurring. Independence is another key difference. The same study showed that nearly all of the US respondents felt their board had a compensation committee that was independent of the board.[112] This is of course required by the SEC so perhaps that why this seems like the norm to American companies. Japan has no such law demanding independence and the data showed that the vast majority of Japanese respondents did not agree with the fact that their board's compensation committee was independent. This is very much a "Japanese" way in the business world as they feel these type of matters should be handled internally. The concept of "internalism" means that shareholders in Japan willingly accept and acknowledge the power of management so fights with shareholders are rare and certainly far less common than in Western countries. The data indicates that there is a correlation between what the policies actually are and what the policies should be regarding corporate governance. If Japan were to adopt a law akin to that of Sarbanes-Oxley, one has to wonder how much the data would change from the Japanese respondents. On the other hand, if parts of the SEC were to be cut down or Sarbanes-Oxley were to be repealed, one has to wonder whether the view on the necessity of independence would decrease as well. Japan should not simply just "recommend" but legislate. The data here indicates that recommendations do very little to change minds. There is a convergence of ideas in corporate governance – internalism vs independence. Neither idea has a spotless record but the questionnaire posed was 10 years ago and it would be interesting to see an updated questionnaire now that the two ways of corporate governance have converged somewhat.

Aronson points out that a mixed or hybrid model is the way to go forward and this could be beneficial not only for Japan but for the West as well.[113] Aronson mentions that "the goal of the hybrid approach is to form a system that combines the information access of insiders with the independence of outsiders in a way that results in real board discussion and management oversight." This type of system was proposed in an FSA report in 2009.[114] The role of an internal company auditor is key to this type of model. The good points to this type of person would be that they have a right of investigation. This would let them be able to have a purview of all relevant information and also get the right to attend board meetings. Over time, they are able to vice their opinions and see an increase in their powers and clout. However, there are limitations. While they can attend board meetings and throw in their two cents, they cannot vote on key issues and lack the ability to fire and hire the CEO or other directors. Aronson makes a good point that company auditors are efficient when it comes to analyzing transactions in both the accounting and legal realms.

The scandal of Olympus came from the accounting department so it would stand to reason that a company auditor would be a great asset within corporate governance in Japan.[115] Professor Gilson noted that there is a difference between Japanese companies and "western" companies when it comes to the audit function with company auditors.[116] In the United States, it is carried out by the board of directors while in Germany it is carried out by a supervisory board. Yet in Japan they problem appears to be that there is weak oversight when it comes to implementing the strategy of the company. Within Japanese corporations and indeed, one of the key problems in Japanese corporate governance law. In the Japanese system there tends to be uncertainty and confusion as to who exactly the CEO is beholden to. Therefore, the fact that the board lacks supervision over the CEO (including both hiring and firing) is an issue that Japanese corporate governance needs to tackle. [117]

---

[111]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988
[112] Abdul Rasheed & Toru Yoshikawa, 'Convergence of Corporate governance: Critical review and future directions' [2009] 17(3) Research Collection Lee Kong Chian School of Business 388-404
[113]Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal
[114] FSA Report 2009
[115]Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal
[116] Ronald Gilson, Choice as Regulatory Reform: The case of Japanese Corporate Governance" [2010]
[117] Abdul Rasheed & Toru Yoshikawa, 'Convergence of Corporate governance: Critical review and future directions' [2009] 17(3) Research Collection Lee Kong Chian School of Business 388-404

Aronson talks about the role of independent directors as well.[118] This is of course something you would be more inclined to see in a country like the United States. Aronson writes that even if these independent directors are a minority of the composition of the board, they can still be "effective in the most fundamental role of monitoring and self-dealing and top management, particularly if the necessary information can be obtained." Now, in a hypothetical mixed system, these independent directors would be interacting and dealing with people of the company including company auditors. Many previous sources have cited the need for one single independent director but Aronson has a different take. He wants to go beyond just one single independent director and he refers to the Asian Corporate Governance Association which proposed a minimum of three. There is a good argument for this and that is that is stands to reason a sole independent director would be rather uncomfortable flying solo challenging management. The argument that there is strength is numbers is most certainly applicable here. Interestingly enough, the movement towards this model is due to the belief among Japanese companies that the board structure is of less importance than the ability of corporate governance to work. One of the more famous Japanese companies, Toshiba, has an equal division of executive directors and non-executive directors in its boardroom.[119]

