

Shareholder climate proposals in Japan

Summary

- Last year, Japan's first ever shareholder proposal on climate change was submitted at Mizuho Financial Group, receiving nearly 34% shareholder support.
- Under Japanese corporate law, the sole legal pathway for a shareholder proposal on climate change is via an amendment to a company's articles of incorporation (as at Mizuho Financial Group last year).
- Shareholder proposals in the form of amendments to articles of incorporation of Japanese companies are relatively common in Japan, with 31 submitted in 2020, and in other jurisdictions.
- The legal effect of such shareholder proposals is the same as the "special resolutions" on climate change filed and passed at UK companies including Barclays, BP, Royal Dutch Shell, Rio Tinto and Anglo American, which take binding effect as part of the companies' constitutions.
- Investors should support reasonable shareholder proposals calling for strengthened disclosure and management of climate-related information in line with the goals of the Paris Agreement.

Shareholder climate proposals in Japan

Last year in Japan, a landmark shareholder proposal on climate change at Mizuho Financial Group saw substantial 34% shareholder support.¹ It called on the company to disclose a plan outlining its business strategy to align its investments with the goals of the Paris Agreement. This first-of-its-kind submission in Japan was part of an ever-growing global movement of shareholder proposals on climate change, which have encouraged adoption of stronger climate policies at major corporations. This continued growth of shareholder climate proposals reflects the clear financial materiality of climate risks and opportunities

¹ Responsible Investor, *Japan's first climate resolution receives substantial support at Mizuho*, July 2020, available at <https://www.responsible-investor.com/articles/japan-s-first-climate-resolution-receives-substantial-support-at-mizuho>

and an ongoing lack of alignment of many companies' business strategies with the sustainability principles embodied in their various climate-related pledges.²

Reason for framing proposals as amendments to the articles of incorporation

The Mizuho Financial Group shareholder proposal took the form of an amendment to the company's articles of incorporation.³ This is the only available mechanism under Japanese corporate law for addressing climate change-related issues in a shareholder proposal.

In a Japanese joint stock company with a board of directors, a shareholder proposal can be filed only with respect to the matters that shareholders are entitled to vote on and resolve at a shareholders' meeting under either the Japanese Companies Act or the company's articles of incorporation. A shareholder climate proposal would not be among the limited matters prescribed for resolution at a shareholders' meeting (such as appointing a director or approving a merger) under the Companies Act.⁴ It would instead require an amendment to the articles of incorporation. Unless a shareholder climate proposal is filed in the form of an amendment to the company's articles of incorporation, it is highly likely that it would be rejected by the board as impermissible under the Act. Even if a shareholder proposal in another form were to be accepted by the board and resolved at a shareholders' meeting, such resolution could still be regarded as void if it were not on a matter that is permitted to be resolved by shareholders under the Companies Act or the articles of incorporation.⁵

Shareholder proposals (including amending articles) in Japan

According to international law firm White & Case, in the 2020 annual general meeting ("AGM") season, at least 55 Japanese public companies faced shareholder proposals, a 31% increase since the 2018 season.⁶ More than half (31) of these shareholder proposals were structured as amendments to a company's articles of incorporation. The vast majority were not related to environmental matters but rather to governance issues such as disclosure of capital costs or disposal of strategic holdings.

In a similar form to the Mizuho Financial Group proposal, shareholder proposals to add a clause to the articles of incorporation restricting the operation of coal-fired power plants or replacing nuclear power plants with renewable energy sources have been filed at several Japanese electricity utilities (in one case receiving nearly 20% shareholder support).⁷ These proposals have not, to date, attracted the

² For instance, a number of Japanese companies, including Mitsubishi UFJ Financial Group, Mizuho Financial Group and Sumitomo Mitsui Banking Corporation (Japan's three megabanks), support the Task Force for Climate-related Financial Disclosures recommendations ("TCFD"), the UN Principles for Responsible Banking and the Japan Climate Initiative.

³ The shareholder proposal is available at page 55 of the Convocation Notice of the 18th Ordinary General Meeting of Shareholders FY2019, available at https://www.mizuhogroup.com/binaries/content/assets/pdf/mizuhoglobal/investors/financial-information/stock-information/resolution18_eng.pdf

⁴ See article 303(1), and article 295(2) of the Companies Act, which provide the basic framework. Unofficial translation of the Companies Act (Act No. 86 of 2005) available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=2035&vm=02&re=02>. Also see articles 329, 339, 454, 783, 795, 804 and 466 of the Companies Act. Such matters include (i) appointment/removal of directors; (ii) disposition of retained earnings; (iii) approval of merger, divisive merger or other fundamental organizational changes between stock companies; and (iv) amending a company's articles of incorporation.

⁵ In a decision of the Tokyo High Court dated 29 November 1994, it was found that a shareholder resolution to withdraw an appeal to a higher court was void because such matter was not provided as a shareholder resolution matter under the articles of incorporation of the company.

⁶ See White & Case, *Japan's 2020 Proxy Season Results Announced*, July 2020, available at <https://www.whitecase.com/publications/alert/japans-2020-proxy-season-results-announced>

⁷ It has been the case at Chubu Electric Power Co., Tokyo Electric Power Company Holdings, Inc., Kansai Electric Power Co, Inc. See for a summary in English of these proposals Dr. Yoshihiro Yamada, Dr. Janis Sarra, Dr. Masafumi Nakahigash, *Directors' Duties Regarding Climate Change in Japan* (CCLI Paper), February 2021, available at <https://law-ccli-2019.sites.olt.ubc.ca/files/2021/02/Directors-Duties-Regarding-Climate-Change-in-Japan.pdf> (p. 29 et seq.)

widespread Japanese and international financial press attention and level of institutional investor support of the Mizuho Financial Group shareholder proposal.

