DOING BUSINESS IN JAPAN

DLA PIPER

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PREFACE

I am pleased to present to you DLA Piper's "Doing Business in Japan" Guide.

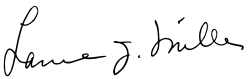
Japan is the world's third largest economy and remains cutting-edge in business. In 2012, 68 Global 500 Companies were headquartered in Japan, demonstrating the strong global orientation of Japanese businesses. Japan can be counted on to make long-term investments, due to its culture of respect for the individual, value for education, demand for quality and fostering of prosperous communities. It is also resilient and able to respond to change. Foreign companies can reap long-term financial and strategic benefits in Japan.

Japan is a unique player in the Asia-Pacific, having emerged as a market long before many of its currently emerging neighbours and therefore occupying an important role in building regional prosperity and security. Japan can also be contrasted with its Western business partners, because although it stands on similar economic footing, its rich culture means that Japan will always be a unique and delightful business partner.

Doing business in Japan has never been easier. It is also safe, relatively deregulated, consistent, profitable and enjoyable.

This Guide can assist you to realise your potential in the Japan market, whether you want to invest in Japan or do business with Japan. It covers key areas including the Companies Act, M&A, employment law, taxation, contract law, product liability and dispute resolution. Some of the legal concepts may even seem familiar, with Japan's legal system having been influenced by Anglo-American models.

Please contact us if you want more information on any topic. DLA Piper has been in Japan for eight years. Our Tokyo office consists of Japanese lawyers (*bengoshi*) and foreign lawyers, many of which travel frequently to or are jointly based in China, the U.S.A. and Europe. Our Tokyo office lawyers are fluent in English, Japanese, Mandarin and other languages, having studied law, been admitted to the bar and worked outside of Japan. We can apply our local knowledge to your commercial needs.



LANCE J. MILLER
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A. INTRODUCTION

Japan is a constitutional monarchy governed by the Japanese Constitution, a "supreme law"[1] which declares that sovereign power resides with the people.[2]

Japan has a population of 127.5 million people[3], an area of 377,799 square kilometres[4] and a GDP of US $5.960 trillion.[5]

In Japan, power is separated into Legislative, Administrative and Judicial Power, exercised by the Diet, Cabinet and Courts, respectively.

The Diet is Japan's sole law-making body and also has authority to approve treaties, appoint the Prime Minister, initiate amendments to the Constitution, determine the national budget and deal with other national matters. The Diet consists of the Lower House (*Shuugiin*) and Upper House (*Sangiin*). Each House has Legislative Power with key differences outlined below:

HOUSE	NUMBER OF MEMBERS	ELECTION TERM	OTHER FEATURES
Lower	480[6]	4 years	Can be dissolved by the Prime Minister. Has more power than the Upper House in some cases, including the ability to override the Upper House's vetoes on bills.
Upper	242	6 years	Only half of its members are elected at each election (i.e., 121 members are elected every three years).

[1] Constitution of Japan, art. 98.

[2] Preamble, Constitution of Japan.

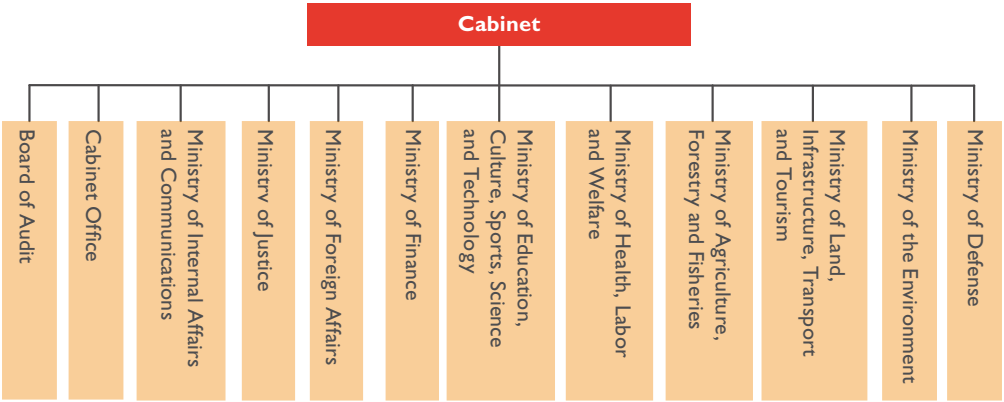
[3] Japan Statistics Bureau, Population Estimates as of 1 October 2012, as at July 2013.

[4] World Bank, Surface Area Estimates for 2011, as at July 2013.

[5] World Bank, GDP (current US$) for 2012, as at July 2013.

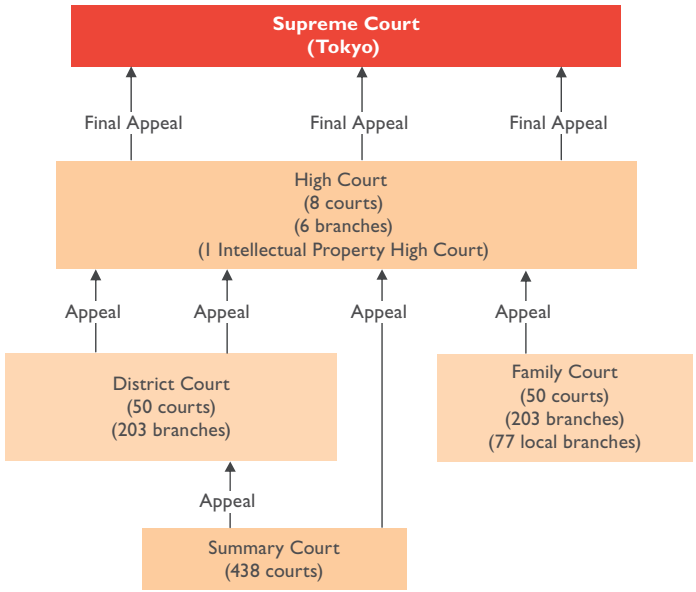
[6] The number of members of the Lower House will be reduced to 475 in the next election.

Enacted laws are enforced by administrative organizations presided over by the Cabinet. The Cabinet consists of the Prime Minister and other Ministers of State, and holds the power to control and supervise administrative branches, as outlined in the following diagram:



Sourced: Ministry of Internal Affairs and Communications, Japan.
(http://www.soumu.go.jp/main_sosiki/gyoukan/kanri/pdf/01_organizationcharts.pdf)

Judicial power is vested in the courts. The courts consist of the Supreme, High, District, Summary and Family Courts. The court structure is three-tiered, with the Supreme Court being the final appellate court.



Source: Supreme Court of Japan.
(http://www.courts.go.jp/about/sosiki/gaiyo/index.html)

B. COMPANIES ACT

1. CORPORATE ENTITIES IN JAPAN

If you are a foreign entity wishing to do business in Japan, you have three main choices for corporate formation. You can establish the following structures:

(i) a joint-stock company called a *Kabushiki Kaisha* ("**KK**");

(ii) a company that is similar to a US limited liability company called a *Godo Kaisha* ("**GK**"); or

(iii) a registered branch office.

While the KK is the most common type of corporate entity in Japan, GKs are gaining in popularity due to their more streamlined approach, including more flexibility in corporate governance and management decisions, lower annual costs and decreased regulation. You may also consider establishing a registered branch office if you wish to gain presence and do business in Japan without establishing a subsidiary.

2. KABUSHIKI KAISHA

KKs are similar to US C corporations. Shareholders have limited liability. Within the KK model, there is a wide variety of corporate governance structures that can be used. For example, a KK may be established with or without a board of directors functioning as a panel (although at least one director is required). The corporate formalities for KKs are fairly strict, as discussed below.

(A) Incorporation Process

If you are considering setting up a KK, you should allow three to four weeks for the incorporation process after preparing and executing the constitutional documents of the KK (e.g., the articles of incorporation[7]). This time estimate is based on all involved parties promptly attending to all incorporation matters. We can advise you on the steps required to incorporate a KK, including:

INCORPORATION PROCESS	
i	selection of the type of KK corporate structure and determination of its basic information (e.g., registered address, director(s) and shareholders);
ii	confirmation with the Legal Affairs Bureau[8] that there are no conflicting corporate names at the same address;
iii	preparation of incorporation documents including articles of incorporation;

[7] The articles of incorporation are the basic charter of a corporation which set out the purpose of a business, its trade name, the location of its head office, the minimum or total value of assets invested in the corporation and the name and address of the incorporator. The articles of incorporation must be filed with the Legal Affairs Bureau.

[8] The Legal Affairs Bureau is an organization established by the Ministry of Justice. It administers civil administrative affairs such as the registration of companies (corporate formation) and the perfection of security interests in real estate and security assignments by registration. It also has other areas of responsibility such as family registration (e.g., births, deaths and marriages), nationality (e.g., naturalization) and deposits (e.g., deposits to secure the payment of court costs).

iv	receipt from the KK's parent company of an affidavit attesting to its existence and its basic information and affidavits bearing the true signatures of parent company representatives. Affidavits must be attested to by a public notary from the signor's home country;
v	notarization of the articles of incorporation by a Japanese Public Notary;
vi	remittance of the KK's capital to the personal bank account of the KK's representative director who is resident in Japan;
vii	appointment of directors (and other officers if applicable, such as representative directors and statutory auditors);
viii	examination by directors (and statutory auditors, if applicable) of the legality of the establishment procedures;
ix	application to register the incorporation of the KK with the Japan Legal Affairs Bureau;
x	acquisition of a certificate evidencing the company's registration and a certificate evidencing the registration of its seal (approximately 10 days after the application for registration);
xi	opening of a bank account under the KK's name;
xii	transfer of the funds kept in the personal bank account of the representative director resident in Japan to the KK bank account; and
xiii	notification to the Bank of Japan of the establishment of the KK by the foreign parent company.[9]

(B) Capitalization

There is no minimum capital requirement for a new KK. However in practice you should ensure there is sufficient capital to pay into your newly established KK to cover certain costs. Incorporation expenses can run approximately JPY 300,000, and include registration tax, revenue stamps for the articles of incorporation and the fees of a Japanese Public Notary.

There is no par value for shares under the Companies Act. There is also no requirement to issue share certificates.

(C) Operations

(1) Overview

The Companies Act requires all types of KKs to have a shareholders' meeting and at least one director who is basically in charge of the operation of the business affairs of the corporation.[10] A KK can also have the following types of corporate organs.

[9] Advance notification may be required in certain industries (see section E "Foreign Investment Control").

[10] Companies Act, art. 326.

TYPES OF CORPORATE ORGANS	
i	Board of directors
ii	Statutory auditor
iii	Board of Statutory auditors
iv	Accounting auditor
v	Accounting advisor
vi	Committees (nominating committees, audit committee, and compensation committee)

(2) Shareholders' Meeting

The shareholders' meeting is the supreme decision-making body for a KK. Matters to be resolved at a shareholders' meeting differ between KKs with and without a board of directors. If a KK has a board of directors, the power of the shareholders' meeting is limited to significant matters as set forth in the Companies Act and the articles of incorporation.[11] If a KK has no board of directors, the power of a shareholders' meeting is not limited to such matters, and spans any matters concerning the KK's[12] operations to the extent that there is no infringement of mandatory provisions of law.

Under the Companies Act, a shareholders' meeting may adopt an ordinary resolution constituted by a majority of the voting rights present at the meeting, where the shareholders constituting a majority of the votes of the shareholders who are entitled to exercise their votes are present[13] to form a quorum. However some decisions require special resolution, which is constituted by a majority of two thirds of all of the voting rights present,[14] where the shareholders constituting a majority of the votes of the shareholders who are entitled to exercise their votes are present to form a quorum. The following table lists some of the decisions which require a special resolution:

SPECIAL RESOLUTION	
i	Amendment of the articles of incorporation[15]
ii	Transfer of all or material part of the business of the company[16]
iii	Merger with or acquisitions of other companies[17]
iv	Reverse stock split[18]
v	Reduction of the stated capital[19]
vi	Dissolution of the company[20]

[11] Companies Act, art. 295, para 2.
[12] Companies Act, art. 295, para 1.
[13] Companies Act, art. 309, para 1.
[14] Companies Act, art. 309, para 2.
[15] Companies Act, art. 466.
[16] Companies Act, art. 467, para 1.
[17] Companies Act, art. 783, art. 795 and art. 804.
[18] Companies Act, art. 180, para 2.
[19] Companies Act, art. 447.
[20] Companies Act, art. 471, no. 3.

(3) Director

A director is an essential organ of KK and exists in all types of KK. The common role of directors in a KK is to:

(i) make decisions regarding the operations of the corporation; and

(ii) supervise the operations engaged in by other directors.

Whether each director has authority to represent the KK or operate the business affairs of a KK depends on whether the KK has a board of directors or a representative director without a board.

If there is a board, each representative director appointed from among the directors[21] has the authority to solely represent the KK. Other directors cannot bind the KK without the authority of the representative director or the board of directors. In a KK with a board of directors, the representative directors and directors with relevant board authorization have authority to operate the business affairs of the KK.

In a KK without a board of directors, each director has authority to solely represent the corporation unless one or more representative directors are to be appointed from among the directors.[22] Also, each director has the authority to operate the business affairs of the corporation, unless otherwise provided for in the articles of incorporation. If the corporation has two or more directors, the business affairs of the KK must be decided by the majority of all directors.

Foreign nationals are qualified to be directors, although at least one representative director must have a registered address in Japan.

(a) Directors' Duties

A director has a fiduciary duty of care in managing the KK and must not cause any disadvantage to the company by providing a benefit to himself or herself or to a third party. As a member of the board of directors, a director must decide matters of importance in managing the KK. In making management decisions, a director is required to exercise his or her "duty of care as a conscientious manager." Directors

[21] At least one representative director must be appointed in a KK with a board of directors.

[22] Companies Act, art. 349.

are granted broad discretion in making management decisions and are generally not held liable for business decisions, even if the decision ends in poor results for the company (this can be thought of as a Japanese version of the "business judgment rule").

