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Subordination of Shareholder Loans in Japan

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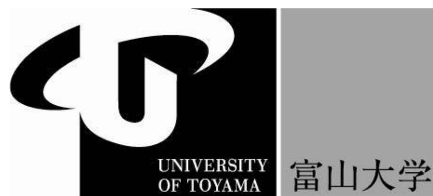

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Abstract

In the U.S., Germany, and several other countries, either corporate or bankruptcy law allows courts to subordinate loans by controlling shareholders or to treat the loans as equity. In Japan, although many scholars support introducing subordination into Japanese law, no legislation has been enacted. In addition, some courts have recently declined to employ subordination and regarded shareholder loans as one of the ordinal economic activities. Should we introduce subordination in Japan?

This paper discusses the function of subordination in terms of creditor protection through comparative law (American law and German law) and argues that there is no need to use it actively in Japan. The existing rules are sufficient to protect general creditors, without subordination. Indeed, the thoughtless introduction of subordination might hinder the implementation of efficient financing and completion of projects in closely-held companies or corporate groups.

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1 Introduction

Subordination of shareholder loans has been used in the U.S., Germany, and several other countries.[1] In these countries, either corporate or bankruptcy law allows courts to subordinate loans by controlling shareholders or to treat the loans as equity. Therefore, subordination has played a significant role in creditor protection because general creditors can receive more payments in bankruptcy proceedings.

In Japan, subordination is a controversial issue. Subordination has been adopted in several cases where plaintiffs claimed shareholder liability. Many scholars also support introducing subordination into Japanese law, referring to the U.S. and Germany. However, subordination has not been enacted in legislation in Japan yet.[2] Recently, some courts have declined to employ subordination and regarded shareholder loans as one of the ordinal economic activities. Should we introduce subordination in Japan? If we employ subordination according to foreign law, it might hinder the implementation of efficient financing and completion of projects, as shareholder loans are important financing tools in closely-held companies or corporate groups.

This paper discusses the function of subordination in terms of creditor protection through comparative law (American law and German law) and argues that there is no need to use subordination actively in Japan. Although previous studies in Japan mainly focus on the conditions or range of subordination, they have never revealed how subordination serves creditor protection compared to the other rules.

The rest of this paper is organized as follows. Part II provides previous cases involving subordination of shareholder loans in Japan, which show that the courts have indefinite views on subordination. Then, after an overview of previous studies in Part III, Part IV briefly reviews subordination in the U.S. and Germany. Based on comparative law, Part V considers reasons that may justify subordination and why Japan may benefit from it, but this paper argues that the existing rules are sufficient to protect general creditors, without subordination. Finally, Part VI concludes.

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[1] Examples include Austria, Italy, and Spain. *See* Martin Gelter & Jürg Roth, *Subordination of Shareholder Loans from A Legal and Economic Perspective*, 5 J. INST. COMP. 40, 40 (2007).

[2] Experts have twice discussed whether to legislate subordination of shareholder loans. Hōmushō Minzikyoku Sanzikanshitsu, *Shōhō & Yugenkaishahō Kaiseishian [A Draft for the Reform of Commercial Code and Limited Companies Act]*, 89 BESSATSU SHŌJI HŌMU 125(1986) and Hōmushō Minzikyoku Sanzikanshitsu, *Tōsanhōsei ni kansuru Kaiseikentōkadai [Agendas on the Reform of Bankruptcy Law]*, 46 BESSATSU NBL 1 (1999).

2 Previous Cases in Japan

2.1 The legal basis for subordination of shareholder loans

As mentioned above, there is no particular rule for subordination of shareholder loans in Japan. If someone makes a claim for subordination before a judge, the claimant needs to employ general rules for the modification of bankruptcy claims. Through the interpretation of general rules, some courts have subordinated shareholder loans to other claims.

For example, Art. 155 (1) Minji saiseihō [Civil Rehabilitation Act] provides as follows:

> The content of any modification of rights based on a rehabilitation plan shall be equal between rehabilitation creditors; provided, however, that this shall not apply where any rehabilitation creditor who will suffer detriment has given consent or where equity will not be undermined even if the plan otherwise provides for a small rehabilitation claim or any of the claims listed in Article 84 (2) or any other difference in treatment of rehabilitation creditors.[3]

Kaisha kōseihō [Corporate Reorganization Act] also has a similar rule.[4] In Hasanhō [Bankruptcy Act], there is no similar rule. As a result, parties must refer to the fundamental principles given in Art. 1(2) Minpō [Civil Code]. It provides as follows:

> The exercise of rights and performance of duties must be done in good faith.

These rules have no specific conditions for subordination and only contain words such as "equity" and "good faith," which are abstract principles. Thus, Japanese courts must determine whether to subordinate shareholder loans based on such abstract principles. This inevitably makes the function of subordination

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[3] The translations of Japanese law referred in this paper are from the website "*Japanese Law Translation,"* which is managed by the Ministry of Justice. *Available at* http://www.japaneselawtranslation.go.jp/

[4] Art. 168(1) Corporate Reorganization Act provides as follows:

> The content of a reorganization plan concerning the persons holding the following types of rights shall be equal between such persons who hold the same type of rights; provided, however, that this shall not apply where any person who will suffer detriment has given consent or where equity will not be undermined even if the plan otherwise provides for a small reorganization claim, etc. or any of the claims listed in Article 136, paragraph (2), item (i) to item (iii) or where equity will not be undermined even if any other difference is set in treatment of the persons who hold the same type of rights.

unclear while allowing courts some degree of discretion to employ it.

2.2 Previous Judgments

There are seven Japanese cases in which subordination of shareholder loans was discussed. As seen in Table 1, Japanese courts have no established doctrinal basis for subordination and instead relied on other various reasons to subordinate such loans.

Among the judgments in which shareholder loans were subordinated, case 2[5] and case 5[6] listed not only "control by shareholder," but also that the "shareholders' conduct triggers bankruptcy of the company" or "shareholders' realization of their company in insolvency." In contrast, Case 1[7] referred to "family company," "insolvency (overindebtedness)," and "mismanagement" without mentioning the reasons provided in cases 2 and 5. The relationship between these reasons is unclear, and these courts did not even explain why subordination is necessary based on these reasons.