Majority requirements and effects on corporate behaviour

Under Japanese law, a shareholder proposal seeking to amend the articles of incorporation of a joint stock company has to take the form of a special resolution. In order to pass, it needs a two-thirds majority vote of the shareholders present at the meeting. The articles of incorporation of a company may increase this majority requirement.⁸

Even if a shareholder proposal related to climate issues has not received sufficient support to be adopted at the AGM, it can have a direct effect on a company's behaviour. Blackrock analysts found in the United States that *"for shareholder proposals that received 30-50% support, 67% resulted in companies fully or partially meeting the ask of the proposal."*⁹ In Japan, the Mizuho Financial Group climate proposal was opposed by the company, but resulted in it adopting a pledge – prior to the AGM – to cease financing of coal projects by 2050. This was followed by Sumitomo Mitsui Financial Group announcing that it would also stop lending to new coal plants. In 2020 in the United Kingdom, responsible investment group ShareAction coordinated a group of investors that filed a shareholder proposal aimed at phasing out fossil fuel financing at Barclays, which in turn prompted the bank to table its own net-zero ambition resolution. The board-led climate resolution received 99.9% support.¹⁰ In 2021, ShareAction coordinated a group that filed a shareholder proposal at HSBC aimed at putting in place a strategy to reduce exposure to fossil fuels assets and short-, medium- and long-term targets aligned with the goals of the Paris Agreement, which similarly prompted the bank to propose its own version of the shareholder proposal, to be voted on at the 2021 AGM.¹¹

Shareholder proposals in Japan compared to the United Kingdom

Shareholder proposals in Japan seeking to amend companies' articles of incorporation have the same legal effect as the many climate-related shareholder resolutions filed at high-profile UK companies in recent years, which often passed with board support. These UK resolutions have been structured as special resolutions, which require 75% shareholder support to pass. They take effect as part of the company's constitution once passed.¹²

In other words, shareholder proposals such as the 2020 Mizuho Financial Group proposal are no more "heavy-handed" in their effect than equivalent climate-related special resolutions seen in the United Kingdom, such as those passed at Barclays in 2020 and BP in 2019.¹³ Each of the *"Aiming for A"* resolutions passed in 2015 and 2016 at Royal Dutch Shell, Rio Tinto and Anglo American¹⁴ also took the

⁸ See article 309(2)(xi) of the Companies Act. Unofficial translation of the Companies Act (Act No. 86 of 2005) available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=2035&vm=02&re=02>.

⁹ See BlackRock, Our 2021 Stewardship Expectations, Global Principles and Market-level Voting Guidelines, 2021, available at <https://www.blackrock.com/corporate/literature/publication/our-2021-stewardship-expectations.pdf> (p. 5)

¹⁰ See voting results for resolution 29 in Barclays PLC, Results of Annual General Meeting (2020), available at <https://home.barclays/content/dam/home-barclays/documents/investor-relations/reports-and-events/AGM2019/AGM%202020%20Poll%20results%20RNS.pdf>

¹¹ HSBC, *HSBC announces resolution on climate change*, March 2021, available at <https://www.hsbc.com/-/files/hsbc/investors/results-and-announcements/stock-exchange-announcements/2021/march/sea-210311-climate-resolution-rns.pdf>

¹² See sections 17, 29 and 283 of the Companies Act 2006, available at <https://www.legislation.gov.uk/ukpga/2006/46/section/17>, <https://www.legislation.gov.uk/ukpga/2006/46/section/29>, and <https://www.legislation.gov.uk/ukpga/2006/46/section/283>

¹³ Text of the Climate Action 100+ shareholder resolution (resolution 22), available at <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/investors/bp-agm-notice-of-meeting-2019.pdf>

¹⁴ See for instance for wording of the Aiming for A resolution (resolution 21): 2016 AGM Notice available at <https://www.angloamerican.com/-/media/Files/A/Anglo-American-Group/PLC/investors/reports/agm-2016-voting-results.pdf>, voting results (96% of support), available at <https://www.angloamerican.com/-/media/Files/A/Anglo-American-Group/PLC/investors/reports/agm-2016-voting-results.pdf>

form of special resolutions and therefore took effect as part of the companies' constitution under UK company law.

Board and investor support for reasonable shareholder climate proposals

Boards of Directors in Japan are legally obliged to properly identify and manage climate risk.¹⁵ We would encourage boards to support reasonable shareholder proposals on proper disclosure and management of climate change risks and opportunities in alignment with the goals of the Paris Agreement, as part of properly discharging their existing legal duties in relation to climate change.

Principles for Responsible Investment (PRI), an initiative in partnership with UNEP Finance Initiative and UN Global Compact, recently released a report restating the importance for responsible investors to vote in favor of resolutions aimed at aligning a company's corporate policy with the goals of the Paris Agreement. PRI highlights that "*investors should support all resolutions which, if successful, would be consistent with their voting principles.*"¹⁶

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¹⁵ See Dr. Yoshihiro Yamada, Dr. Janis Sarra, Dr. Masafumi Nakahigash, *Directors' Duties Regarding Climate Change in Japan* (CCLI Paper), February 2021, available at <https://law-ccli-2019.sites.olt.ubc.ca/files/2021/02/Directors-Duties-Regarding-Climate-Change-in-Japan.pdf>

¹⁶ Principles for Responsible Investment (PRI), *Making voting count*, March 2021, available at <https://www.unpri.org/download?ac=12730> (p. 5)