(b) Directors' Liabilities

The standards for a finding of immunity from liability for business decisions include: (i) no actual violation of law or administrative order, (ii) that the decision was made on behalf of the company, (iii) that the decision was not extremely unreasonable, and (iv) that the decision was made after obtaining sufficient information. Directors of a KK with a board of directors must supervise the performance of the duties of the representative director(s) and other members of the board of directors. While a director is not required to investigate aggressively each matter, a director can be held liable for negligence in the exercise of his or her duties if the director is not aware of a fact that he or she should have known.

In most cases, the company will be responsible for decisions made by its directors. If a company enters into an agreement with a third party and subsequently breaches the agreement, the company would be responsible, not the individual directors (assuming there is no gross negligence or wilful misconduct by the directors and the director is immune as described above).

Generally speaking, in claims that are brought by third parties KKs are permitted to indemnify the directors if the directors were not grossly negligent in performing their obligations. The Companies Act allows a company to reduce the directors' liabilities to the company only in accordance with the requirements below.

EXEMPTION FROM DIRECTOR'S LIABILITY TO COMPANY	
i	Consent of all shareholders[23]
ii	Special resolution of a shareholders' meeting[24] (partial exemption only)
iii	Resolution of the board of directors in accordance with the articles of corporation[25] (partial exemption only)

For exemptions (ii) or (iii) above, a director cannot enjoy such an exemption if he or she is grossly negligence in performing his or her obligations.

(4) Board of Directors

The board of directors is a group consisting of all directors. A KK can choose to have a board of directors or no board. There is no need for an external director to be a member of the board of directors unless the KK is a corporation with committees.

The board of directors has responsibilities to:

(i) make decisions regarding business execution;

(ii) supervise the execution of business; and

(iii) appoint and discharge representative directors.[26]

[23] Companies Act, art. 424.

[24] Companies Act, art. 425.

[25] Companies Act, art. 426.

[26] Companies Act, art. 362, para 2.

Furthermore, the board of directors has exclusive power with regard to significant matters as set out in the Companies Act which must be decided by resolution of the board of directors (e.g., assignment of important assets to and by the company, borrowing significant amounts of money and electing and dismissing important employees such as managers).[27]

(5) Statutory Auditor

The statutory auditor is responsible for auditing the performance of duties by directors for compliance with statute and the articles of incorporation, including determining whether such performance is proper or improper. However for a KK which is not a public company, the articles of incorporation can limit the scope of the audit to accounting[28] but this limitation does not apply to a KK with a board of statutory auditors or a KK with accounting auditors.[29]

The statutory auditor also audits financial statements, business reports and supporting schedules thereof to be submitted to each shareholders' meeting and prepares an audit report for each business year.[30] The statutory auditor can at any time request a director, accounting advisor, or employees of the KK to report on its business, and investigate the status of the KK's business and assets. Statutory auditors cannot be directors or employees of a KK, in order to maintain independence.

(6) Board of Statutory Auditors

The board of statutory auditors is an organ which consists of all statutory auditors.[31] The board of statutory auditors must include at least three statutory auditors and at least half of the board needs to be external statutory auditors.[32] The board of statutory auditors sits like a committee to allow each auditor to undertake his or her own duty effectively.

The duties of the board of statutory auditors are as follows:

(i) preparation of audit reports;

(ii) appointment and removal of full-time statutory auditors; and

(iii) decision-making regarding the establishment of audit policies, the manner of investigation of the status of the corporate operation and assets of the corporation, and any other matters relating to the performance of duties of statutory auditors.[33]

Each statutory auditor can exercise his or her authority solely and independently.

(7) Accounting Auditor

An accounting auditor performs audits of financial documents of a KK. In performing audits, the accounting auditor must prepare an accounting audit report. The accounting auditor can at any time inspect and copy accounting books or relevant materials of the KK,[34] and request the director, accounting

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[27] Companies Act, art. 362, para 4.

[28] A public company is a company for which the transfer of shares is not subject to the company's approval (Companies Act, art. 2, no 5.)

[29] Companies Act, art. 389, para 1.

[30] Companies Act, art. 436.

[31] Companies Act, art. 390, para 1.

[32] Companies Act, art. 335, para 3.

[33] Companies Act, art. 390, para 2.

[34] Companies Act, art. 396, para 2.

advisor, or employees of the KK to report on accounts. A large KK[35] or a KK with a committee (see Section (9) below) is required to have an accounting auditor.

(8) Accounting Advisor

An accounting advisor has a duty to prepare financial documents. The accounting advisor has recently been created by the Companies Act. The role was created to improve the credibility of financial documents, particularly in small or medium sized corporations. It is not mandatory to appoint an accounting advisor.

(9) Committees

The Committees system was introduced based on the US corporate governance system for the purpose of corporate governance of a KK. A KK can become a "corporation with committees" by so providing in its articles of incorporation. A corporation with committees must have a board of directors and at least one accounting auditor. A corporation with committees may not have statutory auditors. A KK with committees consists of (i) executive officer(s); (ii) a nominating committee; (iii) an audit committee; and (iv) a compensation committee.

ROLE OF EXECUTIVE OFFICER(S) AND COMMITTEES	
Executive officer(s)	Executive officers are appointed by the board of directors. Executive officers (i) make decisions regarding the execution of operations delegated by the board of directors and (ii) execute the operations of the KK.
Nominating committee	The nominating committee makes decisions regarding the content of proposals to appoint or dismiss directors and accounting advisors to be submitted to a shareholders' meeting.[36]
Audit committee	The audit committee (i) audits the execution of operations of executive officers, directors and accounting advisors; (ii) prepares audit reports; and (iii) makes decision regarding proposals to appoint or dismiss accounting auditors to be submitted to a shareholders' meeting.[37]
Compensation committee	The compensation committee makes decisions regarding the remuneration of individual executive officers, directors and accounting advisors.[38]

Each committee must be organized with at least three members, and a majority of the members must be external directors.

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[35] A "large KK" is a KK for which (i) the amount of stated capital in the balance sheet as of the end of its most recent business year is JPY 500 million or more; or (ii) the total sum of the amounts in the liabilities section of the balance sheet as of the end of its most recent business year is JPY 20 billion or more.

[36] Companies Act, art. 404, para 1.

[37] Companies Act, art. 404, para 2.

[38] Companies Act, art. 404, para 3.

(D) Corporate Obligations

The other three, key requirements for KKs are a general meeting of shareholders, a board of directors' meeting and disclosure obligations.

An ordinary general meeting of shareholders must in principle be held at least once each year. The meeting must be held within three months of the end of the KK's fiscal year. Shareholders' meetings may be conducted by written resolution.

If a company has a board of directors, an actual board meeting must be held at least once every three months, at which each representative director must report on the performance of his or her duties. Written resolutions of the board are permitted if so provided under the articles of incorporations.

The articles of incorporation of a KK and other documents are filed with the Legal Affairs Bureau.

A KK must disclose, for example, the following items in undertaking registration.[39]

EXAMPLES OF DISCLOSED ITEMS	
i	Company name
ii	Address of its principal office
iii	Incorporation date
iv	Business purposes
v	Number of authorized shares
vi	Number of shares already issued
vii	Amount of capital
viii	Method of public notice
ix	Names of officers (including director, representative director, executive officer, representative executive officer, statutory auditor, accounting auditor, and accounting advisor)
x	Address of each representative director or representative executive officer

These items are recorded in a corporate registry created by the Legal Affairs Bureau and are publicly available. A KK must also disclose its balance sheet at the end of each annual shareholders' meeting by public notice,[40] in many cases using the official gazette known as the *Kampo*.[41]

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[39] Companies Act, art. 911, para 3.

[40] Companies Act, art. 440, para 1.

[41] Kampo is published by the National Printing Bureau, and relates to the enactment, amendment and abolishment of laws and regulations, public notices, the national budget, treaties, matters of the Diet and other nationally related matters.

3. GODO KAISHA

The GK form was introduced in Japan in 2006 with the revision of the Companies Act. A GK structure is similar to a US limited liability company and allows more flexibility in corporate governance and management decisions than a KK. The annual corporate governance costs are generally lower as there are fewer requirements to be observed.
We have recently assisted many clients in their decision to opt for a GK structure, due to the ease of corporate governance and tax advantages for its US parent company.
A legal entity can be a member of a GK.

(A) Incorporation Process

If you are considering setting up a GK, you should allow two to three weeks for the incorporation process after members who own the GK prepare and execute constitutional documents (e.g., the articles of incorporation). This time estimate is based on all involved parties promptly attending to incorporation matters. We can advise you on the steps required to incorporate a GK, including:

INCORPORATION PROCESS	
i	determination of its basic information (e.g., registered address and managing member(s));
ii	confirmation with the Legal Affairs Bureau that there are no conflicting corporate names at the same address;
iii	receipt from the GK's parent company of an affidavit attesting to its existence and its basic information and affidavits bearing the true signatures of parent company representatives. Affidavits must be attested to by a public notary from the signor's home country;
iv	preparation of incorporation documents including articles of incorporation;
v	application to register incorporation of the GK with the Legal Affairs Bureau;
vi	acquisition of a certificate evidencing the company's registration and a certificate evidencing the registration of its seal (approximately 10 days after the application for registration);
vii	opening of a bank account under the GK's name;
viii	remittance of capital by a member to the GK's bank account; and
ix	notification to the Bank of Japan of the establishment of GK by the foreign parent company.[42]

[42] Advance notification may be required in certain industries (see section E "Foreign Investment Control").

(B) Capitalization

There is no minimum capital requirement for a new GK. However in practice you should ensure that there is sufficient capital to pay into your newly established GK to cover certain costs. Incorporation expenses can run approximately JPY 100,000, and include registration tax and revenue stamps for the GK's articles of incorporation.

(C) Operations

(1) Overview

As a general rule, fundamental matters (e.g., the amendment of articles of incorporation, conversion, mergers) must be determined by the consent of all members,[43] and each member who invests in a GK has authority to operate its business affairs based on a decision of the majority of members and to represent the GK.[44] GKs can adopt different requirements for resolutions as long as such rules are provided in the articles of incorporation.

(2) Members who Execute the Business

The articles of incorporation can designate members as "members who execute GK's business" (*gyomu shikko shain*).[45] Each member who executes the business can represent the GK unless specific representative members are appointed from the members who execute the business or by the articles of incorporation. If all members who execute business are individuals (i.e., without legal entity), at least one of those individuals must be resident in Japan.

(3) Executive Manager

If one of the members who execute business is a legal entity, that legal entity must assign at least one individual as an executive manager ("*shokumu shikkosha*"), and there must be at least one executive manager who has a registered address in Japan.[46] The executive manager is not required to be a representative, officer or employee of the legal entity. A person external to the GK (e.g., a corporate lawyer or an accountant) could be its executive manager.

[43] Companies Act, art. 637, art. 781, art. 793, etc.

[44] Companies Act, art. 590, para 2 and art. 599, para 1.

[45] Companies Act, art. 591, para 1.

[46] Companies Act, art. 598, para 1.

(D) Corporate Obligations

Unlike the KK structure, there is no requirement for a regular general meeting of members. This demonstrates the ease of GK corporate governance.

There are however some disclosure obligations. The articles of incorporation and other documents are filed with the Legal Affairs Bureau. A GK must disclose items provided in the corporate registry including:

EXAMPLE OF DISCLOSED ITEMS	
i	Company name
ii	Business purposes
iii	Amount of capital
iv	Names of managing members
v	Names and addresses of representative members
vi	Names and addresses of its executive manager (where one of the members who execute the business is a legal entity)
vii	Method of public notice

Upon the request of a creditor, a GK must also disclose its financial statements.[47]

[47] Companies Act, art. 625.

4. REGISTERED BRANCH OFFICE

The third main form of corporate structure used by foreign companies in Japan is a registered branch office. If you are a foreign company intending to engage in business on a regular basis in Japan, and do not wish to establish a subsidiary, you can establish a branch office and appoint at least one representative resident in Japan, to represent and bind the company in Japan.[48]

(A) Establishment Process

If you are considering setting up a registered branch office, you should allow two to three weeks for the establishment process after the necessary establishing documents have been prepared by your home office and notarized. This time estimate is based on all involved parties promptly attending to incorporation matters. We can advise you on the process to establish a Japan branch office including:

ESTABLISHMENT PROCESS	
i	determination of the information regarding the branch office which needs to be registered;
ii	confirmation with the Legal Affairs Bureau that there are no conflicting corporate names at the same address;
iii	preparation of an affidavit by the home office attesting to its basic information (name, address, directors of the head office) as well as information regarding the representative resident in Japan;
iv	notarization of the above affidavit by a public notary from the home office's country or by that country's embassy or consulate in Japan;
v	application to register establishment of the branch office with the Legal Affairs Bureau;
vi	obtaining a certificate evidencing the branch's registration and a certificate evidencing the registration of its seal (approximately 10 days after the application for registration); and
vii	opening of a bank account under the branch office name.

(B) Representatives

You must ensure that at least one representative in Japan (e.g., a branch manager) is appointed. At least one of those representatives must have a Japanese address, but needs not be a Japanese citizen.

(C) Corporate Obligations

Where the foreign company has a similar structure to a KK (such as a US C corporation), an equivalent to a balance sheet must be disclosed by public notice in Japan at the end of each financial year. The method of public notice can be the *Kampo*, daily newspaper, or website.[49]

[48] Companies Act, art. 817, para 1.
[49] Companies Act, art. 939, para 1.

C. EMPLOYMENT LAW

1. INTRODUCTION

Traditionally in Japan, many employees work under the notion that they will not change employers during their career. This concept is known as life time employment, whereby employers were expected to employ workers until retirement.

Japanese labor laws are very employee-friendly in order to provide for a long and positive relationship between employer and employee. Decisions made by an employer that have a negative or potentially negative impact on employees are often difficult to implement or may be void if implemented improperly. Furthermore, redundancy is not common. There is no concept of "at will" employment in Japan and termination of employees generally must be for cause. If you are an employer in Japan, you generally can freely determine who you would like to employ. However, an employer's right to dismiss a hired employee is severely restricted. A dismissal will be invalid under Japanese law as an abuse of rights if it "lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms."[50]

2. HIRING

If you are hiring employees in Japan, you should consider the issues outlined below.