However, the point is that while some leading companies have drifted towards this system with good results, it still is not widespread among Japanese corporate governance practices and thus, the best parts should be codified into law. Even companies that have implemented these practices to an extent would certainly object to being legally bound to follow these practices. One possible solution that would also be viewed as a good response to the Olympus stock scandal would be a "comply or explain" system on the Tokyo Stock Exchange (TSE). The broad conclusion and foremost priority that needs to be addressed with regards to Japanese corporate governance is that there was no oversight and no safeguard for monitoring management. One of the reasons for a seeming lack of movement to take steps to remedy this is that there is a view that it is a binary choice between maintaining the status-quo Japanese system and implementing a more western system. As pointed out, this is not the case and a mixed system is an idea that is certainly gaining popularity in Japan. Whether or not the Olympus Scandal will lead to any significant changes still remains to be fully seen but turning the scandal into a positive and using the momentum to implement changes. If changes are not made here, history will repeat itself and the blowback from another scandal could result in stringent mandatory requirements along the lines of the Sarbanes-Oxley Act.[120] This act in the United States basically protects investors from fraudulent accounting activities by corporations. In addition, it implemented strict reforms to reveal financial disclosures from companies and helps prevent accounting fraud. Japan lacks a comparable act to this but it is certain companies would not like a similar act to this being codified into law in Japan.[121]

The convergence between these two systems, insider and outsider, exemplified by Japan and the United States, respectively, can be observed "*de jure*" or "in form" or "*de facto*" which is "in function". *De jure* convergence refers to convergence in the international level. Basically, there would be a growing wish of both investors as well as issuers to operate in the international level. Nearly all players in the business world would agree that having a market that is international as opposed to simply national is much better from a financial point of view. *De facto* convergence of convergence in function is defined as practices and positions that are voluntarily implemented that appeal to other companies and entities on the global stage. In this way, companies will be similar in their strategic approaches even if the corporate governance system they have differs. The best and most successful competitors will be emulated. This is how hybrids are formed – you have the institutional pressures which of course are strong but you also have the need to satisfy stakeholders with a lot of different goals and agendas. In order to fulfill all of these responsibilities, there has to be a long-term competitive advantage for global stakeholders. Of course, these types of convergence are not independent of each other.

De jure convergence is inclined to craft the choices of the company be more uniform and this in turn stimulates de facto convergence. On the other hand, *de facto* convergence can influence *de jure* convergence such as in the case of a regulatory gap where companies will by themselves utilize the best practice to handle competitive pressure.

---

[118]Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal

[119]Khondaker Rahman, 'Accounting Irregularities at Toshiba: An Inquiry into the Nature and Causes of the Problem and Its Impact on Corporate Governance in Japan'[2016] 5(4) Global Advanced Research Journal of Management and Business Studies 88-101

[120] Sarbanes-Oxley Act 2005

[121]Kathryn Harrigan, 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

The conclusion of these studies is that despite the differences between belong to an insider system or an outsider system, or *de jure* vs *de facto* convergence, there has to be a way to handle an increase in competition. Relationships can be fleeting in this day and age and consumers and stakeholders may bolt to whatever is up and coming. This can be anywhere in the world now and not just limited to one's country. Therefore, being able to compete globally is important. This is where the importance of relationships with stakeholders come into play – the relationship has to be built on trust and a long-term commitment from both sides. The path that is charted will ultimately be one where insider and outsider systems trudge forward and evolve down a road where they are prodded by laws of national and international bodies alike and molded by substantial approaches implemented by companies. The author concludes by saying that the vision of the board of directors very much can decide how the company will evolve or converge – if at all. "The board of directors is the real promoter of both corporate sustainability and substantial convergence between insider and outsider systems".[122] Five companies were analyzed including Adidas and Kesko.