Conversely, courts refusing to subordinate shareholder loans seem to, at the outset, have a negative attitude towards subordination. Case 4[8] explained that "there are no particular rules on subordination" and "lack of discussion on subordination". In addition, recent judgments (case 6[9] and case 7[10]) regarded shareholder loans as "one of the ordinal economic activities." In contrast to case 1, case 3[11] contended that "mere mismanagement is an insufficient reason to subordinate shareholder loans".

In sum, subordination is dependent upon the courts' discretion, and courts have opposing views on it. Moreover, even when subordination is used, the necessity for it is ambiguous based on the various factors considered and discussed by the courts. This situation differs greatly from German law, in which the conditions for subordination are clearly prescribed by legislation. Rather, it is similar to American law, which leaves the discretion to subordinate shareholder loans to courts, although the law of subordination is formally provided in the Bankruptcy Code.

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[5] Fukuoka Kōtō Saibansho [Fukuoka High Ct.] Dec. 21, 1981, 1046 HANREI JIHŌ [HANJI] 127.
[6] Hiroshima Chihō Saibansho Fukuyama Branch [Hiroshima Dist. Ct.] Mar. 6, 1998, 1660 HANJI 112.
[7] Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Feb. 11, 1965, 16 KAKYŪ SAIBANSHO HANREISHŪ [SAIBANREI JŌHŌ] 240.
[8] Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Dec. 16, 1991, 903 KIN'YŪ SHŌJI HANREI [KINYŪ HANREI] 39.
[9] Tōkyō Kōtō Saibansho [Tōkyō High Ct.] June 30, 2010, 1372 HANREI TAIMUZU [HANTA] 228.
[10] Tōkyō Kōtō Saibansho [Tōkyō High Ct.] July 4, 2011, 1372 HANTA 228.
[11] Nagoya Kōtō Saibansho Kanazawa Branch [Nagoya High Ct.] Sep. 1984, 537 HANTA 237.

Table 1 List of the Cases

Case	Date	Type*	Judge**	Reason***
1	2.11.1965	C	Yes	family company, insolvency (overindebtedness), mismanagement
2	12.21.1981	C	Yes	control by shareholder, shareholders' conduct triggers bankruptcy of the company
3	9.1.1984	C	No	mere mismanagement is an insufficient reason to subordinate shareholder loans
4	12.16.1991	B	No	there are no particular rules on subordination, lack of discussion on subordination
5	3.6.1998	B	Yes	control by shareholder, shareholders' realization of the companies in insolvency
6	6.30.2010	R	No	other creditor's understanding of shareholder loans, shareholder loans are one of the ordinal economic activities
7	7.4.2011	R	No	shareholder loans are one of the ordinal economic activities

* Type stands for the kind of bankruptcy proceedings ("C"=corporate reorganization proceeding, "B"=bankruptcy proceeding, and "R"=civil rehabilitation proceeding).

** Judge means whether the court subordinated shareholder loans ("Yes"=subordinated shareholder loan or "No"=did not subordinate shareholder loan).

*** Reason is the grounds mentioned in the judgment.

3 An Overview of Previous Studies in Japan

This section reviews a large number of previous studies on subordination of shareholder loans in Japan, most of which refer to the rules of subordination in the U.S. or Germany and suggest the introduction of these rules into Japanese law. They can be divided into two legal fields: corporate law and bankruptcy law. Each field has different viewpoints on subordination, and thus this section analyzes them separately.

3.1 Bankruptcy Law

As seen in Table 2, a lot of the literature in bankruptcy law has examined

subordination of shareholder loans from the principle of "equality of creditors". Other studies with unclear viewpoints seem to naturally rely on that principle when employing subordination. These studies considered a situation where shareholders with loans to the companies are allowed to receive payments as general creditors in bankruptcy proceedings while also benefitting from the success of the business, and found that this situation contradicts the "equality of creditors." As a result, these studies simply listed the conditions of subordination, but did not explain what problems shareholder loans cause to other general creditors and how subordination resolves those problems.

Ito (1984)[12] mentioned four conditions for subordination: "a breach of the duty of loyalty," "undercapitalization," "bankrupt company's loss triggered by shareholders," and "parent company's benefit at subsidiary's cost." Hata (1996),[13] and Nakajima (2015)[14] also identified "exploitation." The definition of "exploitation" differs slightly depending on the author and, for example, is commonly used in the sense of unreasonable consideration in transactions and excessive dividends from companies to controlling shareholders. In addition, Kurabe (2007)[15] and Kawanaka (2013)[16] mentioned "recharacterization," which regards shareholder loans as equity in bankruptcy proceedings without requiring "inequitable conduct" on the part of shareholders and has recently been used in American courts. Other studies listed conditions such as "instrumentality," "risk of business failure," "capital-like loans," "dominant bargaining power," "mismanagement," and "elimination of unfairness" (Okuyama (1969),[17] Takahashi

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[12] MAKOTO ITO, SAIMUSHA KŌSEI TETSUDUKI NO KENKYŪ [STUDY ON BANKRUPTCY PROCEEDINGS] 299-301 (1984).

[13] Hiroki Hata, *Tōsan Saiken no Retsugoteki Shogū ni tsuite (1) [Subordination of Debt Claims in Bankruptcy (1)]*, 40-2 JYŌCHI HŌGAKU RONSHŪ 139, 150 (1996).

[14] Masaki Nakajima, *Naibusha Saiken no Retsugoka [Subordination of Insider Claims]*, in KAISHAHŌ / TŌSANHŌ NO GENDAITEKI TENKAI [DEVELOPMENT OF COMPANY LAW AND BANKRUPTCY LAW] (Mitsumasa Tanabe et al., ed., 2014) 455.

[15] Mayumi Kurabe, *Tōsan Tetsuduki ni okeru Saiken no Retsugoka ni tsuite [Subordination of Claims in Bankruptcy Proceedings]*, 318 DŌSHISHA HŌGAKU 2191, 2205 (2007).

[16] Hiroyoshi Kawanaka, *Hasan Tetsuduki ni okeru Saiken no Retsugoka no Ichisokumen [An Aspect of Subordination of Claims in Bankruptcy Proceedings],* 46-3 HIKAKU HŌGAKU 1, 32-4 (2013).