(A) Recruitment

Recruitment in Japan is often undertaken by placing advertisements on websites, in newspapers or through the engagement of employment or recruitment agencies or temporary staff providers. Careers fairs are commonly used to hire new graduates. Recruitment by specified age[51] and gender[52] is generally prohibited.

(B) Making Offer of Employment

Article 15 of the Labor Standards Act requires an employer to detail certain terms of employment in writing before or upon entering into an employment contract. As an employer you can fulfil this requirement by giving employees a written employment contract or by providing a copy of your employer's "work rules" ("*shuugyou kisoku*").

[50] Labor Contract Act, art. 16.
[51] Employment Countermeasures Act, art. 10.
[52] Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment, art. 5.

(C) Work Rules

In Japan, most terms and conditions of employment are stipulated in an employer's "work rules." You will need to create work rules and file them with the local Labor Standards Inspection Office if you employ ten or more employees. The Labor Standards Inspection Office is local branch of the Ministry of Health, Labor and Welfare ("**MHLW**"). Prior to filing, work rules must be submitted to a representative of the majority of employees (or a union if one exists) for comment. While employee comments do not need to be accepted by the employer, the comments should be considered in good faith. The work rules set out the minimum standard employment terms within the workplace and generally stipulate terms as follows:[53]

MINIMUM TERMS OF WORK RULES	
i	Wages, including the method of calculation and payment, time of payment, system of rates and bonuses
ii	Working hours and breaks
iii	Holidays
iv	Termination of employment, including matters related to resignation and reasons for termination
v	Disciplinary action, including the kind and degree of disciplinary action
vi	Other general matters, including the place and scope of work, term of employment and matters related to health and safety

(D) Cancellation of Offer

If an employer has made a formal offer of employment to a prospective employee, and that individual has accepted it, the Japanese courts consider that an employment relationship has been established, even if the employee has not commenced work.[54] As a result, when an employer attempts to cancel an accepted offer prior to the start date, a court may treat such cancellation as invalid or illegal unless it was based on reasonable grounds (e.g., where an employee provided significant false information) and was socially acceptable.

[53] Labor Standards Act, art. 89.

[54] 33 MINSHŪ 582 (Sup. Ct., 20 Jul 1979) and 34 MINSHŪ 464 (Sup. Ct., 30 May 1980).

(E) Use of Staffing Agencies in Japan

In Japan, "staffing" (called "*haken*") is a popular alternative to direct hiring. It involves a staffing agency providing *haken* employees to a company.

Staffing alleviates the difficulties associated with terminating an employment contract and other employment related matters. *Haken* employees are direct employees of the agency and not the company utilizing their services. However, employers should be aware of the limitations of *haken* which include:

LIMITATIONS ON *HAKEN*	
i	*Haken* employees are not allowed to be placed in port transport, construction, security and some medical work.[55]
ii	*Haken* workers' placement terms are limited up to three years unless such position falls into certain categories of jobs that require knowledge, skill and experience.[56]
iii	Only licensed staffing agencies may be used.[57]
iv	A company utilising a *haken* employee may be required to offer him or her a permanent position after a certain period of time and under certain circumstances.[58]

The Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers regulates *haken* employment and the use of *haken* employees. In 2012, that Act was amended to ensure the protection of *haken* employees. The amendment generally prohibits the hiring and firing of *haken* employees on a day-to-day basis, and requires that a company which chooses to terminate a *haken* employee ensures that such an employee has new employment opportunities. The amendment also strengths sanctions against illegal *haken* employment.[59]

(F) Working Visas

If you are a foreign national who wishes to live and work in Japan you must obtain the requisite visa. A visa can only be obtained from a Japanese embassy or consulate outside of Japan and will not be issued within Japan. There are working visas, general visas (e.g., for cultural activities or college students), specified visas (e.g., for a spouse of a Japanese national or long-term resident), diplomatic visas and official visas. A working visa does not itself permit a foreign national to live or work in Japan. Upon entry into Japan, a foreign national will be granted an appropriate "status of residence" which will stipulate the extent of that individual's ability to live and work in Japan. Generally speaking, foreign nationals will be subject to Japanese employment law.

[55] Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers ("Worker Dispatching Act"), art. 4.

[56] Worker Dispatching Act, art. 40-2.

[57] Worker Dispatching Act, art. 5 and 16.

[58] Worker Dispatching Act, art. 40-4 and 40-5.

[59] Worker Dispatching Act, art. 40-6.

(G) Employment Contracts

Individual employment contracts are usually short since both employer and employees can generally refer to the work rules for terms and conditions of employment. The terms and conditions of work rules will take precedence over terms and conditions in an individual employment contract or offer letter if the terms and conditions in the work rules are more favorable to the employee. The less favorable terms and conditions in the individual employment contract or offer letter will be considered invalid.

Employers will typically designate within an employment contract or work rules a fixed period of time from the starting date of employment as a probationary period for a new non-fixed term employee. The probationary period normally ranges from one to six months and in many cases, the period is three months. During a probationary period, an employee can be dismissed on "reasonable and socially acceptable" grounds (see "Dismissal for Cause" below). These grounds are construed relatively broadly for employees serving a probationary period. If an employer wishes to be extend a probationary period, the right to do so should be provided for in the employment contract or work rules.

(H)Term Employment Contracts

Due to the significant restraints on terminating employees (see "Termination of Employment" below), employers may consider entering into term employment contracts. Term employment contracts cannot be longer than three years, except in some limited circumstances. An employment contract will generally terminate at the end of the stated term but can be renewed by the parties. Whether or not an employment contract is renewable, and any criteria for renewal should be stated in the agreement. On 10 August 2012, the Labor Contract Act was amended in order to help stabilize the employment conditions for employees on fixed-term agreements. With some exceptions, this amendment introduced a mechanism whereby a fixed-term employment relationship that has continued for over five years must be converted into a permanent employment relationship upon request by the employee.

(I) Collective Agreements

There are two types of collective agreements.

The most common type is a labor-management agreement ("*roshi-kyotei*") which is an agreement between management and either the representative of the majority of employees in the workplace or a labor union to which a majority of the employees belong. The purpose of this is to contract out of restrictive provisions of the Labor Standards Act, such as wage deduction[60] or working time.[61]

The second type of agreement is a collective bargaining agreement (**"CBA"**) ("*roudo-kyoyaku*") which is between a labor union and an employer. CBAs are not particularly common in Japan as the proportion of the workforce in Japan that is unionized has fallen to below 20% according to MHLW. If the rules in the employment agreement are contrary to the CBA, such rules will be void and will be replaced with the CBA.[62] The CBA is sometimes extended to non-unionized employees.[63]

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[60] Labor Standards Act, art. 24.

[61] Labor Standards Act, art. 36.

[62] Labor Union Act, art. 16.

[63] Labor Union Act, art. 17.

3. MANAGEMENT

(A) Hours of Work

An employer cannot require employees to work for more than eight hours per day and 40 hours per week unless the employer enters into a labor-management agreement ("**Article 36 Agreement**") with either a labor union organized by a majority of the employees or an employee representing a majority of the employees in the workplace.[64] An Article 36 Agreement sets out the maximum hours of overtime work, and the Labor Standards Act and the guidelines[65] recommend that the maximum hours of overtime work should be 45 hours per month. The performance of overtime work without such an agreement in place is a criminal offence,[66] unless the relevant employee is in a managerial position.[67]

(B) Overtime

Employers are required to pay wages at an increased wage rate as shown in the below table, if employees work in excess of statutory work hours or late at night.[68]

CONDITIONS		INCREASED WAGE RATE
Working in excess of statutory work hours	–	125%
	exceeding 60 hours in a month	150%[69]
Working on statutory days off		135%
Working late at night (between 10.00pm and 5.00am)	–	125%
	in excess of statutory working hours	150%
	in excess of statutory working hours exceeding 60 hours in a month	175%
	on statutory days off	160%

Managerial level employees are generally exempt from an entitlement to overtime payment,[70] but are entitled to a late night allowance.[71] It may be difficult to determine whether an employee meets the criteria of a managerial level employee and several administrative notices have been issued by the MHLW regarding the interpretation of who is a managerial level employee. Case law has also established standards for the determination of who is a managerial level employee.[72]

[64] Labor Standards Act, art. 32 and 36.

[65] The public notice issued from the Ministry of Labor (current MHLW), No. 154 of 18 December 1998

[66] Labor Standards Act, art. 119.

[67] Labor Standards Act, art. 41.

[68] Labor Standards Act, art. 37.

[69] The 150% compensation rate does not currently apply to small and medium sized businesses

[70] Labor Standards Act, art. 41.

[71] 1000 RODO HANREI 5 (Sup. Ct., 18 Dec. 2009).

[72] **e.g.**, 839 RODO HANREI 58 (Sapporo D. Ct., 18 Apr. 2002).

Generally speaking, a managerial level employee means "a person who is substantially in a body of the management in terms of labor management and planning of the management strategy." Whether an employee is a managerial level employee should be determined by the employee's actual situation and not simply by the title or rank of the employee.[73] Such determination usually takes into account the following standards:[74]

MANAGERIAL LEVEL EMPLOYEE	
i	A managerial level employee should be in a position which is not suitable to be bound by fixed working hours;
ii	A managerial level employee must have duties, responsibilities and authority important enough to require the employee to work regardless of the fixed working hours or holidays; and
iii	A managerial level employee should be compensated fairly considering their managerial position.

(C) Benefits and Entitlements

(1) Annual Leave

An employee who has been continuously employed for six months and whose attendance has been at least 80% of the total number of working days during that period, is entitled to a minimum of 10 days' paid annual leave on the day after completing six months of employment.[75] This entitlement increases by one day per year for the following two years and by two days per year thereafter, up to a maximum of 20 days per year as outlined in the following table:

Service period (years)	0.5	1.5	2.5	3.5	4.5	5.5	6.5
Leave (days per year)	10	11	12	14	16	18	20

Unused annual leave expires after two years if not used. Currently, an employee may take leave on an hourly basis up to the number of hours equivalent to five days, if a labor-management agreement is in force.

(2) Sick Leave

An employer is not required to grant paid leave to an employee who is absent from work as a result of illness or injury, unless the work rules or employment contract provide otherwise.

[73] Notices issued from the Head of the Labor Standards Bureau, No. 17 of 13 September 1947 and No. 150 of 14 March 1988.

[74] 839 RŌDŌ HANREI 58 (Sapporo D. Ct., 18 Apr. 2002).

[75] Labor Standards Act, art. 39.

(3) Maternity Leave, Childcare Leave, Family Care Leave

A pregnant employee is entitled to maternity leave for a period of six weeks before the expected date of birth and eight weeks after the birth.[76] An employee who lives with and is raising a baby under 18 months of age is eligible for child care leave.[77] In addition, employees are eligible for family care leave of up to 93 days to care per subject family member. These absences are unpaid unless otherwise provided for in the work rules or the employment contract of the relevant employee. An employee will generally receive a certain percentage of their base salary under the nationally maintained unemployment insurance scheme, during these periods of leave.

(4) Statutory Days Off

An employer must allow at least one day off per calendar week or four days off per four calendar weeks. The timing of statutory days off can be specified in an agreement between an employer and its employees, with the result that Sundays and public holidays[78] will not necessarily be statutory days off. Wages for working on statutory days off must be at least 135% of the regular rate.

(D) Wages

There are two types of minimum wage. A district minimum wage applies to all employees employed in a given district regardless of their age or experience.[79] A minimum wage applies to employees in a given industry, excluding those under 18 years of age or over 65 years of age.[80]

According to Article 24 of the Labor Standards Act, unless otherwise provided in the CBA, the wages of Japan-resident employees must be:

(i) paid in Japanese Yen in cash or bank deposit;

(ii) paid directly to each employee;

(iii) paid in full (an employer cannot set-off its obligation to pay wages to an employee against any monetary obligations the employee owes to the employer without the employee's consent); and

(iv) paid at least once a month on a specified date.

If you are a non-resident employee in Japan, we can advise you on the regulations specific to you.

(E) Stock Options

Employee stock option plans are permissible in Japan and have become more widely utilized since being introduced by foreign companies in the late 1990s. In general, the pool of eligible optionees in Japanese companies is more narrowly defined than in US companies. It should be noted that issuance of options to Japanese employees may trigger the requirement to make certain filings with respect to the offer of securities in Japan.

(F) Stock Ownership Plan

In Japan, some companies encourage their employees to purchase and retain companies' stock. In most cases, the employees cannot assign the stock and they are required to return the stock upon termination of employment.

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[76] Labor Standards Act, art. 65.

[77] Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave, art. 5.

[78] LThere are currently 15 national holidays in Japan.

[79] Section 2, Chapter 2 of the Minimum Wages Act (No. 137 of 1959).

[80] Section 3, Chapter 2 of the Minimum Wages Act (No. 137 of 1959).

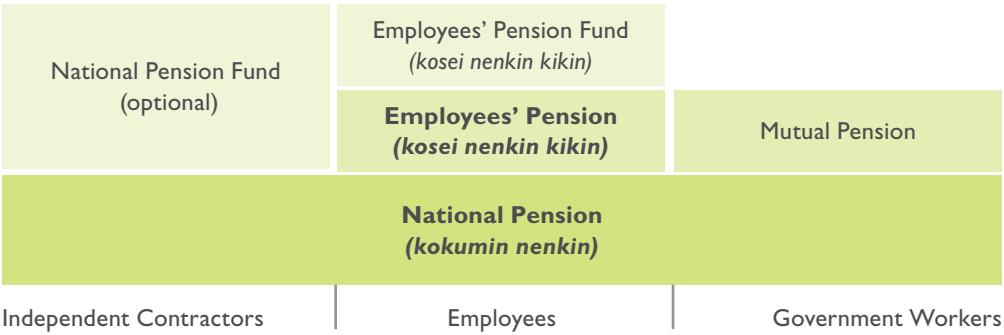
This system allows employees to become investors and have an economic stake in their employer, while their employer enjoys reliable stock ownership.

(G) Social Security

As a general rule, employers are required to participate in four different types of social security programs for their employees, i.e., (i) pension; (ii) health insurance and nursing care insurance; (iii) worker's accident compensation insurance; and (iv) employment insurance.

