

The State of IG in Japan and an Unexplored Approach to Opening Up the Conservative Corporations

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Information Governance (IG) is still a new term in Japan. Nikkei BP, one of Japan's foremost business publications, has a definition that is not too different from old fashioned record management except it happened to use some software to do it digitally. Their definition has not changed since 2007.¹ As an article meant to be part of their dictionary of business terms and concepts, it is emblematic of the state of corporate Japan. It is not surprising, however, that electronic discovery service providers have developed their offerings to include 'big data' analytical tool sets that can be deployed towards IG purposes. This brief article aims to inform IG practitioners about the state of IG in Japan, and describes some of the challenges one can expect there. It concludes with a suggestion that the top leadership of corporations must be convinced of the value IG adds to the bottom line.

The general sentiment in Japan is that export oriented manufacturers are specifically targeted for FCPA, trade regulations, and especially antitrust violations. This is untrue when one examines the data for the FCPA violation, where American and Korean individuals and legal entities have been sanctioned far more frequently.² There is a strong case to make for antitrust enforcement, where a plurality (52 of the 123) of fines for Sherman Act violations greater than \$10 million were paid by Japanese companies between 1995 and 2015. This amounted to \$3612.43 million in fines.³ Of this, \$2905.48 million was fined since 2009. This is roughly a staggering half billion dollars in fines per year. A top Japanese attorney confided his strong suspicion that Japan is a target because there yet exists a robust manufacturing sector, and aggressive enforcement serves the US holding companies in weakening their competition so their overseas subsidiaries may expand market share—also through anti-competitive means.

¹ Kazuhiro Yoshikawa. *IT Report: What Information Governance is*. (Feb. 7, 2007)

<http://itpro.nikkeibp.co.jp/article/Keyword/20070207/261051/>

² see e.g. OECD Working Group on Bribery: *2013 Data on Enforcement of the Anti-Bribery Convention*

<http://www.oecd.org/daf/anti-bribery/Working-Group-on-Bribery-Enforcement-Data-2013.pdf>;

³ Dept. of Justice, Antitrust Division. *Sherman Act Violations Yielding a Corporate Fine of \$10 million or More*.

<http://www.justice.gov/atr/public/criminal/sherman10.pdf>

Be that as it may, Japanese companies remain vulnerable to foreign-initiated investigations, and Black Swans⁴ are now a regular sight in Japan. Half a billion dollars in losses due to regulatory enforcement for one company over decades may be written off as a Black Swan event. Such occurrence every year should be considered a regular disaster demanding a constructive response.

IG would certainly assist in proactively detecting and resolving latent legal issues, before exploding in the company's face. The primary challenge in this field remains the same in Japan, however: How to approach vulnerable businesses and convince them of the practical value of implementing this cutting edge practice.

Japan is an ironic country. It is renowned for its high tech culture, constantly improving and adopting new things. However, its globally recognized corporations tend to be far more conservative, shunning whatever may upset the status quo. Despite years of law suits, investigations, settlements, fines and jail terms, many Japanese companies still employ relatively primitive forms of records management and electronic discovery. They hold fast to corporate hierarchy and generally rely upon top leadership to initiate any changes. At present, IG does not register.

Corporations have a general affairs department that exists in a supportive role of the corporation, from office supplies procurement to payroll, investor relations and records management. There might be an IT department, if it is not already part of general affairs, which does not keep track of corporate ESI. Instead, it is charged with hardware accounting and maintenance, email account maintenance, general software troubleshooting, and implementing their document retention protocol (if they even have one!). It is not unheard of where the company deletes all ESI every two weeks, while employees may retain any ESI at their discretion. Combined with Japan's strong legal protection of ESI in the possession of private persons, discovery can be a long, costly struggle. The typical solution should involve a thorough reassessment and reform of ESI protocol, with a crisis management system in place specifically for international discovery. Yet this seldom occurs meaningfully.

There are issues to consider in the legal department as well. Firstly, it is accepted to be a cost/loss center. It is funded to address issues, not to create value or profit. Secondly, addressing internal legal issues is part of compliance work, even if reactively. Personnel are not particularly rewarded for proactive work as this is

⁴ The Black Swan is a recently popularized term of art conceptualizing unanticipated, statistically improbable events that nevertheless occur, and have dire consequences to those unprepared.

expected of them, while unrealized or averted costs and damages are difficult to measure. Thirdly, it does not coordinate with the IT department, and has not integrated big data tools to detect suspicious communication or activities. The personnel also have little experience or knowledge about IG or electronic discovery's latest or best practices. Thus far, there has not been sufficient departmental incentive.

The list of particular issues could go on, but the underlying problem is that the implementation of IG cannot be initiated by managers and personnel within the departments. Thus, it may not be productive to hold seminars to raise the awareness of them. Our energies should instead be directed towards the shareholders and the board of directors.

In Japan, many of the board members are also top corporate officers, and at least theoretically answerable to the shareholders. In the strongly hierarchical, top-down corporate culture of Japan, only the board members, and especially the CEO and chairperson, are in the position to initiate and implement reforms. It is their fiduciary duty to maximize shareholder value, and ignoring the potential of IG to avert or reduce an upwards of half a billion dollars in legal damages may one day be judged to be a breach of that duty. Shareholders should also become educated and pressure the board to implement an IG program.

While collectively Japanese corporations may approximate ossified, inflexible institutions, we can return to focusing on key decision makers that could influence the directors. Japan has a strong robotics and artificial intelligence research sector, occasionally gracing the news headlines with a quirky development.⁵ There is a network of relatively new companies that would be thrilled to apply machine learning technologies to aid their country's companies. Perhaps they are a licensing agreement away from adapting US technologies for domestic consumption. Big Data is already a silent boom, though slowly implemented at ponderous speeds, and primarily towards consumer data mining and analysis. It may be opportune to also leapfrog into AI enhanced information governance before the older varieties of analytical tools become entrenched.

⁵ While there are creepier examples, see, e.g., the most mainstream and commercialized AI robot would be Softbank's, which can read emotion! Akihabaranews, *SoftBank - Humanoid Robot "Pepper" with Artificial Intelligence out for sale in 2015*. 6 Apr. 2014. <http://akihabarnews.com/2014/06/06/article-en/softbank-humanoid-robot-pepper-artificial-intelligence-out-sale-2015-175419671>

While this may seem to be a monumental task, large corporations' shareholders are other large legal entities, so there will not be too many people that need convincing. Part of their job is to be on top of the latest developments in technologies and best practices. Also, Japan is an interesting society that could adopt changes rapidly, once somebody blazes the uncharted territory. It is my sense that the barrage of ongoing investigations and lawsuits, and the likelihood of future problems, would make board members and shareholders more amenable to the idea of creating or outsourcing a Chief IG Officer. Once the most visible corporate titans begin adopting the best practices of IG, it would not be long before Japan catches up.