[17] Tsuneo Okuyama, *Iwayuru Hōjinkaku Hinin no Hōri to Jissai [Piercing the Corporate Veil in Practice]*, in JITSUMU MINJI SOSHŌ KŌZA DAIGOKAN [LECTURES OF CODE OF CIVIL PROCEDURE VOL. 5] (Tyūichi Suzuki & Akira Mikaduki ed., 1969) 175.

(1997),[18] Kashiwagi (2001),[19] Masuichi (2002),[20] Mukaiyama (2008),[21] and Kojima (2012)[22].

In contrast, a few studies analyzed subordination from the perspective of creditor protection. Uehara (1988)[23] introduced the discussion on "equity substitution law (*Eigenkapitalersatzrecht*)" in Germany, which subordinated shareholder loans made during a company's crisis to other general claims.[24] He found two reasons for subordination in this circumstance: "the creation of the ability to pay in appearance" and "risk shifting to other general creditors." Matsushita (1990)[25] researched studies and cases on subordination in the U.S. in depth and suggested using subordination for "undercapitalization." He insisted that the risk arising from undercapitalization should be redistributed to shareholders with subordination.

Table 2 List of Previous Studies in Bankruptcy Law

Author	Perspective	Referenced Country / Reason
Okuyama (1969)	equality of creditors	— / instrumentality, risk of business failure
Ito (1984)	equality of creditors	the U.S. / four reasons including a breach of the duty of loyalty, etc.
Uehara (1988)	creditor protection	Germany / the creation of the ability to pay in appearance, risk shifting to other general creditors
Matsushita (1990)	creditor protection	the U.S. / undercapitalization
Hata (1996)	the need for subordination	the U.S. & Germany / a number of reasons

[18] Hiroshi Takahashi, *Saikensha no Byōdō to Kōhei [Equality and Fairness of Creditors],* 1111 JURISUTO 159 (1997).
[19] Noboru Kashiwagi, *Saimusha to Keiei Shihai suru Kabunushi de ha nai Saikensha no Saiken to Kōheihōjyō no Retsugoka [A debtor, creditor's (not being shareholder) claim and equitable subordination]*, IN MINJI SOSHŌHŌ RIRON NO ARATANA KŌTIKU GEKAN [THE CONSTRUCTION ON THE THEORY OF CODE OF CIVIL PROCEDURE VOL.2] (Yoshimitsu Aoyama et al., ed., 2011) 476.
[20] Toru Masuichi, *Naibusha ni Kansuru Hinin no Tokusoku oyobi Naibusha Saiken no Retsugoka [Avoidance and Subordination of Insider Claims]*, 69 BESSATSU NBL 17 (2002).
[21] Junko Mukaiyama, *Tōsanhō ni okeru Naibushatō no Saiken no Retsugoteki Toriatsukai ni tsuite (2/final) [Subordination of Insider Claims in Bankruptcy Law (2/final)]*, 127 WASEDA DAIGAKU DAIGAKUIN HŌKEN RONSHŪ 173, 186 (2008).
[22] Nobuo Kojima, *Tōsan Saiken (Naibusha Saiken) no Retsugoka [Subordination of Bankruptcy Claims (Insider claims)]*, in TŌSANHŌ KAISEI TENBŌ [PROSPECTS OF THE CHANGE IN BANKRUPTCY LAW] (Tokyo Bengoshikai Tōsanhōbu ed., 2012) 478-79.
[23] Toshio Uehara, *Kaisha no Tōsan to Naibu Saiken no Retsugoteki Shogū (Tyū) [Bankruptcy and subordination of insider claims the second volume of the three],* 1280 HANJI 5-6 (1988).
[24] Dirk A. Verse, *Shareholder Loans in Corporate Insolvency – A New Approach to an Old Problem,* 9 GERMAN L. REV. 1109, 1112 (2008).
[25] Junich Matsushita, *Ketsugō Kigyō no Tōusanhōteki Kiritsu (1) [Studies in Insolvency Law of Corporate Groups(1)]* 107 Hōgaku Kyōkai Zasshi 1761, 1793 (1990).

	in Japan	including undercapitalization, etc.
Takahashi (1997)	equality of creditors	— / undercapitalization, exploitation
Kashiwagi (2001)	—	the U.S. / a number of reasons including undercapitalization, etc.
Masuichi (2002)	—	— / capital-like loan, dominant bargaining position
Kurabe (2007)	equality of creditors	the U.S. / a number of reasons including recharacterization, etc.
Mukaiyama (2008)	the need for subordination in Japan	the U.S. / undercapitalization, mismanagement
Kojima (2012)	equality of creditors	— / elimination of unfairness
Kawanaka (2013)	—	the U.S. / recharacterization
Nakajima (2015)	equality of creditors	— / undercapitalization, exploitation

3.2 Corporate Law

As shown in Table 3, most studies in corporate law have viewed subordination in terms of limited liability or creditor protection. They considered subordination of shareholder loans as an exception to the limited liability principle that a firm's creditors have no claim against its shareholders' assets. Thus, the central concern in this research was how to protect creditors against some problems under the limited liability system, and some of these studies were primarily interested in "piercing the corporate veil" or "undercapitalization" rather than subordination itself. Unfortunately, in their analyses, these studies (except for Goto (2007)[26]) simply listed the conditions for subordination under American and/or German law like the studies in bankruptcy law do.

Sudo (1964)[27] mentioned three conditions for subordination: "undercapitalization," "exploitation," and "a breach of fiduciary duty by parent company." Either "undercapitalization" or "exploitation" were cited frequently in

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[26] GEN GOTO, KABUNUSHI YŪGEN SEKININ SEIDO NO HEIGAI TO KASHŌSHIHON NI YORU KABUNUSHI NO SEKININ [DEMERITS OF LIMITED LIABILITY AND THE SHAREHOLDER'S LIABILITY FOR UNDERCAPITALIZATION] 143 (2007).