(1) Pension

Japan has a government sponsored pension plan that an employer and employee into which each makes a contribution. The Japanese pension plan system is considered to have three layers as shown below.



For employees who are employed by companies, the first layer is the National Pension ("*kokumin nenkin*"), for residents older than 20 and younger than 60 years,[81] and the second layer is the Employee's Pension ("*kosei nenkin*"). These pensions pay benefits to employees which have been paying into the system for at least 25 years. You should be aware that all individuals employed in Japan pay into such system, including foreign nationals.[82] A full-time director who receives wages for his or her work is also required to participate in these pension programs.

If certain requirements are met, foreign nationals from countries which have entered into social security agreements with Japan may have a portion of their payments refunded after leaving the country.[83]

(2) Health Insurance and Nursing Care Insurance

These insurances cover medical and nursing care expenses incurred by employees, and benefits will be paid for illness or injury.[84] A director who receives wages for his or her work is also required to participate in these insurance programs.

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[81] National Pension Act, art. 7.

[82] The third layer is the Employees' Pension Fund ("*kosei nenkin kikin*"), which is the optional part of the pension program provided by only some companies.

[83] Japan has executed the social security agreements with following countries; Australia, Belgium, Brazil, Canada, Czech, France, Germany, Hungary (not effective), India (not effective), Ireland, Italy (not effective), Netherlands, South Korea, Spain, Switzerland, UK, and USA (as of March 2013).

[84] The contribution for nursing care insurance is required for the employees who are 40 years old or over.

(3) Workers' Accident Compensation Insurance

This insurance covers any injury or illness incurred by workers as result of working or communing to or from the workplace. Benefits will be paid as compensation for medical treatment, work missed, disability or death.

(4) Unemployment Insurance

Unemployment insurance provides for workers who become unemployed and aids such employees to maintain a stable living. Benefits are also paid to workers on child care leave and family care leave. Representative directors are not covered by the insurance program.

(5) Payment of Contributions for Social Security

Each employer and employee bears contributions for this insurance at the rates described below. The employer usually deducts the portion of the contribution payable by the employees from their salaries and pays them together with the portion of the contribution payable by the employer to each authority. The rates effective as at April 2013 are as follows.

	Health Insurance and Nursing Care Insurance	Employee's Pension	Workers' Accident Compensation Insurance	Employment Insurance
Contribution rate (% of total annual wage) for the employer	4.985% (5.76% if the employee is 40 years old or over)	8.56%	0.3% (for the business involving mainly clerical work)	0.5%
Contribution rate (% of total annual wage) for the employee	4.985% (5.76% if the employee is 40 years old or over)	8.56%	n/a	0.85%
Note	The rates will vary depending on the location. (The rates shown above are those in Tokyo.)		The rate will vary depending on types of business.	

(H)Retirement Allowance

There is no legal requirement that employers provide a retirement allowance. However, many Japanese companies stipulate a retirement age within their work rules and elect to provide a one-time, lump sum retirement allowance when an employee retires.

(I) Data Privacy

In Japan the receipt, maintenance of and access to personal information relating to an individual is regulated by the Act on the Protection of Personal Information (No. 53 of 2003). Upon the collection of such information regarding a person, the collector must notify that person of the purpose of the use of that

information, and thereafter must take necessary and proper measures to prevent leakage, loss or damage of that information, and other reasonable steps to control the security of that information. In addition, the party maintaining such information is required to adopt internal regulations designed to ensure the confidential and secure maintenance of such information for as long as it is held. Disclosure of personal information to third parties is strictly limited. Parent and affiliated companies which are separate legal entities are generally considered to be third parties to each other, such that an entity in Japan is not permitted to freely exchange employee information to its related entities. However, certain service providers, such as a payroll service provider, may not be considered a third party in some circumstances. In practice, employers obtain consents from employees for sharing personal information among group companies under the work rules or employment contracts.

(J) Intellectual Property

Article 35 of the Patent Act (No. 121 of 1959) considers a patented invention developed by an employee in the scope of its employer's business and achieved by an act categorised as a work duty to be an "employee invention."
An employer will have a non-exclusive license to the patent of the employee invention.
The employee can assign an exclusive license to its employer for "reasonable value."
The interpretation of "reasonable value" is sometimes challenged by employees in court cases. This provision applies to the utility model rights[85] and designs[86] developed by an employee.

On the other hand, unless otherwise provided in the employment agreement or work rules, the employer is the author of works produced by the employee in the course of the performance of his or her duties in connection with the company's business and made public by the company under the company's name.[87]

(K)Non-Disclosure and Non-Competition

Trade secrets are protected under the Unfair Competition Prevention Act and non-disclosure agreements with employees are widely used and generally enforceable in Japan. Non-competition clauses are not always enforceable, since the Constitution guarantees freedom of choice of occupation. Courts usually consider whether the prescribed term, geographical scope and professional field are reasonable, and whether adequate compensation is paid for such restrictions in determining the enforceability of such clauses.

4. TERMINATION OF EMPLOYMENT

Employees in Japan enjoy substantial security in continued employment. There is no concept of "at-will" termination in Japan. Termination of employees generally must be for "cause."[88]

(A) Dismissal for Cause

If you are an employer in Japan you should be alert to the fact that it is very difficult to terminate employees. Behavior and performance that would be "cause" for dismissal in many jurisdictions may not warrant termination in Japan. Although employers do have a right to dismiss employees, a dismissal will be regarded as an

[85] Utility Model Act, art. 11, para 3.

[86] Design Act, art. 15, para 3.

[87] Copyright Act, art. 15, para 1.

[88] Labor Contracts Act, art. 16.

"abuse of rights" under Japanese law, and therefore invalid, if a court determines that the dismissal does not meet the standard of being on "reasonable grounds" and "socially acceptable." This is a high standard. The following grounds of termination may be considered "reasonably and socially acceptable" in some circumstances:

REASONABLY AND SOCIALLY ACCEPTABLE CIRCUMSTANCES	
i	Loss of or significant and continuous lack in ability to perform work duties (e.g., non work related sickness or injury)
ii	Serious insubordination and failure to correct conduct after clear warnings
iii	Poor performance after training has been provided and other positions have been explored, where the training is considered to be ineffective and no alternative positions exist
iv	Provision of material false information about one's background that impacts performance (e.g., claiming to be fluent in a foreign language and having very limited language skills, where such skills are a job requirement)
v	Serious misconduct (e.g., theft or violence in the workplace)

The grounds for dismissal should be stated in the work rules. However, an employer must, in all cases, have valid reasons for terminating an employee in Japan and this applies whether or not the work rules or an employment contract purports to give the employer an express right to terminate the employment in particular circumstances. Simply listing grounds for dismissal in the work rules cannot validate what is otherwise an invalid termination. For example, even if the work rules state that insubordination is grounds for dismissal this will not validate termination for minor insubordination.

(B) Reductions in Force

During the recent financial crisis and recession, many employers considered downsizing their workforce in Japan. Case law has developed four factors which must be thoroughly considered in order to justify termination based on economic conditions. The conditions are:

(i) there must be strong economic necessity to reduce the workforce ("**Economic Necessity Test**");

(ii) there must be necessity to terminate employees ("**Termination Necessity Test**");

(iii) the employees to be dismissed should be selected using a reasonable and fair standard; and

(iv) termination procedures must be reasonable and proper.

It is very difficult to prove the Economic Necessity Test and Termination Necessity Test. In relation to the Economic Necessity Test, there are no statutory criteria, but case law suggests that a company must be facing a real threat of bankruptcy suffering multiple yearly losses. In relation to the Termination Necessity Test, a court will look to other measures explored short of termination such as reducing executive salaries, transferring employees within group companies and offering severance packages to certain employees or groups of employees. Reductions in workforce are typically achieved through severance packages offered to employees which are voluntarily accepted.

(C) Notice of Termination

Employers must give at least 30 days' notice of dismissal or provide payment of 30 days' base salary in lieu of notice.[89] This requirement also applies to disciplinary dismissals, although there are rare cases in which an employer can dispense of this requirement by obtaining approval from the relevant Labor Standards Inspection Office. Furthermore, if an employee requests, the employer must deliver a certificate stating the reason for termination between the day of notice and the day of termination.[90] The employer has to deliver a separate certificate stating an employee's period of employment, kind of employment, position, wages or reason for termination without delay.

(D) Solution by Court

Employment matters can be heard using regular civil litigation before the courts or using the Labor Tribunal Committee. The Labor Tribunal Act (No. 45 of 2004) provides for a Labor Tribunal Committee consisting of one judge and two experts to solve individual labor-related disputes within three trial sessions by mediation or tribunal. If one or both parties do not agree with the tribunal result, a party can raise objections.

(E) Solution by Government

Article 5 of the Act on Promoting the Resolution of Individual Labor-Related Disputes (No. 112 of 2001) provides that where one or both parties file(s) an application for mediation with respect to an individual labor-related dispute, if the Director of the Prefectural Labor Bureau considers it necessary for the resolution of the dispute, a mediation will be conducted by the Dispute Coordination Committee. The Dispute Coordination Committee consists of three or more members with relevant knowledge and experience appointed by the MHLW. If the parties come to an agreement, it is usually treated as a settlement agreement.

[89] Labor Standards Act, art. 20.

[90] Labor Standards Act, art. 22.

D. TAXATION

The Japanese tax system is mainly concerned with income and asset taxes. Business operators should be aware of corporation tax obligations. Individuals should be aware of income tax obligations.

Japan has also entered into tax treaties with several countries to avoid double taxation that can occur when a party is subject to two tax regimes ("**Double Tax Treaties**"). For Japanese resident taxpayers (corporations or individuals), tax is payable on income generated in Japan and abroad. If you are a foreign individual or entity with no permanent establishment ("**PE**") in Japan, you will only be subject to Japanese taxation on certain limited income generated from Japan.

1. CORPORATION TAX

(A) Taxation of Corporation Tax

A foreign company which establishes a branch office in Japan will be subject to Japanese corporation tax only for all the income generated in Japan by the branch office.[91]

A KK or a GK will be subject to Japanese corporation tax on income generated domestically and abroad. Foreign source income, foreign capital gains, and foreign dividend income are subject to corporation tax, unless Japan has entered into a Double Tax Treaty with the relevant foreign jurisdiction such that tax exemptions or lower tax rates for certain categories of foreign income apply. Japan has entered into Double Tax Treaties with more than 60 jurisdictions.[92] Japanese corporations also have recourse to credit foreign tax (to a certain limit) against corporation tax incurred in the same taxable year ("**Foreign Tax Credit**"), which is discussed below.

(B) Tax Rate of Corporation Tax

In Japan the basic national Corporation Tax rate is 25.50%.[93] However, you should be aware that for the taxable years from April 1, 2012 until March 31, 2015, an additional "**Special Reconstruction Corporate Tax**" is imposed at a 10% rate on the standard corporation tax amount.[94] Therefore, for the taxable years from April 1, 2012 to March 31, 2015, the corporation

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[91] Corporation Tax Act (No. 34 of 1965), art. 141.1.

[92] Japan has executed Double Tax Treaties with the following countries; Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Brazil, Brunei, Bulgaria, Canada, China, Czech, Denmark, Egypt, Finland, Fiji, France, Germany, Georgia, Hong Kong, Hungary, India, Indonesia, Ireland, Israel, Italy, Kazakhstan, South Korea, Kuwait, Kyrgyz, Luxembourg, Malaysia, Mexico, Moldova, Netherlands, New Zealand, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Russia, Saudi Arabia, Singapore, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Thailand, Turkey, Turkmenistan, UK, Ukraine, USA, Uzbekistan, Vietnam and Zambia (as of August 2013).

[93] For small and medium sized corporations, which are corporations with capital amounts less than JPY 100 million (US$ 1.2 million), the portion of income not exceeding JPY 8 million (US$ 9.6 million) is taxable at a reduced tax rate of 19.00%.

[94] Special Measures to Secure the Financial Resources to Implement the Restoration from the Great East Japan Earthquake (No. 117 of 2011), art. 48.

tax rate is effectively 28.05%. Corporations are also subject to local taxes, which increase the standard effective tax rate to 35.64%, or 38.01% during the period in which the Special Reconstruction Corporate Tax is in effect.

The below chart outlines the different components of the effective tax rate in the Tokyo metropolitan area, as at September 2013.

	Before Amendment	After 2011 Amendment[95]	After 2011 Amendment + Special Reconstruction Corporations Tax
Corporate Tax (national tax)[96]	30.00%	25.500%	28.050% (=25.50% + 25.500% x 10.000%)
Special Local Corporations Tax (local tax)	4.292%	4.292%	4.292%
Business Tax (local tax)	3.260%	3.260%	3.260%
Inhabitant Tax (local tax)	6.210% (=30.00% x 20.70%)	5.280% (=25.500% x 20.700%)	5.280% (=25.500% x 20.700%)
TOTAL	43.762%	38.332%	40.882%
Effective tax rate	40.690%	35.640%	38.010%

(C) Foreign Tax Credit

If you are operating a KK or GK and have profits outside Japan, you should be aware of the foreign tax credit. In order to avoid international double taxation on income, the foreign tax levied on a Japanese domestic corporation, in the ordinary course of its business, may be credited to a certain limit against Japanese corporation tax on ordinary income and on undistributed profits.[97] If a company is unable to credit foreign tax fully against its Japanese corporation tax for the business year in question, the uncredited part can be carried over to the next three business years. However if the foreign tax rate is over 35%, the resultant extra amount of foreign tax is not deductible.

[95] This refers to the amendment of the Corporate Tax Act (No. 114 of 2011).

[96] Corporation Tax Act, art. 143, para 1.

[97] Corporation Tax Act, art. 69.

2. INCOME TAX

Income tax is imposed on the income of individuals who reside in Japan (including resident foreign nationals). Income tax is relevant to corporations for some categories of income as well.