They all seemed inclined to follow the long-term stakeholder relationship model and they all understood this was needed for long-term durability. Financial, social and environmental considerations were implemented. In addition, there are mechanisms to closely listen to their concerns and this includes issues such as labor rights as well as delving into research for ways to make business without hurting people or the environment. There has to be understanding that the world can be fluid as well. There are signs of some pushback on globalization as recent trends within the United States and United Kingdom would indicate. However, this could be a blip before a return to the normalcy of globalization marching forward.

5.4 Conclusion

When talking about a more ideal form of corporate governance, it's too simplistic to say that countries need to converge towards one system. The goal of businesses and countries alike is to gain a competitive advantage. There needs to be a process which promotes sustainability. Daniela Salvioni writes that sustainability "is a long term vision that characterizes socially responsible companies and refers to a concept of global corporate responsibility including legal, economic, social and environmental aspects."[123] As has been touched upon, company ownership and control structure are areas that definitely differ around the world, not which of least Japan and the United States. Corporate sustainability, according to the Brundtland Report, means that companies and corporations should consider the long run or the future.[124] One aspect to this is that there needs to be emphasis placed on the stakeholders. This is ideal for long-term sustainability. Of course, this does not mean to ignore shareholders and their needs or desires. There has to be a compromise being outsider and insider systems. Outsider systems tend to be more market-oriented and have ownership that is rather dispersed. Shareholders wield influence by having the right to vote. Moreover, when the owners are not satisfied, they will sell their shares and this will make their distrust or frustrations easily apparent. This leads the way for hostile takeovers often including a change in the composition of the board. This means that profit in the short-term is what is crucial. When shareholders have that much power, it is at the expense of the stakeholders and it is possibly at the expense of long-term prospects. If the company cannot deliver now, it could be in trouble. This is what it means to be in an outsider system. Now, this has been an obvious part of corporate governance in the United States but it has been changing. Hostile takeovers have decreased in the United States as there does seem to be less of a pure outsider system. Insider systems are what Japan was like – concentrated ownership and hostile takeovers would be a rare event. The internal mechanisms of corporate governance serve to protect minority shareholders. However, despite seeming like they might be opposites they do share something in common – in both systems ownership influences the strategic corporate approach regarding the board composition. There, it is pointed out if companies adopt a sustainability approach, which has been the case, there would of course be some degree of convergence.[125]

---

[122] Abdul Rasheed & Toru Yoshikawa, 'Convergence of Corporate governance: Critical review and future directions' [2009] 17(3) Research Collection Lee Kong Chian School of Business 388-404

[123] Daniela Salvioni 'Corporate Governance, Ownership and Sustainability' Corporate Ownership & Control / Volume 13, Issue 2

[124] Brundtland Report

[125]Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal

Chapter Five

Conclusion

6.1 Introduction

One of the most striking phenomenon in recent times is the convergence of systems of corporate governance. As countries such as Japan and the United States struggle with various corporate scandals, they will look outside their country for possible solutions. In this way, convergence is formed as the rules and norms for International Business law change. Convergence is not an easily defined occurrence however. There are different types of convergence such as de jure convergence and de facto convergence. Both forms have been used in international relations.[126]

The role of independent directors cannot be understated. "Independence, when it comes to boards, allows a director to be objective and evaluate the performance and well-being of the company without any conflict of interest or the undue influence of interested parties." The advantages of this are clear – independence from management would allow directors to not only have the ability to be more connected with information on the outside, they would be less dependent on the CEO of a company for information which of course can be easily manipulated. Compensation is also different as board members do not receive financial compensation for anything other than their service to the board. This includes consulting, middleman services or other professional services. This also ties into less of a conflict of interest.[127] The problem in both Japan and the United States is that they don't follow this setup. In Japan they weren't legally required or pressured until relatively recently and in the United States the spirit of being independent was not followed as was seen in the collapse of Bear Sterns.[128]