[27] Shigeru Sudo, *Kogaisha no Hasan to Oyagaisha Saiken (1) [Subsidiary's Bankruptcy and Parent Company's Claim (1)]*, 4 - 3 KOKUGAKUIN HŌGAKU 45, 61-62 (1967).

other studies (Egashira (1980),[28] Katagi (1982),[29] and Sakurazawa (2008)[30]). According to Egashira (1980), limited liability is based on the assumption that companies hold and maintain a certain amount of capital. Accordingly, shareholders cannot enjoy limited liability where there is "undercapitalization" or "exploitation." Katagi (1982) and Matsuyama (1985)[31] also pointed out "the creation of the ability to pay in appearance." This reason, which was also mentioned in the bankruptcy law studies, means that shareholder loans mislead potential creditors into providing a loan to debtor companies because the creditors misunderstand the debtors' creditworthiness. In addition, Shinoda (1984)[32] listed "risk shifting to other general creditors," and Saito (2001)[33] identified "fraudulent conveyance."

In contrast to these studies, Goto (2007) began discussing a different perspective that focuses on the distortion of shareholders' incentives to take on riskier projects or to externalize the tort cost when companies are in financial distress, which will be hereafter referred to as "excessive risk taking." Subordination was discussed in a small part of his book, in which he argued that subordination can eliminate the distortion of shareholders' incentives because it regards shareholder loans as equity and subordination can internalize the cost resulting from excessive risk taking. Yet, he also suggested that subordination may be used for other purposes in the U.S. Takeda (2007)[34] also referenced "excessive risk taking."

Table 3 List of Previous Studies in Corporate Law

Author	Perspective	Referenced country / Reason
Sudo (1964)	equality of creditors	the U.S. / a number of reasons including undercapitalization, etc.
Egashira (1980)	limited liability	the U.S. & Germany / undercapitalization, mismanagement

[28] KENJIRO EGASHIRA, KAISHA HŌUJINKAKU HININ NO HŌRI [PIERCING THE CORPORATE VEIL], 310, 313 - 14 (1980).
[29] Haruhiko Katagi, *Kashōshihon Gaisha to sono Kisei [Regulation of Company with Undercapitalization],* 111 - 2 HŌGAKU RONSŌ 5, 48 (1982).
[30] Takaya Sakurazawa, *Kaisha Tōsanji ni okeru Shihai Kabunushi no Kaishasaikensha ni taisuru Sekinin [The Controlling Shareholder's Liabilities to the Creditors When a Corporation is in Bankruptcy],* 125 WASEDA DAIGAKU DAIGAKUIN HŌKEN RONSHŪ 131, 146 (2008).
[31] Miwako Matsuyama, *Shōkibo Kaisha ni okeru Shihon no Kakuho to Shihai Kabunushi no Sekinin [Maintenance of Equity and Controlling Shareholder's Liability in a Small Company],* 13 KITAMI DAIGAKU RONSHŪ 33, 37 (1985).
[32] Shiro Shinoda, *Kashō Shihon ni okeru Shain no Sekinin (3/Kan) [Shareholder's liability for Undercapitalization (3/final)],* 39 - 3 MEIJO HŌGAKU 1, 30 (1990).
[33] Maki Saito, *Kogaisha no Kanri to Oyagaisha no Sekinin (1) [Liability of Holding Company for the Debts of its Subsidiaries (1)]*, 149 - 1 HOGAKU RONSŌ 1, 33 (2001).
[34] Norihiro Takeda, *Doitsu Yūgen Kaishahō ni okeru Shain Kashitukehō no Kaisei [The change of shareholder loans law in GmbHG]*, 41 - 3 HIKAKUHŌ ZASSHI 181, 216 (2007).

Katagi (1982)	creditor protection	the U.S. & Germany / a number of reasons including undercapitalization, etc.
Shinoda (1984)	the need for subordination in Japan	Germany / risk shifting to other general creditors
Matsuyama (1985)	creditor protection	Germany / the creation of the ability to pay in appearance
Saito (2001)	creditor protection	the U.S. & Germany / fraudulent conveyance
Goto (2007)	limited liability	the U.S. / a number of possible reasons including excessive risk taking, etc.
Takeda (2007)	—	Germany / excessive risk taking
Sakurazawa (2008)	limited liability	the U.S. / a number of reasons including mismanagement, etc.

3.3 Two Open Questions from Previous Studies

Two questions remain from the previous studies. First, it is difficult to understand the function of subordination, as a variety of reasons are simply listed together. While the previous studies mention many reasons that might justify subordination, they do not show how shareholder loans and their subordination work. For example, "undercapitalization" and "the creation of the ability to pay in appearance," which are frequently mentioned in the studies, are different situations. The former represents a situation when equity is small, and the latter concerns other creditors' trust in the company's ability to pay.

Second, subordination should not be discussed from a moral perspective. More particularly, "equality of creditors," which is often emphasized in the literature, may be an important factor in bankruptcy proceedings, but corporate law in Japan has no rule that shareholders must provide additional equity to the company instead of lending loans and allows them to become creditors at any time. After all, the literature on the "equality of creditors" only mentions situations (such as "undercapitalization," "mismanagement," and "exploitation," etc.) in which it is easy to blame shareholders from a moral perspective. Such an approach hinders the understanding of how subordination functions.

4 Subordination in the U.S. and Germany

This section discusses subordination of shareholder loans in the U.S. and Germany, which substantially impacted the previous studies in Japan.

4.1 The U.S.

4.1.1 The outline of subordination

In the U.S., subordination of shareholder loans originated in the case law, until it was enacted in § 510(c) of the Bankruptcy Code in 1978.[35] However, this law outlines no particular conditions for subordination and references only "under principles of equitable subordination," and the discretion to use it remains with the courts.[36]

4.1.2 Case law

American courts use subordination for a variety of purposes and do not provide a theoretical basis to justify it. In *Taylor v. Standard Gas & Elec. Co.*[37] and *Pepper v. Litton*,[38] the two leading judges of the Supreme Court did not explain why subordination was necessary in either case. Some Japanese studies understood *Taylor v. Standard Gas & Elec. Co.* as an "undercapitalization" case[39] or "exploitation" case.[40] Furthermore, some doubted if there was any need to use subordination in *Pepper v. Litton*, because the existence of shareholder claims was suspicious in that case.[41] Looking at subsequent cases, subordination was used for a number of reasons ("capital contributions,"[42] "the potential injustice to other creditors,"[43] "the unconscionable use of the opportunity afforded by the domination to advantage itself at the injury of the subsidiary,"[44] and "fraudulent or otherwise inequitable,"[45] etc.).