Under the Income Tax Act (No. 33 of 1965), there are various categories of income, depending on the status of the taxpayer and the nature of the income. For Japanese residents, the calculation of income tax is based on the income category. The amount of tax is calculated by subtracting deductions from the total income (which results in a taxable amount), and applying a progressive tax rate to the taxable amount. The following calculations apply as at September 2013:

Taxable income (JPY)		Deduction (JPY)	Further amount (applied to income above the Minimum)
Minimum	Maximum		
-	1,950,000		5%
1,950,001	3,300,000	97,500	10%
3,300,001	6,950,000	427,500	20%
6,950,001	9,000,000	636,000	23%
9,000,001	18,000,000	1,536,000	33%
18,000,001	-	2,796,000	40%

For example, if the taxable income is JPY 5 million, the amount of income tax is JPY 572,500 (5,000,000 x 20 % – 427,500).

From 1 January 2013 to 31 December 2037, a surtax called the Special Reconstruction Income Tax will apply.[98] This surtax will add an additional 2.1% to the final income tax arrived at after other tax calculations.

3. CONSUMPTION TAX

Consumption tax is a kind of value added tax (VAT). Like VAT, consumption tax is generally imposed on each stage of manufacturing, wholesale, retail and service provision.[99]

At each stage, business operators (i.e., recipients of purchase money for goods transferred or services provided) pay consumption tax to the tax authority. In practice the operators pass such consumption tax on to final purchasers of the goods or services. The amount that a purchaser pays to the seller for consumption tax is deductible from tax owed by the purchaser on its subsequent sale of the goods or services. The current rate of consumption tax is 5%, although it is scheduled to increase to 8% in April 2014 and to 10% in October 2015.

[98] Special Measures to Secure the Financial Resources to Implement the Restoration from the Great East Japan Earthquake (No. 117 of 2011), art. 9.

[99] Consumption Tax Act (No. 108 of 1988), art. 4.

(A) Taxable Transactions

As a general rule, domestic transactions[100] and transactions for the import of foreign goods[101] are taxable under the Consumption Tax Act.[102] However, certain types of domestic transactions are not taxable, including transfers and leases of land and transfers of securities. The purchase of certain items, such as securities and postal stamps, is not subject to the consumption tax.

(B) Purchase Tax Credit

In order to avoid multiple taxation, if a consumption tax payer[103] makes a purchase subject to consumption tax, the total consumption tax on the purchase and on the import of foreign goods during a taxable period may be credited against the consumption tax payable for the sales of goods or provision of services in the taxable period during which the taxable purchase or import was made.[104]

If all sales of assets or provisions of service conducted in a taxable period are subject to consumption tax, the entire tax amount for domestic purchase or taxable import can be credited. In theory, if both taxable and non-taxable assets are transferred, only tax on a taxable purchase corresponding to the transfer of taxable assets can be credited to certain extent.

4. TAXES ON REAL ESTATE

(A) Fixed Asset Tax

After the acquisition of real estate, an owner will become liable for a fixed asset tax.[105] An owner of fixed assets (including land and buildings) on 1 January of a given year is liable for fixed asset tax for that entire year.[106] Fixed asset tax is imposed on the value of real estate as listed on fixed asset tax rolls.[107] The taxation basis of residential land is treated as one third of the original purchase price and the basis for small residential land (200 square meters or less) is one sixth of the original purchase price.[108] The fixed asset tax rate is generally 1.4%.[109]

Your business may also be subject to city planning (i.e., zoning) tax if a piece of land or a building is located in certain designated urban areas. The city planning tax is a surtax on the fixed asset tax, and is imposed at a rate of 0.3% on land and structures.[110]

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[100] Domestic transactions are transactions in Japan in which consideration is paid for the transfer or lease of assets, or the provision of services for business purposes.

[101] Import transactions involve the receipt of foreign goods from a bonded area (i.e., where dutiable goods may be stored without the payment of customs duty) in Japan. Foreign goods are (i) goods imported from foreign countries; and (ii) goods permitted for export.

[102] Consumption Tax Act, art. 4.

[103] Generally speaking, consumption tax payment is due two years after the first year for which a company has taxable sales of JPY10 million or more. Newly incorporated companies or foreign companies that begin taxable sales in Japan for the first time are exempt from consumption tax filing for the first two years if the stated capital of the company is less than JPY 10 million.

[104] Consumption tax Act, art. 30.

[105] Land, building, ships, aircraft or any other depreciable assets are subject to the fixed asset tax (Local Tax Act, art. 341.).

[106] Local Tax Act (No. 226 of 1955), art. 343 and 359.

[107] Local Tax Act, art. 349.

[108] Local Tax Act, art. 349.3.2.

[109] Local Tax Act, art. 350.

[110] Local Tax Act, art. 702.4.

(B) Real Estate Acquisition Tax

An acquirer of real estate must generally pay real estate acquisition tax.[111] However if real estate is acquired through a statutory merger, inheritance or in-kind contribution, the acquisition is not taxable. The price listed on fixed asset tax rolls is used to determine the acquisition tax. In addition, as a special measure, the taxation basis of residential land is treated as half of its original purchase price until 31 March 2015. The rate of real estate acquisition tax is 4%. However until 31 March 2015 the rate for the acquisition of lands or residential houses is 3%.

(C) Registration Tax

The purchaser of a piece of land or a building will need to pay registration tax in order to be recorded as the owner on the land registry or building registry and to perfect the title.[112] The purchaser usually bears liability for registration tax. Registration tax is imposed on the value of the real estate where such value is generally determined based on fair market value. However, the current legislative regime requires that the price as listed on the fixed asset tax rolls is used to calculate the registration tax.

As a general rule, the registration tax rate is 2%, but there are several special rules which may apply. For example, the tax rate for an asset transfer due to a statutory merger is 0.4%.

5. TRANSFER PRICING

You should be aware of the transfer pricing restrictions which apply to Japanese corporations transacting business with foreign affiliates. Many international companies been scrutinized by the Japanese tax authorities regarding transfer pricing issues. Where a corporation sells to, purchases from, provides services for or carries on other transactions with a foreign related party which has a special relationship with that corporation, if its taxable income is less than the amount calculated upon arm's length principles,[113] the corporation will not be able to enjoy tax benefits from such transactions.

Such transactions will be treated as having been conducted at arm's length prices, by either including a differential amount in the corporation's taxable income or now allowing a tax deduction. A corporation which conducts transactions with a foreign affiliate during a business year must attach to its final tax return for that year a document which contains, among other details, the name and location of the head or main office of the foreign affiliate.

There are various ways of ascertaining arm's length prices for the purpose of determining whether a transaction is at arm's length. The main methods of the calculation are:

NAME OF METHOD	APPLICATION
Comparable uncontrolled price method	Start with the uncontrolled market price for the same or similar goods and make any necessary adjustments
Resale price method	Start with the price at which the goods are sold by the seller to independent customers (resale price) and subtract the normal mark-up for the sale by the original vendor
Cost plus method	Start with the vendor's cost and add an appropriate mark-up calculated on a normal profit ratio for the sale by the original vendor and thus for the purchase by the seller
Any other acceptable method	Use income allocation by cost, fixed assets or other factors

[111] Local Tax Act, art. 73.2.

[112] Registration and License Tax Act (No. 35 of 1967), art. 3.

[113] e.g., when a Japanese subsidiary purchases goods from a off-shore parent company under the inter-company sales agreement

6. TAX HAVEN COUNTERMEASURE

As a general rule, if a Japanese domestic corporation owns 10% or more of a foreign subsidiary in a "**Tax Haven**" (i.e., a country or territory which does not impose income tax or imposes an income tax rate below than 20%), such company is subject to the Controlled Foreign Company Rules ("**CFC Rules**").

A foreign subsidiary in a Tax Haven includes a foreign corporation more than 50% directly or indirectly owned by Japanese residents or Japanese companies, and whose head office is located in a Tax Haven.

However, if the foreign subsidiary satisfies all of the criterion below, the CFC Rules do not apply:

CRITERION	DEFINITION
Business criterion	The foreign subsidiary's main business is not to hold stocks, offer intellectual property rights, or lease vessels or aircraft;
Substance criterion	The foreign subsidiary has a fixed facility such as an office, shop or factory;
Management and control criterion	The foreign subsidiary manages and controls its own business in the country in which its main office is located;
Non-affiliate criterion	If the main business of the foreign subsidiary is wholesale business, banking, trusts, securities, insurance, shipping or air transport, the foreign subsidiary conducts its business mainly with persons other than its affiliates; and
Location criterion	If the main business of the foreign subsidiary is other than those listed in the non-affiliate criterion above, the foreign subsidiary conducts its business mainly in the country or area in which its main office is located.

7. PAYMENT OF TAX

(A) Self-Assessment System

In Japan, most national taxes, including corporation tax, income tax (excluding withholding tax) and consumption tax, are paid by the self-assessment system, by which taxpayers determine and pay their own tax obligations. If a taxpayer makes an incorrect or intentionally false tax return, the tax authority may order re-submission of a corrected tax return and payment of a penalty.

(B) Withholding Tax System

The withholding tax system is used for certain types of income tax such as tax on salary income or interest income.[114] Under the withholding tax system, the taxpayer does not pay tax directly. Instead, the payer of such income (e.g., an employer) is required to withhold a certain amount of money and pay that amount to the tax authority on behalf of the taxpayer (e.g., an employee).

Most Japanese employees do not file a tax return because their income tax has already been paid by withholding from their salary income. It is possible to get a tax refund by filing a tax return if the amount of income withheld exceeds the income tax that should have been imposed. The tax return made by employees is relatively rare because employers frequently adjust withholding tax in the later months of the year to account for their employees' deductible expenses.

[114] Income Tax Act, art. 181 to 223.

Tax is withheld for some types of income paid to non-resident individuals or foreign corporations at a rate of 15% to 20%. The tax rate depends on the category of income. However, Double Tax Treaties may grant a special concession to a resident individual or a resident corporation in a foreign jurisdiction who is not resident in Japan at the relevant time. Some Double Tax Treaties provide that a person with dual residence may be determined to be a person with single residence by mutual agreement between competent authorities. In order to enjoy benefits under Double Tax Treaties, an application form must be filed with the relevant tax office before the first payment between parties is made.

E. FOREIGN INVESTMENT CONTROL

1. OVERVIEW

Generally speaking, Japan does not have strict restrictions on foreign direct investment. However, in exceptional cases, pre- or post-acquisition notices may be required under the Foreign Exchange and Foreign Trade Act ("**FEFTA**").

The FEFTA applies to the following types of transactions:

APPLICATION SCOPE OF FEFTA	
i	Inward direct investments;
ii	Capital transactions (e.g., outbound investments and other similar transactions);
iii	Payments to and from foreign countries; and
iv	Foreign trade (import and export).

The Ministry of Finance ("**MOF**") and the Ministry of Economy, Trade and Industry ("**METI**") enforce the FEFTA. Foreign trade transactions are regulated solely by METI. Inward direct investments, capital transactions and payment transactions are regulated by the MOF and METI, though other agencies may be implicated depending on the transaction.

2. INWARD DIRECT INVESTMENTS

If a "**Foreign Investor**" (as defined below) makes an inward direct investment such as those listed below (each, an "**Inward Direct Investment**"), the Foreign Investor may be required to make a notice filing through the Bank of Japan with the MOF and the relevant ministry with jurisdiction over the transaction matter.

(A) Definition of Foreign Investor

A "**Foreign Investor**"[115] means:

DEFINITION OF FOREIGN INVESTOR	
i	any individual who is a non-resident of Japan;
ii	any entity established pursuant to foreign laws, or other entities having its principal office in a foreign state;
iii	any entity where 50% or more of the voting rights are held by a non-Japanese individual or entity; or
iv	any entity where individuals who are a non-resident occupy the majority of either all officers or the representative officers.

[115] FEFTA, art. 26, para 1.

(B) Definition of Inward Direct Investment

The term "Inward Direct Investment" generally refers[116] to the following transactions by a Foreign Investor, each of which requires a post-transaction filing unless advance notice[117] is required:

NAME OF ACTION	DESCRIPTION
Acquisition of shares of non-listed companies (including establishment of a KK or a GK)	The acquisition of shares or equity of a non-listed company (excluding acquisition from Foreign Investors)
Acquisition of shares of listed companies	Acquisition of 10% or more of shares of a listed company in Japan
Transfers of shares	Transfer of shares or equity of a non-listed company (limited to the transfer from a non-resident individual Foreign Investor who has been holding the shares or equity since he or she was a resident in Japan prior to his becoming a non-resident to any of Foreign Investors)
Consent to substantial change of business purpose	Any consent to a substantial change of the business purpose of a company (for any KK, limited to consent given by Foreign Investors holding one-third or more of the voting rights of all shareholders of the KK)
Loans[118]	Investment to meet all of the following requirements: (i) loans to a Japanese company where the loan term exceeds one year: (ii) the outstanding loan is greater than JPY 100 million; and (iii) the amount of the loan to the Japanese Company is greater than 50% of the amount of the liabilities of the Japanese company.[119]
Acquisition of company bonds[120]	Investment to meet all of the following requirements: (i) a Foreign Investor acquires bonds of a Japanese company where the redemption term exceeds one year; (ii) the outstanding bonds of the Japanese company acquired by the Foreign Investors exceeds JPY 100; and (iii) the amount of the bonds is greater than 50% of the amount of the liabilities of the Japanese company.[121]

[116] FEFTA, art. 26, para 2.

[117] Strictly speaking, establishment of a registered branch by a foreign company falls under the category of Inward Direct Investment. However, a majority of the types of business that do not require advance notice also do not trigger the post-transaction filing requirements.

[118] There is an exception for loans from banks or other financial institutions that make loans in the ordinary course of business.

[119] If a Foreign Investor holds a Japanese company's bonds where the redemption term exceeds one year, the calculation of whether the amount of the loan exceeds 50% of the Japanese company's liability is based on the outstanding amount of the bonds issued to the Foreign Investor plus the amount of loans to the Japanese company.

[120] Acquisition of bonds made by banks or other financial institutions in the ordinary course of the business does not trigger an Inward Direct Investment filing requirement.

[121] If a Foreign Investor makes loans to a Japanese company, the calculation of whether the bonds exceed 50% of the Japanese company's liability is based on the outstanding amount of the bonds issued to the Foreign Investor plus the amount of loans to the Japanese company.