The "hybrid" model between Japan and the United States is a form of convergence that should be aimed towards in the near future. This can be easier said than done as Shiro Kuniya, managing partner at Ohebashi LPC & Partners characterized Japanese law as strong when it came to an individual's transactions but weak when it came to a company's. In essence, it lacks oversight and sway in the company's implementation of corporate strategy. Augmenting Japanese law to be stronger in this area is a step that should be taken.[129] Another issue s when Japanese companies conflate the supervisory role with the audit role. In the United States, this would normally be done by the Board of Directors. Arosnon writes how the board's lack of true supervision over the CEO may actually be biggest problem in Japanese corporate governance. The trend towards giving shareholders more power in the operations of the company as well as over the CEO and management decisions has been slow and further steps should be implemented to ensure that it continues.[130] The trend of putting Independent directors in the Board should continue to be practiced. Recently, the TSE declared that companies without independent directors would not be listed. How viable this is or whether or not there are any legal loopholes should be explored but one problem in both the United States and Japan is the lack of codified law. Recommendations can be ignored just as easily as they are adhered to so giving more "teeth" to these recommendations in the form of legislation or penalizations would be a great step towards ensuring that convergence can continue.[131]

This dissertation has shown failings in corporate governance are both Japan and the United States. It has also given some advice on how exactly they should convergence. It is also important that even if there are rules or guidelines, the spirit of laws is followed. An independent director should be genuinely independent, not independent in theory but dependent in practice. Globalization is here to stay and the recipe for success depends on the responsibility of both the countries and the corporations. It is up to the countries to pass meaningful laws and regulations that prevent scandals that were discussed in this paper. However, it is also important for corporations to adhere to these standards in a way that shows they are committed to serve their shareholders in a way that is diligent and honorable, they use good judgement and common sense and they can truly be independent.

---

[126] Abdul Rasheed & Toru Yoshikawa, 'Convergence of Corporate governance: Critical review and future directions' [2009] 17(3) Research Collection Lee Kong Chian School of Business 388-404

[127] Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal

[128]

[129] Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal

[130] Abdul Rasheed & Toru Yoshikawa, 'Convergence of Corporate governance: Critical review and future directions' [2009] 17(3) Research Collection Lee Kong Chian School of Business 388-404

[131] Bruce Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal

Converging in a way that is beneficial to everyone and done in good faith is the ideal route to take. Converging in the "wrong way" will have serious repercussions. Nevertheless, the trends are encouraging and seeing the trajectories of Japan, the United States and other countries when it comes to corporate governance laws will be very interesting to watch.

6.2 Recommendations

The study puts forward the following recommendations:

- Many of the recommendations given in the Company Act in Japan are codified into law. This can only be achieved through the legislative process so pressure must be applied by the stakeholders and shareholders alike. Forcing more transparency and independence akin to what is seen is the Sarbanes-Oxley Act should be looked at some type of model for legislation.
- More stringent transparency laws are passed allowing shareholders and stakeholders to have easier access to the financial records and status of the health of the company. This will achieve the purpose of preventing companies from engaging in deception and fraud as has been the case in multiple corporate scandals in both countries. Shareholders and stakeholders both need a full and accurate picture of the current status of the company whether it be good or bad.
- Independent auditors are truly independent, enforced by external mechanism such as the government or trade unions. Outside directors continue to have a larger role within the company and on the board with the TSE refusing to list companies that do not adhere to at least 50% outside directors.