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[35] Section 510(c) of the Bankruptcy Code provides as follows:

> (c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may—
> (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or
> (2) order that any lien securing such a subordinated claim be transferred to the estate.

[36] Rafael Ignacio Pardo, *Beyond the Limits of Equity Jurisprudence: No-Fault Equitable Subordination*, 75 N.Y.U. L. REV. 1489, 1491 (1982).
[37] *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307 (1939).
[38] *Pepper v. Litton*, 308 U.S. 295 (1939).
[39] Egashira, *supra* note 28, at 310.
[40] Goto, *supra* note 26, at 191.
[41] Matsushita, *supra* note 25, at 1783 and Goto, *supra* note 26, at 193.
[42] *Arnold v. Phillips*, 117 F. 2d 497 (5th Cir. 1941).
[43] *Flynn v. Loewer Realty Co. (In re Loewer's Gambrinus Brewery Co.)*, 167 F.2d 318 (2d Cir. 1948).
[44] *Comstock v. Group of Institutional Investors*, 335 U.S. 211 (1948).
[45] *Costello v. Fazio*, 256 F.2d 903 (9th Cir. 1958).

Then, although *Benjamin v. Diamond*,[46] which is still frequently cited in other cases[47] and studies, mentioned "inequitable conduct," the context was ambiguous because it included many circumstances such as "initial undercapitalization," "mismanagement, breach of fiduciary duties, and abuse of fiduciary position," and "other inequitable conduct."[48] As Landers (1975) has pointed out, American courts seem to take an ad hoc approach to subordination.[49] Some studies in Japan appear to reflect the attitude of American courts.

In recent years, American courts have deployed "recharacterization" in addition to subordination.[50] This concept, unlike subordination, does not necessarily require "inequitable conduct" on the part of shareholders.[51]

4.1.3 Literature

The literature published before the 1970s attempted to classify cases where shareholder loans were subordinated and to identify the conditions for subordination. Herzog and Zweibel (1961) mentioned the following six conditions: "consensual subordination," "capital contribution," "fraud by the claimant," "illegality in the origin or enforcement of the claim," "equitable considerations," and "instrumentality."[52] Gleick (1961) also pointed out the following six situations: "consensual subordination to all creditors or part of them," "fraudulent conduct or a breach of fiduciary duty," "instrumentality," "undercapitalization," "joint ventures," and "claims as a result of illegal schemes or conduct."[53] While these attempts may be useful for predicting subordination, they do not clarify the function of subordination.

On the other hand, the literature published after the 1970s focused on the function of subordination. They can be divided into three perspectives. The first perspective is that loans from a parent company to a subsidiary should be always subordinated because the loans are unlikely to maximize the benefits of the

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[46] 563 F.2d 692 (5th Cir. 1977).

[47] *See e.g.*, *In re Fabricators, Inc.*, 926 F.2d 1458 (5th Cir. 1991), *In re Lifschultz Fast Freight*, 132 F.3d 339 (7th Cir. 1997), and *SI Restructuring, Inc. v. Faulkner (In re SI Restructuring, Inc.)*, 532 F.3d 355 (5th Cir. 2008).

[48] Andrea DeNatale & Prudence B. Abram, *Doctrine of Equitable Subordination as Applied to Nonmanagement Creditors*, 40 BUS. LAW. 417, 422 (1985).

[49] Jonathan M. Landers, *A Unified Approach To Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 597-598 (1975).

[50] Hilary A. Goehausen, *You Said You Were Going to Do What to My Loan?,* 4 DEPAUL BUS. & COMM. L. J. 117, 118 (2005).

[51] DANIEL J. BUSSEL & DAVID A. SKEEL, BANKRUPTCY 384 (2015).

[52] Asa S. Herzog & Joel B. Zweibel, *The Equitable Subordination of Claims in Bankruptcy*, 15 VAND. L. REV. 83, 85 (1961).

[53] Harry S. Gleick, *Subordination of Claims in Bankruptcy under the Equitable Power of the Bankruptcy Court*, 16 BUS. LAW. 611, 612 (1961).

subsidiary.[54] Although the second perspective opposes such an opinion, it argues that shareholder loans should be subordinated when the other general creditors misunderstand that the loans by a parent company are included in the subsidiary's assets.[55] The third view, which is the most widely accepted in recent studies,[56] views subordination as a way to supplement fraudulent conveyance law (*a simple remedy against exploitation*).[57] However, this view also understands that subordination is likely to be used in undercapitalization cases (*undercapitalization*).[58]

4.2 Germany

4.2.1 The outline of subordination

In Germany, shareholder loans have been regulated by both case law and statutory law (§ 32a and § 32b GmbHG [the Limited Liability Companies Act]) legislated in 1980.[59] Under both, which were called "equity substitution law (*Eigenkapitalersatzrecht*)", shareholder loans made or left during a company's crisis had to be subordinated, and the repayment of those loans also had to be canceled (except for the loans by shareholders with less than 10 percent equity).[60] A company's crisis means "overindebtedness," "inability to pay debt," and "a third party would not have given a loan to debtor companies."[61] In contrast to American law, German law did not require "inequitable conduct" on the part of shareholders. Also, the case law treated rental properties from shareholders to the company in financial distress as equity substitution. As a result, shareholders had no right to charge rent to the company or to segregate the rental properties from it.[62]

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[54] Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy,* 42 U. CHI. L. REV. 589, 640 (1975).
[55] Richard A. Posner, *The Rights of Creditors of Affiliated Corporations,* 43 U. CHI. L. REV. 499, 523 (1975).
[56] David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination*, 45 WM. & MARY L. REV. 157, 200 (2003), and Adam Feibelman, *Equitable Subordination, Fraudulent Transfer, and Sovereign Debt*, 70 LAW & CONTEMP. PROBS. 171, 176 (2007).
[57] ROBERT CHARLES CLARK, CORPORATE LAW 63 (Aspen, 1986).
[58] For more detail on literature and cases involving shareholder loans in the U.S., *see* Tomoki Masuda, *Kabunushi Saiken no Retugotekitoriatsukai no Kinou ni tuite* [*A Function of the Subordination of Shareholder Loans*], 372 DŌSHISHA HŌGAKU 1523 (2015).
[59] Horst Eidenmüller, *Gesslschafterdarlehen in der Insolvenz*, in FESTSCHRIFT FÜR CLAUS-WILHELM CANARIS ZUM 70. GEBURTSTAG, BAND II 51 (2007).
[60] *Id.* at 51.
[61] Verse, *supra* note 24, at 1112.
[62] Ulrich Huber & Mathias Habersack, *Gmbh-Reform: Zwölf Thesen zu einer möglichen Reform des Rechts der kapitalerserzenden Gesellschafterdarlehen*, Betriebs-Berater [BB] 1, 1 (2006).