(C) Advance Notice Requirements

Under the FEFTA, certain Inward Direct Investments will require advance notice filings and a waiting period[122] where the transaction implicates national security or public order (e.g., airplanes, weapons, nuclear power) or certain designated industries (e.g., agriculture, forestry and fisheries industry, oil industry, leather-making industry, aerospace, maritime industry, etc.).

If necessary, the advance notice must be filed in a prescribed form through the Bank of Japan to the MOF and relevant ministers within six months prior to the Inward Direct Investment.

Transactions requiring advance notice are subject to review and approval by the relevant ministries. If the ministry determines the transaction creates a risk for national security or that there is a likelihood that the transaction will have adverse effects on the Japanese economy the ministry has the authority to block the transaction.

The only recent case where the MOF and the METI blocked a transaction occurred in April 2008. A foreign investment fund planned to obtain 20% of the shares of a power company. The power company had constructed a nuclear power plant in Japan. The fund filed advance notice of the acquisition with the MOF and METI. The MOF and the METI recommended the fund to discontinue the acquisition on the grounds that there may be a risk that the acquisition would disturb the maintenance of public order. The fund gave the MOF and the METI a notice indicating that they would not accept the recommendation by the MOF and the METI, but the MOF and the METI ordered the fund to discontinue the acquisition, which was the first order since the enactment of the FEFTA. In July 2008 the fund announced that it would not file an appeal.

[122] FEFTA, art. 27, para 1.
[123] FEFTA, art. 20.

3. CAPITAL TRANSACTION

Under the FEFTA, loans, the sales of securities and outbound direct investments are considered capital transactions and may be subject to approval by the MOF.[123] The MOF regulations are primarily concerned with post-closing notice filings through the Bank of Japan and have recently been amended to simplify the filing requirements for certain capital transactions. The following are transactions that require post-closing notice filings and are related to foreign companies doing business in Japan.

EXAMPLES OF CAPITAL TRANSACTIONS	
i	Issuance or offer of securities in Japan by a non-resident. The non-resident is not required to report transactions for securities worth less than JPY 1 billion;
ii	Issuance or offer of securities outside of Japan by a non-resident denominated or payable in Japanese yen. The non-resident is not required to make a report transactions for securities worth less than JPY 1 billion; and
iii	Acquisition of real estate[124] in Japan or rights related thereto by a non-resident.

4. PAYMENTS FILING

Payments into Japan that exceed JPY 30 million from a non-resident may trigger the recipient in Japan to file a payment report with the MOF through the Bank of Japan.[125] For example, if a foreign company makes a payment exceeding JPY 30 million to fund its Japanese subsidiary, the Japanese subsidiary is required to make filings with the MOF through the Bank of Japan with regard to the receipt of the funds.

A payment exceeding JPY 30 million from a resident in Japan to a non-resident requires the resident in Japan to file a payment report in the same course as in a recipient filing.[126]

In addition to a small payment exemption (JPY 30 million or less), payments by importers/exporters which are incidental to the import/export of goods will not be subject to the payment filing.

5. FOREIGN TRADE CONTROL

Incorporating a Japanese subsidiary for the import of goods may be regulated depending on the type of goods being imported.

The Import Trade Control Orders[127] provides the details of import regulations and METI enforces the regulations. Articles 4 and 9 of the Import Trade Control Orders create an import license system and an import quota system. Under these articles, METI can designate commodities which are subject to the import quota system. Any company that plans to import those designated commodities must apply for and obtain an import quota and then apply for an import license.

Military goods and technologies, including relevant dual-use goods and technologies, are subject to the export control license requirements under the FEFTA[128] to maintain both national and international peace and security.

[124] The following cases are exceptions to the filing requirements for non-residents: (i) a non-resident acquires real estate for itself, its employees or its family members; (ii) a non-resident who is conducting a non-profit business in Japan acquires real estate for use by the non-profit business; (iii) a non-resident acquires real estate for to use as its office; or (iv) a non-resident obtains real estate from another non-resident.

[125] FEFTA, art. 55, para 1.

[126] FEFTA, art. 55, para 1.

[127] Import Trade Control Orders, Order No. 414 of 1949.

[128] FEFTA, art. 48.

F. ANTI-MONOPOLY AND UNFAIR TRADE REGULATIONS

1. OVERVIEW OF IMPORTANT LAWS

Japan has four major antitrust and fair trade laws: (i) the Anti-Monopoly Act ("**AMA**"); (ii) the Act against Unjustifiable Premiums and Misleading Representations ("**AUPMR**"); (iii) the Subcontractor Act; and (iv) the Unfair Competition Prevention Act ("**UCPA**").

Each of these laws carries civil and criminal penalties. The Japan Fair Trade Commission ("**JFTC**") is responsible for civil enforcement of the AMA and the Subcontractor Act and the Consumer Affairs Agency ("**CAA**") is responsible for civil enforcement of the AUPMR. The Public Prosecutor's Office is responsible for enforcement of criminal penalties under these laws, and the METI enforces the UCPA.

(A) Anti-Monopoly Act

The most important antitrust law in Japan is the AMA (formally known as the "Act on Prohibition of Private Monopolization and Maintenance of Fair Trade" (Act No. 54 of 1947)) which regulates private monopolies, cartels, unfair trade practices, surcharges and mergers and acquisitions.

(B) Act against Unjustifiable Premiums and Misleading Representations

The AUPMR (Act No. 134 of 1962) regulates misrepresentation made by business operators in order to protect the benefits of general consumers.

(C) Subcontractor Act

The Subcontractor Act (formally known as the "Act against Delay in Payment of Subcontract Proceeds, Etc., to Subcontractors" (Act No. 120 of 1956)) regulates abusive practice by the contractor towards subcontractors.

(D) Unfair Competition Prevention Act

The UCPA (Act No. 47 of 1993) regulates unfair methods of competition, such as misleading description of goods, misappropriation of trade secrets and the acquisition of domain names for unjustified purposes. The UCPA focuses more on protecting private parties from the unfair competition by giving injured parties the right to seek an injunction and damages from the wrongdoer.

2. GOVERNMENT AGENCIES

(A) Japan Fair Trade Commission

The JFTC is the government agency in charge of enforcing competition policy and plays a primary role in enforcing the AMA and the Subcontractor Act. Like the FTC in the United States, the JFTC does not have the power to enforce criminal sanctions for violations of antitrust law but it may refer matters to the Public Prosecutor's Office for criminal enforcement. The AMA was amended in 2005 to authorize the JFTC to conduct criminal investigations of violations of antitrust laws to determine whether it would refer matters to the Public Prosecutor's Office. The JFTC issues various guidelines and publicizes case studies which were investigated by it (the parties are made anonymous). The JFTC also offers a prior consultation process where it will give its view as to whether a transaction may be blocked under the AMA.

(B) Consumer Affairs Agency

The CAA was established in 2009 with a stated goal of creating a society where consumers live with ease and safety. The CAA's main role is to protect and enhance the rights of consumers, ensure voluntary and reasonable choice by consumers and to regulate labelling for the quality of products which are closely related to onsumers.

3. SUMMARY OF KEY REGULATIONS UNDER AMA

(A) Private Monopolization, Unreasonable Restraints on Trade, and Unfair Trade Practices

The AMA covers both (i) violations in connection with business transactions and (ii) restrictions on business combinations.[129]

The AMA prohibits business transactions broadly divided into three categories: (i) private monopolization, (ii) unreasonable restraints on trade and (iii) unfair trade practices.

(1) Private Monopolization[130]

The AMA generally defines private monopolization as:

Business activities, by which any business operator, individually or by combination or conspiracy with other business operators, exclude or control the business activities of other business operators, thereby causing a substantial restraint of competition in the relevant market.

This definition of private monopolization includes unilateral actions by a single business entity and concerted activities among several business entities, such as joint interference with new entry into a market.

Whether business activities fall under the AMA definition of "private monopolization" depends heavily on the definition of the relevant market. The relevant market does not necessarily mean the industry in which the company is doing business. Even if a company as a whole has only a small presence in an industry it may have a large influence in the relevant market of a particular product and/or geographic area. Generally speaking, there are two categories of private monopolization: (i) private monopolization through exclusion and (ii) private monopolization through control.

TYPES OF PRIVATE MONOPOLIZATION	DESCRIPTION
Private Monopolization through Exclusion	Trying to exclude competitors from the relevant market individually or by combination with other business operators by means of unjust low-price sales, discriminatory pricing, etc. or monopolizing the market by obstructing business activities of new-comers to the relevant market.
Private Monopolization through Control	Trying to control the market individually or by combination with other business operators by restraining business activities of other business operators through the acquisition of stock, dispatch of officers, etc.

[129] See section M "Mergers and Acquisitions"

[130] AMA, art. 2, para 5.

(2) Unreasonable Restraints on Trade[131]

The AMA defines "unreasonable restraints on trade" as:

Business activities, by which any business operator, by contract, agreement or any other means irrespective of its name, in concert with other business operators, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

The AMA's definition of unreasonable restraints on trade is commonly understood to refer to cartels. A literal reading of the AMA suggests that a cartel does not appear to be illegal unless certain conditions (i.e., harm to the public interest) are met. Practically speaking, however, cartels involving price fixing or market allocation between competitors are *per se* illegal as in most other jurisdictions. If any business operators, acting in concert or through trade associations, consult with each other to jointly determine product prices, sales and production volumes, which should be determined voluntarily by each business operator, and restrain competition as the result, such actions would be deemed to be prohibited cartel activities.

(3) Unfair Trade Practices[132]

The AMA defines unfair trade practices as acts that tend to impede fair competition. The AMA provides five types of unfair trade practices and the JFTC designates additional 15 types of acts under the General Designations,[133] which are applicable to any and all industries. The JFTC has also created "Special Designations" for acts applicable to specific industries, such as department stores or newspaper companies.

Unfair trade practices are illegal only if such practice tends to impede fair competition. Determining whether fair competition tends to be impeded is a difficult and fact-intensive analysis. The JFTC has published several guidelines to aid in a case-by-case analysis.

(B) Intellectual Property and Anti-Monopoly Act

The AMA generally does not apply to parties who are enforcing their rights under the intellectual property laws (i.e., the Copyright Act, the Patent Act, the Utility Model Act, the Design Act or the Trademark Act).[134] The guidelines[135] to the AMA provide basic concepts of the AMA regulations with respect to intellectual property rights and examples that are permitted and not permitted under the AMA, such as patent pools, cross-licencing and restrictions on research and development activities. However, in certain cases enforcement of intellectual property rights may fall under the AMA prohibition on anti-competitive conduct. This usually arises in connection with patent pooling, licensing agreements and standards setting.

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131 AMA, art. 2, para. 6.

132 AMA, art. 2, para. 9.

133 The 15 designated unfair trade practices are as follows: (1) concerted refusal to trade, (2) other refusal to trade, (3) discriminatory consideration, (4) discriminatory treatment on trade terms, etc., (5) discriminatory treatment, etc., in a trade association, (6) unjust low-price sales, (7) unjust high price purchasing, (8) deceptive customer inducement, (9) customer inducement by unjust benefits, (10) tie-in sales, etc., (11) trading on exclusive terms, (12) trading on restrictive terms, (13) unjust interference with appointment of officer in one's transacting party, (14) interference with a competitor's transactions, and (15) interference with internal operation of a competing company.

134 AMA, art. 21.

135 The Guidelines for the Use of Intellectual Property under the Antimonopoly Act.

(C) International Agreements

The AMA prohibits international agreements that contain matters constituting (i) unreasonable restraints of trade or (ii) unfair trade practices.[136] While an agreement between a foreign parent company and its wholly owned Japanese subsidiary is considered an "international agreement" under the AMA, such agreements typically do not raise Japanese antitrust issues. However, foreign companies entering into distribution agreements with Japanese distributors should be wary of the usual anti-trust issues which may arise.

(D) Guidelines

The JFTC has published a number of guidelines concerning interpretation of certain provisions of the AMA,[137] including the following:

MAJOR GUIDELINES	
i	Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act
ii	Guidelines Concerning Distribution Systems and Business Practices
iii	Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination
iv	Guidelines Concerning the Franchise System under the Antimonopoly Act
v	Guidelines Concerning Joint Research and Development under the Antimonopoly Act

[136] AMA, art. 2, para. 6.

[137] These guidelines are available from JFTC's website (http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.html).

(E) Remedies and Penalties

(1) Elimination Measures

The JFTC may take action to stop violations of the AMA provisions concerning (i) private monopolization, (ii) unreasonable restraints on trade, or (iii) unfair trade practices. The JFTC usually issues cease and desist orders and supplemental orders thereto (such as orders to report the measures taken for a cease and desist notice).

(2) Administrative Fines (Surcharge)

The JFTC may levy administrative fines (surcharges) for unreasonable restraints on trade, such as cartel activities and collusive bidding, private monopolization and certain types of unfair trade practices. The amount of surcharge payment is based on a statutory formula and table as shown below.

Total surcharges = (a) x (b)

(a) = sales amounts of products or services in question during the period of violation

(b) = surcharge calculation rates (see below table)

SURCHARGE CALCULATION RATES			
Business Category	**Retail**	**Wholesale**	**Others**
Unreasonable Restraints of Trade	3% (1.2% for SME)[138]	2% (1% for SME)	10% (4% for SME)
Private Monopolization through Control	3%	2%	10%
Private Monopolization through Exclusion	2%	1%	6%
Unfair Trade Practices (Concerted refusal to trade, Discriminatory pricing, Unjust low price sales, Resale price restriction)	2%	1%	3%
Unfair Trade Practice (Abuse of superior bargaining position)	1%		

If the fined party is (i) an entity which has been fined in the past 10 years and (ii) the entity has played a leading role in the matter that is the subject of the current surcharge (e.g., an organizer in cartels and collusive bidding), the amount of the surcharge will be increased by 50%.

[138] SME stands for "Small and Medium sized Enterprises" and refers to companies: (i) whose capital amount is not more than JPY 300 million and whose number of regular employees is not more than 300, engaged in manufacturing, construction, transportation or other business as its principal business, (ii) whose capital amount is not more than JPY 100 million and whose number of regular employees is not more than 100, which operates a wholesale business, (iii) whose capital amount is not more than JPY 50 million and whose number of regular employees is not more than 100, engaged in a service business as its principal business, (iv) whose capital amount is not more than JPY 50 million yen and whose number of regular employees is not more than 50, engaged in retail as its principal business, or (v) any other companies whose business scale is provided by the cabinet order.