It is recommended in the United States

- Sarbanes-Oxley is not only maintained but strengthened especially with oversight. As corporate governance is rapidly expanding and changing, revisiting the act frequently is a practice that would serve all parties well. Moreover, any companies that do not adhere to the law or try to circumvent this act should be delisted from the NYSE.
- The SEC is revamped and overhauled to better alert and enforce misbehavior at institutions. The SEC needs more legal authority to go after companies that are engaging in illicit practices but there should also be a "depolitization" of the SEC. For example, the SEC shouldn't be completely dependent on congress for funding and guidance. Independence from Wall Street and Congress would be ideal.
- Independent auditors are truly independent with harsh penalties for companies that limit hiring auditors with conflicts of interest. Penalties can range from a fine to being delisted on the NYSE to removal of executives depending on the severity and frequency of the conflict.

7.0 Bibliography

Books:

Berghe, Van den, *Corporate Governance in a Globalising World: Convergence or Divergence?* (Springer 2002)

Kawai, Masahiro, *Competition Among Financial Centers in Asia-Pacific* (ISEAS Publishing 2009) 179-181

Macey, Johnathan, *Corporate Governance: Promises Kept, Promises Broken* (Princeton University Press 2010) 82-94

Mallin, C.A., *Corporate Governance* (4th edn., Oxford University Press, 2013)

Pozen, Pozen, *Too Big to Save? How to Fix the US Financial System* (John Wiley and Sons 2009) 134-136

Watson, Sophie, *The Blackwell City Reader* (2nd edn, Wiley-Blackwell 2002) 428-431

Journal Articles:

Adams, Douglas, 'An Unfortunate "Tail": Reconsidering Risk Management Incentives After The Financial Crisis Of 2007–2009 ' [2010] 81(1) University of Colorado Review 248-306

Aronson, Bruce 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?' [2013] 30(1) UCLA Pacific Basin Law Journal

Baird, Douglas, & Rasmussen, Robert, Private Debt and the Missing Lever of Corporate Governance' [2007] 6(19) Vanderbilt Law and Economics 3-32

Block, David, 'One-Tier vs Two-Tier Board Structure: A Comparison Between the United States and Germany' [2016] 1(1) Penn Law: Legal Scholarship Repository 3-20

Char, Jeffrey, 'Reforming Japan's Securities Markets: The Loss Compensation Scandal' [2003] 10(3) Berkeley Journal of International Law 173-215

Coates, John, 'The Goals and Promise of the Sarbanes-Oxley Act' [2007] 21(1) Journal of Economic Perspectives 91-116

Elam, Dennis, 'Olympus Imaging Fraud Scandal: A Case Study' [2014] 7(4) American Journal Of Business Education 325-332

Fisch, Jill 'The Overstated Promise of Corporate Governance' (2010). *Faculty Scholarship*. 1045. University of Penn Law Review

Gilson, Ronald, Choice as Regulatory Reform: The case of Japanese Corporate Governance" [2010]

Harrigan, Kathryn 'Comparing corporate governance practices and exit decisions between US and Japanese firms' [2012] 18(4) Journal of Management & Governance975-988

Hashimoto, Motomi, 'Commercial Code Revisions: Promoting the Evolution of Japanese Companies ' [2002] 1(48) NRI Papers

Pejovic, Caslav, 'Japanese Corporate Governance: Behind LegalNorms' [2011] 29(3) Penn State International Law Review 484-486

Puchniak, Dan, 'The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law' [2007] 9(1) Asian-Pacific Law & Policy Journal 8-44

Rahman, Khondaker, 'Accounting Irregularities at Toshiba: An Inquiry into the Nature and Causes of the Problem and Its Impact on Corporate Governance in Japan'[2016] 5(4) Global Advanced Research Journal of Management and Business Studies 88-101

Rasheed, Abdul & Yoshikawa, Toru 'Convergence of Corporate governance: Critical review and future directions' [2009] 17(3) Research Collection Lee Kong Chian School of Business 388-404

Salvioni, Daniela, 'Corporate Governance, Ownership and Sustainability' Corporate Ownership & Control Volume 13, Issue 2

Yoshimori, Masaru "Whose Company Is It? The Concept of the Corporation in Japan and the West." Long Range Planning, Vol. 28, No. 4, pp. 33-44, 1995