In 2008, the regulation of shareholder loans was significantly revised (§ 39(1) para 5 Insolvenzordnung) in order to simplify the old law. Consequently, "equity substitution law" was abolished, and now shareholder loans are automatically subordinated whether they are made or left during a company's crisis (*automatic subordination*). "Automatic subordination" is based on the perspective that shareholder loans are questionable financing. According to this perspective, if shareholders choose to make a loan to the company, instead of providing a capital contribution, they are assumed to abuse their rights as shareholders.[63]

4.2.2 Case law

Historically, German courts emphasized that shareholders should take responsibility for deciding to provide a loan to the company during a financial crisis instead of providing a capital contribution.[64] Such responsibility was called "the responsibility for a consequence of financing decisions (*Finanzierungsfolgenverantwortung*)." German courts have repeatedly highlighted that a main problem is how to deal with "a continuation of the business in insolvency by shareholder loans" (*the continuation of the business in insolvency*). The regulation of rental properties from shareholders to the company is also justified by this perspective.[65]

However, after 2008, German courts formally apply the revised law (*automatic subordination*) to shareholder loans.[66] Therefore, it is not necessary to prove that shareholder loans are "equity substitution."

4.2.3 Literature

The literature strongly criticized "the responsibility for a consequence of financing decisions" mentioned in German courts because it provides no reason why shareholders should bear that responsibility. If such responsibility is based on shareholders' duty against creditors, monetary liability should be used instead of subordination.[67] Moreover, such responsibility would obligate shareholders to

[63] Markus Gehrlein, *Das Eigenkapitalersatzrecht im Wandel seiner gesetzlichen Kodifikationen* BB3, 3 (2011).
[64] Bundesgerichtshof[BGH][Federal Court of Justice] Sept. 27, 1976, 67 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN[BGHZ] 171 and BGH Nov. 7, 1994, 127 BGHZ 336.
[65] BGH Oct. 16, 1989, 109 BGHZ 55.
[66] BGH Apr. 30, 2015, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT[ZIP] 1130 (2015) and BGH June 29, 2015, 204 BGHZ 83.
[67] Andreas Cahn, *Gesellschafterfremdfinanzierung und Eigenkapitalersatz*, DIE AKTIENGESELLSCHAFT[AG] 217, 218 (2005).

provide additional capital.[68]

Although many studies have attempted to explain the need for subordination, they have failed to do it. A classic account, referenced in Japanese studies, insisted that shareholder loans mislead potential creditors into providing loans to debtors who appear to have the ability to pay (*the creation of the ability to pay in appearance*). As a result, it was argued that shareholder loans should be subordinated for this reason.[69]

Furthermore, Gelter (2006) discussed how to control shareholders' incentive to take on excessive risk with subordination (*excessive risk taking*).[70] He suggested subordination is used as a penalty for inefficient rescue attempts which the ex-ante expected total value of the company is less than its liquidation value at that time, and pointed out that implementing other more severe methods (ex. fiduciary duties of directors towards creditors) are better than subordination in terms of deterring inefficient rescue attempts.[71]

4.3 Summary

The reasons for subordination of shareholder loans differ greatly between the U.S. and Germany. American courts mentioned a variety of reasons such as "undercapitalization," "exploitation," and "inequitable conduct." In particular, the widely accepted view highlighted the use of subordination for "exploitation" in practice, while pointing out that subordination was sometimes employed in the case of "undercapitalization."

By contrast, German courts did not require "inequitable conduct" by shareholders, but rather based subordination on "a continuation of the business in insolvency by shareholder loans" prior to 2008. The classic view understood subordination as the remedy against "the creation of the ability to pay in appearance." Now, German law provides that shareholder loans should be

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[68] Huber & Habersack, *supra* note 62, at 1.

[69] Marcus Lutter & Peter Kommelhoff, *Nachrangiges Haftkapital und Unterkapitalisierung in der GmbH*, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT[ZGR]31, 36 (1979).

[70] Martin Gelter, *The subordination of shareholder loans in bankruptcy*, 26 INT. REV. L. ECON. 478, 479 (2006).

[71] There are additional perspectives. The first perspective argues that limited liability transfers the risk of loss to creditors and that shareholders with loans to the company have a more advantageous position compared with other creditors. Accordingly, shareholder loans should be treated as equity capital first (Ulrich Huber, *Gesellschafterdarlehen im GmbH- und Insolvenzrecht nach der MoMiG-Reform*, IN LIBER AMICORUM FÜR MARTIN WINTER (2011) 265).

The second perspective is that shareholders are more well-informed about the company than other creditors and that shareholder loans should be subordinated to other creditors (Ulrich Ehricke, *§39*, IN MÜNCHENER KOMMENTAR ZUR INSOLVENZORDNUNG (Kirchhof & Eidenmüller & Stürner ed., 2013), margin number 57).

For more detail on literature and cases involving shareholder loans in Germany, *See* Tomoki Masuda, *Doitsu ni okeru Shainkashituke ni taisuru Kiritsuduke* [*The regulation of shareholder loans in Germany*] 383 DŌSHISHA HŌGAKU 623 (2016).

automatically subordinated in order to simplify the former law, but it is unclear why shareholder loans should always be subordinated.