(3) Leniency Program

Where a surcharge is to be imposed on parties causing an unreasonable restraint of trade, parties have the opportunity to cease such acts and make a petition to the JFTC for its leniency program that may reduce the surcharge for the petitioning party.[139]

The leniency program applies to a total of five applicants, and up to three applicants are eligible for leniency after the investigation start date.

ORDER OF APPLICANTS	AMOUNT TO BE EXEMPT
First applicant	Fully exempt from the surcharge
Second applicant	Exempt from 50% of the surcharge amount
Third applicant	Exempt from 30% of the surcharge amount
Fourth or fifth applicant[140]	Exempt from 30% of the surcharge amount

For parties who apply after the start of an investigation, regardless of the order of the application, only 30% of the surcharge amount is exempt.

The leniency program may be applied to the first five petitioners. However, the fourth and fifth petitioners must report newly disclosed facts. The leniency program does not extend past the fifth petitioner. The leniency program is only available for surcharges on acts of unreasonable restraint of trade and is not available for surcharges imposed on acts of a private monopolization or unfair trade practices.

(4) Criminal Penalties

If the JFTC asks the Public Prosecutor's Office to charge a company and/or individual for a violation of the AMA, then a criminal suit will be filed with the court by the public prosecutor. Corporations and the relevant, directors, officers and employees are usually prosecuted simultaneously.

(5) Civil Suit by Private Entities

Parties alleging unfair trade practices may file suit seeking an injunction under the AMA and damages based on a general tort theory or a strict liability theory. The plaintiffs are not required to prove the defendant's negligence or wilful misconduct if the JFTC has made a formal finding that the defendant has violated the AMA. Punitive damages, however, are not available.

A common civil suit alleging unfair trade practices involves continuous supply contracts. Plaintiffs often allege a wrongful termination of a continuous supply contract constitutes an antitrust violation, such as when a supplier terminates agreements with a discounter in order to maintain resale prices. Foreign clients doing business in Japan and relying on one distributor should be aware of this potential long-term risk.

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[139] AMA, art. 7-2, para. 10 to 12.

[140] For the fourth and fifth applicants, they must report facts previously unknown to the JFTC in order to enjoy the benefit of the leniency program.

4. PREMIUMS AND REPRESENTATIONS ACT

The AUPMR (Act No. 134 of 1962) restricts misleading representations, such as statements that certain goods or services are extremely superior to those of other firms. The AUPMR is based on the same concepts as the AMA, particularly in connection with restrictions on deceptive customer inducement. In addition, the AUPMR provides certain restrictions on the maximum value and permissible methods for offering premiums on consumer goods (e.g., gifts given away with products).

5. SUBCONTRACTOR ACT

(A) Overview

The Subcontractor Act (Act No. 120 of 1956) is designed to implement some of the same concepts as the AMA, primarily with regard to abuse of dominant bargaining position against subcontractors. The Subcontractor Act places various obligations and restrictions on a contractor in connection with certain types of subcontracting. The Subcontractor Act would be relevant to most manufacturing companies, construction companies or retail stores in the context of agreements with suppliers.

(B) Definitions

For the purposes of the Subcontractor Act, a "subcontractor" is defined based on the amount of its paid in capital, categories of subcontracting, and the amount of paid-in capital of its contractor.[141]

(1) If a category of subcontracting (i) falls under consignment of manufacture of goods, repair of goods, creation of computer programs or transportation, storage of goods and information processing services and (ii) if the following paid-in capital requirement is met, subcontract restrictions may be triggered.

	GENERAL CONTRACTOR	SUBCONTRACTOR
Paid-in capital	More than JPY 300 million	JPY 300 million or less
	More than JPY 10 million but JPY 300 million or less	JPY 10 million or less

(2) For types of subcontracting other than those mentioned in paragraph (1) above, if the following paid-in capital requirement is met, subcontract restrictions may be triggered:

	GENERAL CONTRACTOR	SUBCONTRACTOR
Paid-in capital	More than JPY 500 million	JPY 500 million or less
	More than JPY 10 million but JPY 500 million or less	JPY 10 million or less

[141] The Subcontractor Act, art. 2, para. 8.

The Subcontractor Act regulates the following transactions:

REGULATED TRANSACTIONS		
Types of Transactions		**Examples**
i	consignment of manufacture of goods	outsourcing of manufacture of goods or parts
ii	repair of goods	outsourcing of repair service
iii	creation of information products	computer programs or TV programs
iv	other services	transportation or maintenance of buildings

(C) Restrictions under Subcontractor Act

Under the Subcontractor Act the contractor is obligated to (a) stipulate the payment date for the price for the subcontractor's work as early as possible and in no event later than 60 days from the contractor's receipt of the subcontractor's work, and (b) provide the subcontractor, upon subcontracting, with a document clearly stating the scope of work, the price for the work, the date and method of payment and other material elements of the subcontracting.

The following actions are prohibited under the Subcontractor Act:[142]

PROHIBITED ACTIONS	
i	Rejecting receipt of delivery of the subcontractor's work without reasonable ground
ii	Delaying payment
iii	Reducing the price for subcontracting without reasonable ground
iv	Forcing the subcontractor to take back the subcontractor's own work, without reasonable ground
v	Stipulating a conspicuously lower price compared to the price normally paid for the same or similar work
vi	Forcing the subcontractor to buy products or services that the contractor designates, without reasonable ground

6. UNFAIR COMPETITION PREVENTION ACT

The UCPA (Act No. 47 of 1993) regulates unfair methods of competition, such as misleading descriptions of goods, misappropriation of trade secrets and the acquisition of domain names for unjustified purposes. While the stated goals of the AMA and the UCPA are to promote free and fair competition, the UCPA focuses more on protecting private parties from unfair competition by protecting unregistered trademarks, forms or shapes of the products sold within three years, domain names and trade secrets and by giving injured parties the right to seek an injunction and damages from the wrongdoer.

[142] The Subcontractor Act, art. 4, para. 1.

G. BRIBERY REGULATION

1. OVERVIEW

Japan's anti-bribery policy is embodied by two separate laws: (i) the Penal Code and the Unfair Competition Act. The Penal Code regards bribery of domestic public officers, while the Unfair Competition Prevention Act addresses bribery of foreign officials.

2. PENAL CODE

Japan's Penal Code strictly prohibits both the provision of and the acceptance of bribes. A person who gives, offers or promises to give a bribe to a "public officer" (or a person who will be appointed as a public officer or who has resigned as a public officer) in connection with the recipient's role as a public officer is subject to imprisonment of up to three years and/or a fine of up to JPY 2.5 million.[143]

"Bribery" as a concept under the Penal Code is interpreted broadly. Anything, money or otherwise, that could satisfy a person's demand or desire could be considered a bribe. Additionally, facilitation payments, which are payments made to public officers to expedite their actions rather than to change their substantive actions, are also considered bribes in Japan.

It is common in Japan to present end-of-year gifts (called "*oseibo*") to show gratitude for favors received during the year. However, gift-giving to a public officer could be seen as a bribe under the Penal Code and is thus not permissible.

3. UNFAIR COMPETITION PREVENTION ACT

Under the UCPA (Act No. 47 of 1993), it is illegal to give, offer, or promise to give any money or other benefits to a foreign public officer for the purpose of having the foreign public officer act or refrain from acting in a particular way in relation to his or her duties, or having the foreign public officer use his or her position to influence another foreign public officer in the same way, in order to obtain illicit gains in business with regard to international commercial transactions.

There are no explicit provisions regarding facilitation payments to foreign public officers. However, payments to foreign public officers to expedite ordinary administrative services are generally not considered to be benefits given "in order to obtain illicit gains" and so depending on the circumstances may not be a violation of the UCPA.

Violation of the UCPA provisions above is punishable by imprisonment for up to five years and/or or a fine of up to JPY 5 million. If the violating party is an employee, officer, or agent of a company and was acting in furtherance of his or her responsibilities toward the company, the company is also subject to a fine of up to JPY 300 million.[144]

[143] Penal Code, art. 197 through 198.

[144] UCPA, art. 18

H. CONTRACT LAW

Foreign companies doing business in Japan should be aware that certain principles or provisions of Japanese law may make what would otherwise be a standard contract provision in any other jurisdiction unenforceable in Japan.

The general ideas and principles of contract law of Japan are provided in the Civil Code (Act No. 89 of 1986) and have been supplemented by over the years by court cases as well as by various laws including the Commercial Code (Act No. 48 of 1899), the Labor Contract Act (Act No. 128 of 2007) and the Consumer Contract Act (Act No. 61 of 2000 ("**CCA**")).

1. OFFER AND ACCEPTANCE

Under Japanese law, a contract consists of an offer from one party and an acceptance by the other party. As a general rule, no writing is required to form a contract. Japan does not have a concept similar to the statute of frauds but certain types of contracts, such as guarantee contracts under the Civil Code or fixed-term building lease contracts under the Act on Land and Building Leases (Act No. 90 of 1991), must be in writing to be enforceable. Once a contract is formed, both parties are obligated to complete the contract and neither party may unilaterally terminate the contract unless otherwise agreed by the parties.

2. NO CONSIDERATION REQUIRED

Under Japanese contract law, the common law concept of consideration (i.e., an exchange of something of value) is not required to form a contract. As a result, what would be considered an unenforceable "gift" contract in other jurisdictions is valid and enforceable in Japan.

3. FREEDOM OF CONTRACT

Under Japanese contract law, freedom of contract is a fundamental principle that allows parties to enter into agreements and assume corresponding risks at their own will. However, various laws have limited this principle for the purpose of protecting parties with inferior bargaining positions. For example, the CCA governs contracts between a business operator and a consumer and offers additional protections to consumers not provided under the Civil Code or the Commercial Code. The CCA would invalidate a contract provision that provides a blanket and total exemption to the business operator from compensatory liability for damages incurred by the consumer that are a result of the business operator's failure to perform its obligation or with respect to tort liability.[145] The Electronic Contract Act (Act No. 95 of 2001) contains specific requirements pertaining to electronic contracts in connection with online sales to provide consumers more extensive protection than that provided under the Civil Code.

4. CONSUMER CONTRACT ACT

Under the CCA, business operators entering into contracts with consumers are required to clearly set out the rights of consumers and duties owed to consumers as well as consumers' obligations. The CCA prohibits certain contract clauses including limitations on seller's liability [146] or requiring a consumer to pay large liquidated damages.[147] Further, under the CCA, consumers may rescind a consumer contract in certain cases.

[145] CCA, art. 8.

[146] CCA, art. 8.

[147] CCA, art. 9.

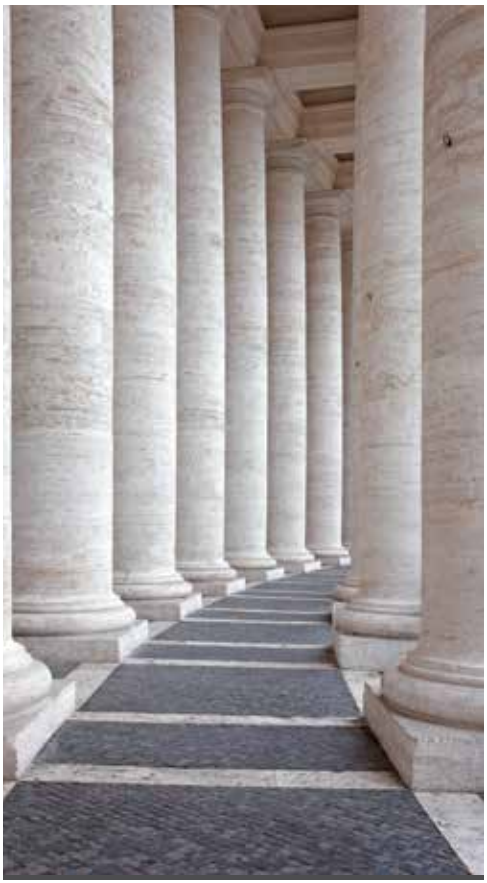
CASES WHERE CCA PERMITS RESCISSION	
i	If a business operator made material misrepresentations that resulted in the consumer having a misunderstanding with respect to the misrepresented matter.[148]
ii	If a business operator provided conclusive evaluations of future prices or outcomes[149] (e.g., "Your performance will definitely improve if you use our service or product.").
iii	If a business operator intentionally omitted disclosing disadvantageous facts while making representations regarding a product or service, resulting in the consumer believing that there are no disadvantageous facts.[150]

5. USE OF SEAL AND E-SIGNATURE

In Japan, it is customary for both individuals and companies to use a seal to execute a contract instead of signature of the parties. In addition, seals are required for signing most legally binding documents and are required for incorporation of a company in Japan. While it is not a statutory requirement, almost all companies in Japan place their registered seal on written contacts usually next to the names of their representatives.

Under the Code of Civil Procedure,[151] a document bearing the impression of the authentic seal may be established as valid more easily than a document without an authentic seal impression. Since seals are used to execute contracts and other legal documents, Japanese companies are careful with the storage and use of their seals.

Any document with an e-signature, regardless of the technology used, can be brought into courts as evidence. Under the Act on Electronic Signatures and Certification Business (Act No. 102 of 2000), an electronic record with a certain qualified e-signature is presumptively valid in civil procedures,[152] which has the same legal effect provided by a document bearing the impression of the authentic seal.



[148] CAA, art. 4, para. 1, no.1.

[149] CAA, art. 4, para. 1, no.2.

[150] CAA, art. 4, para. 2.

[151] Code of Civil Procedure, art. 228, para. 4.

[152] Act on Electronic Signatures and Certification Business, art. 3.