Website Articles:

Carney, John, 'The SEC Rule That Broke Wall Street' (*CNBC*, 21 March 2012) <https://www.cnbc.com/id/46808453> accessed 15 June 2017

Coney, Peter, 'The Olympus effect? Recent changes to whistleblower law regime' (*International Law Office*, 3 August 2015) <http://www.internationallawoffice.com/Newsletters/White-Collar-Crime/Japan/Nagashima-Ohno-Tsunematsu/The-Olympus-effect-Recent-changes-to-whistleblower-law-regime> accessed 20 May 2017

Elders, Gregory 'Japan's corporate governance overhaul' (*Bloomberg*, 6 January 2017) <https://www.bloomberg.com/professional/blog/japans-corporate-governance-overhaul-2/> accessed 10 June 2017

Hanna, Julia, 'The Costs And Benefits Of Sarbanes-Oxley' (Forbes, 10 March 2014) <https://www.forbes.com/sites/hbsworkingknowledge/2014/03/10/the-costs-and-benefits-of-sarbanes-oxley/> accessed 16 August 2017

Hiura, Toshihiko, 'Corporate Governance in Japan: Board Membership and Beyond' (*Bain & Company*, 24 February 2016) <http://www.bain.com/publications/articles/corporate-governance-in-japan-board-membership-and-beyond.aspx> accessed 24 August 2017

Koh, Yoree 'At Olympus, High Times, Dark Shadow' (*Wall Street Journal*, 8 November 2011) <http://wsj.com/japanrealtime/2011/11/08/at-olympus-high-times-dark-shadow/> accessed 10 May 2017

Layne, Nathan, 'Special Report: The masterminds of the Olympus coverup' (*Reuters*, 16 December 2011) <http://www.reuters.com/article/us-olympus-masterminds-idUSTRE7BF0FB20111216> accessed 20 May 2017

McBride, James 'Abenomics and the Japanese Economy' (*Council on Foreign Relations*, 10 February 2017) <https://www.cfr.org/backgrounder/abenomics-and-japanese-economy> accessed 3 September 2017

McKenna, Francine, 'The Olympus Fraud Dissected' (*Forbes*, 2 01 2012) <https://www.forbes.com/sites/francinemckenna/2012/01/02/the-olympus-fraud-dissected/>accessed 3 August 2017

Ryback, William, 'Case Study on Bear Sterns ' (*Toronto Centre*, 2010) <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/02BearStearnsCaseStudy.pdf>accessed 1 April 2017

Saijo, Kunio, 'Whistleblowers: our best weapon against corporate fraud' (*Nikkei Asian Review*, 6 July 2017) <https://asia.nikkei.com/magazine/20170706/On-the-Cover/Whistleblowers-our-best-weapon-against-corporate-fraud> accessed 22 July 2017

Sullivan, Ruth, 'Board make-up becomes a governance issue' (*Financial Times*, 4 March 2012) <https://www.ft.com/content/2ec7014e-631a-11e1-9245-00144feabdc0>accessed 13 June 2017

Other Websites:

Institutional Shareholder Services, 'Board Composition (Japan)' (*Executive Summary*, 6 November 2014) <https://www.issgovernance.com/file/policy/japan_board.pdf>accessed 30 May 2017

Afp, 'Toshiba crisis shines light on Japan corporate culture' (*NST Online*, 14 March 2017) <https://www.nst.com.my/news/2017/03/220624/toshiba-crisis-shines-light-japan-corporate-culture> accessed 3 August 2017

Nikkei, 'Japan's corporate governance gets some long-overdue scrutiny' (*Nikkei Asian Review*, 6 July 2017) <https://asia.nikkei.com/magazine/20170706/On-the-Cover/Japan-s-corporate-governance-gets-some-long-overdue-scrutiny> accessed 3 September 2017

Legislation:

H.R. 3763 (107th): Sarbanes-Oxley Act of 2002

Japan: Companies Act (Act No. 86 of July 26, 200