5 The function and need for subordination in Japan

This section considers the individual reasons for subordination of shareholder loans found through comparative law and the need for subordination in Japan. This paper has found the following major reasons for subordination: "the creation of the ability to pay in appearance" (Germany), "the continuation of the business in insolvency" (Germany), "undercapitalization" (the U.S.), "a simple remedy against exploitation" (the U.S.), "excessive risk taking" (Germany), and "automatic subordination" (Germany). Furthermore, this paper considers subordination for "involuntary (tort) creditors," although the previous studies on subordination rarely discussed it.

In addition to these reasons, some studies in Japan and some cases in the U.S. pointed out "a breach of fiduciary duty," "inequitable conduct," "instrumentality," and "recharacterization," but this paper does not discuss them. This is because "a breach of fiduciary duty" reflects only basic norms and does not reflect creditors' interests in being protected. "Inequitable conduct" and "instrumentality" are ambiguous and include a variety of concepts.[72] Moreover, "recharacterization" addresses a different problem from subordination, and "the focus of the recharacterization inquiry is whether a debt actually exists."[73]

5.1 The creation of the ability to pay in appearance

Should subordination of shareholder loans be used for the creation of the ability to pay in appearance? In other words, do shareholder loans mislead potential creditors into providing a loan to debtor companies that are overestimated in their ability to pay?

This reason cannot justify subordination. First, because the total amount of debt, not equity, increases the liabilities of balance sheets when shareholders make a loan to the company, creditors will not estimate the company to become improved in its ability to pay (not to improve equity ratio).

Second, even if creditors estimate the solvency of a debtor based only on cash flow, this reason is unjustified because the change in cash flow will occur even if a loan is made by other creditors, such as a bank. Accordingly, if shareholder loans

[72] Egashira, *supra* note 28, at 303.
[73] *In re SubMicron Systems Corp.*, 432 F.3d 448 (3d Cir. 2006). *See* Andrea Dardano et al., *Recharacterization of Debt to Equity under U.S. Law and Its Effects on Corporate Governance*, 11 CORP. OWNERSHIP & CONTROL 435, 435 (2013).

are subordinated for such a reason (the change in cash flow), other creditor loans should also be subordinated. Not to mention, under such treatment of loans, no one would loan money to companies.

In short, it is suspicious that shareholder loans mislead potential creditors into providing loans to debtors, and the change in cash flow is not a problem unique to shareholder loans.

5.2 The continuation of the business in insolvency

German courts have pointed out repeatedly that shareholder loans enable companies to continue the business in insolvency. Thus, subordination of shareholder loans can be seen as a sanction against it. This can be understood relative to a director's duty to file a petition for bankruptcy. In Germany, once a company becomes insolvent (overindebtedness or inability to pay debt), directors should file a petition for bankruptcy within three weeks (§ 15(a) Insolvenzordnung).[74] Nevertheless, if they decide to continue their business without filing a petition, they should be liable for the damages to creditors due to that decision (this liability is called *Insolvenzverschleppungshaftung*).[75] Thus, German law negatively evaluates "the continuation of the business in insolvency."

However, this reason is not persuasive under Japanese law. Unlike German law, Japanese law does not provide for such a director's duty. Even if the director's decision in insolvency is litigated, it would be settled through Art.429(1) of the Companies Act, which provides that "[if] Officers, Etc. are with knowledge or grossly negligent in performing their duties, such Officers, Etc. shall be liable to a third party for damages arising as a result thereof." This law is intended to allow creditors (third parties) to bring a direct action against directors for damages that they have suffered due to the directors' gross negligence. Under this law, the decision to continue the business during financial difficulties is just one of the many factors Japanese courts consider when judging a director's liability. Consequently, it is difficult to base subordination in Japan on such a duty.

5.3 Undercapitalization

Case law in the U.S. and some studies in Japan (for example, Egashira (1980), Katagi (1982), and Matsushita (1990)) focused on "undercapitalization." Indeed, in some cases, subordination of shareholder loans has been employed where companies were undercapitalized or overly indebted. However, it is natural that

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[74] Derlef Kleindiek, *Anh zu §64 Rn. 1.*, in GMBH-GESETZ KOMMENTAR (Lutter & Hommelhoff, ed., 2016) margin number 1.
[75] ANDRE TORSTEN WEIß, INSOLVENZSPEZIFISCHE GESCHÄFTSFÜHRERHAFTUNG 127 (2017).

companies find themselves in such a situation when their own assets are insufficient to pay all of their creditors. If companies have enough equity, creditors can collect on the loans in most cases. This was highlighted in *In re Lifschultz Fast Freight*:[76]

> Because mere undercapitalization does not, and should not, justify equitable subordination, we think the better view is that, while undercapitalization may indicate inequitable conduct, undercapitalization is not in itself inequitable conduct.
> . . . Every firm in bankruptcy, and many outside, can in some sense be said to be undercapitalized--which is to say, to have insufficient funds on hand.
> . . . So what is wrong with undercapitalization in itself?

In sum, if "undercapitalization" is used as a basis to subordinate shareholder loans to other creditors, subordination should be used whenever creditors cannot collect on all loans in bankruptcy proceedings. However, at best, "undercapitalization" may indicate some risk (excessive risk taking, etc.) arising from such a situation. Accordingly, we should pay attention not to undercapitalization itself, but to the concrete risks arising from undercapitalization.

5.4 A simple remedy against exploitation

How does subordination of shareholder loans work for exploitation? As mentioned above, in the recent studies in the U.S., subordination is understood as "a simple remedy against exploitation."[77] According to this view, it is difficult for creditors to prove the individual damages caused by exploitation because they must expend a great deal of time and resources to prove it. Dividends rules and fraudulent conveyance law do not handle exploitation well. In contrast, subordination does not require proof of specific damages from individual transactions or dividends, and it is enough to determine that a series of inequitable conduct by controlling shareholders amounts to exploitation. As a result, subordination contributes to a reduction of litigation costs and time, and thus functions as "a simple remedy against exploitation."

However, it is unnecessary to use subordination against exploitation to provide a remedy where the dividends rules and fraudulent conveyance law do not. First, if exploitation by controlling shareholders lasts for a long time, other general creditors are able to take self-defensive actions based on that fact. For example,

[76] 132 F.3d 339 (7th Cir. 1997).
[77] CLARK, *supra* note 57, at 63.

they may incorporate the exploitation in the terms of the contract between them and the companies (increasing the interest rate, etc.). If the exploitation is not continuous but rather a single act, Art. 424(1) of the Civil Code (the rescission of fraudulent act)[78] is available in Japan, and requesting rescission is not costly.

In addition, other creditors need not directly monitor the exploitation by controlling shareholders because it should be reflected in the companies' financial statements. For example, if the controlling shareholders have the companies unreasonably discount trades between them and the companies, the companies' profits would be reduced. The creditors can set the interest rates and terms based on the financial statements. If the exploitation has existed for a long time, creditors have enough time to respond to it. Accordingly, some self-defenses that are available to creditors may be more beneficial than subordination.

5.5 Excessive risk taking

As Gelter (2006) revealed, subordination of shareholder loans can control shareholders' incentive to engage in excessive risk taking because subordination can internalize the damage resulting from such risk taking to shareholders by changing shareholder loans to equity.[79]

Perhaps, German law may need to use subordination for excessive risk taking that is likely to be conducted during insolvency or near insolvency. Suppose that shareholders hold director positions, which is often the case in closely-held companies, and that they take on excessive risk without filing for bankruptcy. In such a case, under German law, creditors (or trustees) who challenge such practices must prove damages with accuracy (but the amount of their claims), as well as the point when directors should have filed for bankruptcy. Calculating damages is very difficult because creditors must calculate the repayments that would have been available in bankruptcy proceedings had the directors fulfilled their duties properly. This is a heavy burden for creditors, and thus this law is known as "Unused law (totes Recht)."[80] Accordingly, subordination may be a greater deterrent against excessive risk taking than this law.

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[78] Article 424(1) of the Civil Code provides as follows:

> An obligee may demand the court to rescind any juristic act which an obligor commits knowing that it will prejudice the obligee; provided, however, that, this shall not apply to the cases where any person who benefits from such act, or any person who succeeds to such benefit, did not know, at the time of such act or succession, the fact that the obligee is to be prejudiced.

[79] Gelter, *supra* note 70, at 487.

[80] *Weiß*, *supra* note 75, at 132.

In Japan, Art. 429(1) of the Companies Act can be used to pursue directors' liability based on excessive risk taking. Unlike German law, Art. 429(1) is relatively useful for general creditors. It does not require creditors (third parties) to calculate their damages with accuracy and they can always demand the amount of their claims, and Japanese courts tend to easily recognize the gross negligence of directors in practice.[81] If shareholders are not in a director's position, the corporate veil may be pierced to hold shareholders liable. It is similar to subordination in terms of function.

Moreover, under both rules (Art. 429(1) of the Companies Act and piercing the corporate veil), the extent of compensated damages are not limited to the amount of shareholder claims.[82] By contrast, subordination can cover only the amount of shareholder loans regardless of the amount of damages to creditors. Thus, even if subordination is used to deter excessive risk taking, there will be cases where subordination cannot prevent shareholders from taking excessive risk because subordination cannot internalize all of the externalized costs onto the shareholders.[83]

5.6 Automatic subordination

Should shareholder loans be automatically subordinated like under German law after 2008? There are some problems in this approach.

If shareholder loans are always subordinated, it may discourage shareholders from bailing out companies with loans, even when the rescue attempt is efficient.[84] To avoid such a problem, it is more desirable to directly focus on the validity of the rescue attempt itself rather than shareholder loans.

Perhaps, automatic subordination may be justified from the view that courts are not able to identify whether or not the rescue attempt with shareholder loans is efficient.[85] As a result, courts could use shareholder loans as an alternative indicator of excessive risk taking. However, looking at the cases where subordination has been used in the U.S. and Germany, there is no indication that after shareholders make a loan to a company in crisis, the company engages in excessive risk taking.[86] Rather, there are many cases where companies in

[81] Yoichi Takahashi, *Torishimariyaku no Taidaisansha Sekinin ni kansuru Hanrei Hōri ha Kongo mo Iji sarerubekika? (2/Kan)* [*Should We Maintain the Case Law Rule about Directors' Liability to Third Parties? (2/final)*] 178 - 2 HOGAKU RONSŌ 1, 13 (2015).
[82] Gelter, *supra* note 70, at 499.
[83] *Id.* at 487.
[84] *Id.* at 487.
[85] David A. Skeel & Georg Krause-Villmar, *Recharacterization and the Nonhindrance of Creditors*, 7 EUR. BUS. ORG. L. REV. 259, 266 (2006) and Andreas Cahn, *Equitable Subordination of Shareholder Loans?*, 7 EUR. BUS. ORG. L. REV. 287, 293 (2006).
[86] An exceptional case is *Gannett Co. v. Larry*, 221 F.2d 269 (2d Cir. 1955).

insolvency decide to continue business through shareholder loans. It is difficult to believe that after shareholder loans are made, shareholders (or directors) choose to take on excessive risk only in Japan. Thus, shareholder loans are inappropriate as alternative indicators of excessive risk taking.

5.7 Involuntary (Tort) creditors

In the above analysis, this paper assumed that creditors can engage in self-defense in the case of exploitation or excessive risk taking. However, some creditors cannot use self-defense, including tort creditors. Therefore, subordination of shareholder loans may be employed for them.

However, the damages that tort creditors have suffered do not match the amount of subordinated claims. Accordingly, subordination cannot internalize tort costs into shareholders completely as it does in the cases of excessive risk taking In addition, from the viewpoint of compensation for damages, subordination is not a desirable approach. This is because subordination affects not only tort creditors, but also all creditors including voluntary creditors who can use self-defense. Thus, it is preferable for involuntary creditors to pursue a director's liability to a third party (Art. 429(1) of the Companies Act) or pierce the corporate veil to directly obtain compensation.

6 Conclusion

This paper argues that there is no need to actively use subordination of shareholder loans in Japan, as other laws (including self-defense by creditors) can better address the problems arising from a variety of situations that are revealed through comparative law. Instead, if we introduce subordination into Japanese law based on ambiguous reasons, it may hinder efficient rescue attempts or economic activities in closely-held companies or corporate groups.