6. CONTRACT INTERPRETATION BY COURTS

(A) Three Basic Principles

In reviewing contract disputes Japanese courts will look to the text of the agreement. By way of background, courts interpret the contact based on the literal meaning of the text but they are also bound by general legal principles such as:

PRINCIPLES FOR CONTRACT INTERPRETATION	
i	Principles of good faith[153]
ii	Abuse of rights[154]
iii	Consideration of public order and good morals[155]

These legal principles are found in the Civil Code but courts have some latitude in how they are applied on a case-by-case basis. Generally speaking, these principles do not arise in business disputes barring unusual circumstances. A court often applies the abuse of rights principle in the context of employment agreements when voiding a company's action against an employee (e.g., termination, demotion or pay cut).

Japanese courts have recognized a doctrine that is similar to the common law jurisdictions' concept of promissory estoppel based on the principle of good faith.[156] The courts apply this doctrine where one party reasonably relies and incurs costs based on another party's promises and will award actual damages if the other party does not perform. However, only actual damages are recoverable and lost profits may not be recovered.

(B) No Parol Evidence Rule

Japanese contract law does not have a parol evidence rule, meaning that a Japanese court may, at its discretion, look beyond the written agreement to other evidence (e.g., written correspondence or oral discussions) as the court deems necessary to confirm the intent of the parties. In addition and perhaps as a consequence, Japanese courts have relatively broad discretion in exercising discretion when interpreting contracts. In practice, the use of an "Entire Agreement" clause (affirming the written agreement is the sole agreement of the parties) is widely recognised in business transactions and some court cases respect its enforceability.

(C) Enforcement of Non-Competition Provision

One common example where Japanese courts exercise discretion in interpreting contracts is with regard to non-competition provisions in employment or entrustment agreements between companies and employees or directors. While non-compete provisions are common in Japan, courts will consider a variety of factors in determining whether the provision is enforceable such as whether there was additional and sufficient compensation provided, reasonability of geographic scope and time and will examine the previous duties of the employees or directors. Courts can determine the non-compete provision to be valid in whole or in part.

[153] Civil Code, art. 1, para. 2.
[154] Civil Code, art. 1, para. 3.
[155] Civil Code, art. 90.
[156] 1232 HANREI JIHO 110 (Tokyo H. Ct., Mar. 17, 1987)

(D) Termination of Continuous Agreement

Another issue that foreign companies sometimes encounter is in termination or non-renewal of continuous agreements, especially distribution agreements. While the contract may clearly provide for termination following a commercially reasonable notice period, distributors sometimes challenge the termination or expiration of the contract. The longer an agreement is in place and one party becomes reliant on the other, there is an increased risk that a termination of the agreement could be challenged. Courts sometimes uphold challenges to termination of such agreements through monetary compensation, meaning the courts will allow termination but require compensation be paid to the distributor.

7. REMEDIES

The Japanese Civil Code generally provides two types of remedies for breach of contract: specific performance[157] and monetary damages.[158] If a party of a contract fails to perform its duties set forth in the contract, the other party may seek damages arising from such failure to perform. Here is a brief summary of these contractual remedies.

(A) Specific Performance

Japanese courts can order specific performance as a remedy for breach of contract. For example, if a party to the contract fails to deliver certain unique goods, the other party may seek the enforcement of such delivery.

(B) Damages

In addition to the specific performance, Japanese courts recognise monetary damages as a remedy for breach of contract. The table below shows how courts treat certain concepts of damages under Japanese law.

CONCEPTS	NOTES
Scope of recoverable damages	Reasonably foreseeable damages may be recovered
Punitive damages	Not recognized in contract or in tort The Supreme Court of Japan previously ruled that a judgment of a foreign court awarding punitive damages is not enforceable in Japan[159]
Penalty and liquidated damage clauses	Valid and enforceable

[157] Civil Code, art. 414.

[158] Civil Code, art. 415.

[159] 51 Minshu 6, 2573 (Sup. Ct., Jul. 11, 1997)

I. PRODUCT LIABILITY

1. INTRODUCTION

The Product Liability Act (No. 85 of 1994) ("**PLA**") was enacted in 1994 and came into force in 1995. Prior to the enactment of the legislation, product liability was addressed by a tort section in the Civil Code, under which a consumer was not protected if a product was defective but there was no negligence on the manufacturer's part. Under the PLA, a consumer can be protected if he or she successfully establishes the existence of a product defect.

2. OVERVIEW OF PLA

(A) Definition of "Product"

The PLA defines a product as a movable product that is manufactured or processed.[160] As such the PLA does not cover defective information, defective software, real estate, unprocessed or uncooked agricultural products or the performance of related services. However, the PLA may address some of these products and services by extension so that its consumer protection purpose can be met. The following table provides examples of such interpretation.

DEFECTIVE NON-MOVABLE PRODUCTS	EXTENDED APPLICATION
Software	Defect in a disc or in a device (e.g., a desktop computer)
Real estate	Defect in a movable component
Cooking services (food poisoning)	Defect in cooked food

(B) Definition of "Defect"

Under the PLA, a defect means a lack of safety that the product should ordinarily meet, taking into account the nature of the product, the ordinarily foreseeable manner of use of the product, the time at which a manufacturer delivered the product, and other circumstances concerning the product.[161] Determination of whether there was a defect requires a case-by-case analysis. A consumer has the burden of proof regarding the existence of a defect.

(C) Responsibility for Defective Product

Under the PLA, a "**Manufacturer**" will be liable for damages arising from a defective product.[162] A Manufacturer includes:

[160] PLA, art. 2, para. 1.
[161] PLA, art. 2, para. 2.
[162] PLA, art. 2, para. 3.

DEFINITION OF MANUFACTURER	
i	An actual manufacturer or importer as a business;[163]
ii	An apparent manufacturer or importer of a product (i.e., a party who gives consumers the misleading impression that they are a manufacturer or importer);[164] or
iii	A party which can by extension be considered a manufacturer or importer, taking into account circumstances including the manner in which a product is manufactured, processed, imported or sold.[165]

(D) Exemption

Under the PLA, a Manufacturer will not be responsible for product liability in either of the following cases:[166]

(i) the Manufacturer has established that the defect in a product could not have been discovered given the state of scientific or technical knowledge at the time when the manufacturer delivered the product; or

(ii) the Manufacturer has established where a product is used as a component or raw material of another product, the defect occurred primarily because of the compliance with the instructions concerning the design given by the manufacturer of such other product, and that the Manufacturer was not negligent with respect to the occurrence of such defect.

There have been no cases in which Japanese courts have granted such exemptions to companies.

(E) Statute of Limitations

An alleged victim can make a claim under the PLA within three years of becoming aware of the occurrence of damage and the identity of the liable party, or within ten years of delivery of a product.[167]

If damage is caused by substances which become harmful to human health when they accumulate in the body, or where symptoms appear after a certain latent period, the ten-year limitation period commences on the occurrence of damage (not delivery).

(F) Non Punitive Damages

As punitive damages are considered unenforceable under Japanese law,[168] a Manufacturer will not be subject to punitive damage liability under the PLA.

[163] PLA, art. 2, para. 3, no. 1
[164] PLA, art. 2, para. 3, no. 2
[165] PLA, art. 2, para. 3, no. 3
[166] PLA, art. 4
[167] PLA, art. 5, para. 1.
[168] 51 Minshu 6, 2573 (Sup. Ct., Jul. 11, 1997)

J. ADVERTISEMENT LAW

1. OVERVIEW

Advertising in Japan is governed by a set of complementary laws and regulations, including the Unfair Competition Prevention Act ("**UCPA**"), Act against Unjustifiable Premiums and Misleading Representations ("**AUPMR**"), and the Consumer Contract Act ("**CCA**"). Further information and clarification is provided by guidelines issued by the pertinent regulatory agencies. Self-regulating industry organizations also can provide guidance to those engaging in advertising.

Summary of Advertising and Marketing Laws and Regulations

NAME OF STATUTES	OVERVIEW
Unfair Competition Prevention Act	The purpose of the UCPA is to ensure fair competition among businesses. The provisions of the UCPA address product imitations and packaging that can cause consumer confusion as well as product claims that are untrue or misleading about products' contents, quality, place of origin, or other characteristics.
Act Against Unjustifiable Premiums and Misleading Representation	The AUPMR establishes regulations on premiums (i.e., economic benefits given to customers as an inducement to purchase a particular product) and misleading representations in connection with transactions in goods or services. The objective of the AUPMR is to protect consumer interests. If businesses compete by offering excessive extra incentives and additional services instead of low prices and high quality goods, consumers may buy poor quality or overpriced goods or services. The AUPMR regulates these premiums and representations so as to keep them within a reasonable range.

NAME OF STATUTES	OVERVIEW
Consumer Contract Act	The CCA governs consumer contracts between business operators and consumers, and obligates business operators to set out the rights and duties in consumer contracts in a clear and lucid manner. The CCA provides the consumer the right to rescind a contract if a business operator undertakes certain improper actions, such as making misrepresentations during the solicitation process prior to entering into the contract, or using inappropriately high-pressure tactics to coerce the customer into entering into the contract.
Act on Specified Commercial Transactions ("ASCT")	The ASCT was passed to protect Japanese consumers from high-pressure sales tactics that make them susceptible to unwanted purchases and from sales methods that are likely to result in misunderstandings with regard to the nature of the contractual obligations, the goods and services being purchased, or the amount of payment to be due. The protection afforded and disclosure required under the ASCT depend on the method by which customers are solicited and the contracts are concluded. The ASCT applies to, for example, door-to-door sales, online sales, certain mail order marketing solicitations, and telephone solicitations.
Act on Prohibition of Private Monopolization and Maintenance of Fair Trade ("Anti-Monopoly Act")	Among other broader provisions against anticompetitive behavior, the Anti-Monopoly Act prohibits certain advertising and marketing practices that distort free markets. The Anti-Monopoly Act addresses misrepresentations made in business-to-business transactions as well as in consumer transactions.

2. KEY REGULATORY BODIES:

NAME OF BODIES	OVERVIEW
Consumer Affairs Agency ("CAA")	Established in 2009, the CAA acts as a centralized body protecting consumers of all goods by enforcing consumer protection laws such as the AUPMR. The CAA has issued several guidelines to clarify their enforcement position on certain issues, including misrepresentations in online sales and proper labeling of the origins of goods.
Consumer Commission	The Consumer Commission is a panel of independent experts that monitors and issues reports on the policies being implemented by the other governmental organs with the goal of advancing consumers' interests. The Commission provides advice to the legislature and to the ministries responsible for drafting the laws and regulations, and communicates the views of consumers and consumer groups to the CAA.
National Consumer Affairs Center ("NCAC")	NCAC is an independent administrative agency under the jurisdiction of the CAA. Among its primary tasks, NCAC (i) gathers information on complaints and inquiries received from consumers from local consumer affairs centers across the country; (ii) provides advice and training to local consumer affairs centers and provides advice directly to consumers; and (iii) publishes results of product testing.
JFTC	JFTC also plays a role to enforce advertisement regulations from a viewpoint of the Anti-Monopoly Act.
Japan Advertising Review Organization ("JARO")	JARO is a non-government and self-regulatory body for advertisers. As its primary function, JARO handles complaints of and inquiries to all types of advertisement from consumers and its members.

3. REMEDIES FOR VIOLATIONS OF ADVERTISING LAWS

Remedies for violation of advertising laws vary depending on the law, the severity of the offense and whether the violation was ended prior to official action on the part of the pertinent ministry. An ongoing violation of the AUPMR can result in the issuance by the CAA of a "cease and desist" order as well as a public announcement of the regulatory violation, which would be damaging to the violating company's reputation. Regulatory enforcement proceedings necessary to comply with cease and desist orders or other business improvement orders are often drawn out, involving multiple meetings with regulators and submissions of drafts of improvement plans.

The UCPA is primarily enforced through private action: a person whose business interests have been infringed or are likely to be infringed by unfair competition under the UCPA may seek an injunction against the infringing person (or person likely to infringe) that suspends or prevents the infringement, and may pursue damages. There are additional penalties for certain intentional egregious violations of the UCPA that can include imprisonment and fines for the responsible individual as well as fines levied on the responsible individual's employer.

If certain terms in a contract between a business operator and a consumer violate the CCA, such terms can be nullified. In some circumstances, such as when the business operator has improperly coerced the customer into entry into the contract, the customer may have the right to rescind the contract altogether. In addition, the CCA also permits certain qualified consumer organizations to seek injunctions against business operators from engaging in violating behavior.

4. SPECIAL REGULATORY ISSUES

(A) Contests and Sweepstakes Regulations

The AUPMR and regulations and notifications issued thereunder govern contests and sweepstakes in Japan.

The AUPMR provides that when an award provided by way of a contest, game, lottery, or sweepstakes is related to the promotion of product sales ("buy this product, receive an entry into the sweepstakes" is a typical example), the maximum value of such award may not exceed 20 times the Transaction Amount (as defined below), and in no case may the award exceed JPY 100,000. The total value of all awards provided may not exceed 2% of the total sales forecast of the product being promoted during the term of the game, contest, lottery, or sweepstakes.

The interpretation of "Transaction Amount" differs depending on the circumstances:

	CIRCUMSTANCES	TRANSACTION AMOUNT
i	When the award provided to purchasers relates to the value of purchased product's purchase price…	…the Transaction Amount is the product purchase price.
ii	When the awards are provided to purchasers regardless of purchase price…	…the Transaction Amount is generally considered to be JPY 100
iii	When the awards are provided even if a product is not purchased but still in promotion of such purchase, such as a requirement for the individual to come to the store…	…the Transaction Amount will be considered to be JPY 100 or the cost of the least expensive good in the store, whichever is greater

K. ENVIRONMENTAL LAW

I. OVERVIEW

The Environmental Basic Act (the "EBA," Act No. 91 of 1993) sits at the top of the Japanese environmental regulatory scheme and consists of 46 articles and supplementary provisions. The EBA itself does not have direct effect on corporations or individuals, but instead serves as a framework that requires the legislature to establish environmental protection laws. These laws fall within two general categories: (i) those that prevent or minimize environmental pollution and (ii) those that create a "recycling society."

In addition to national laws, local codes play an important role in protecting the environment. Corporations are obligated to understand how these codes apply to their activities. These codes can vary depending on the local government, and the activities restricted by such codes are not always clear. Preliminary inquiries with the appropriate authority are generally needed when questions arise.

1. Laws and Regulations Aimed at Preventing or Minimizing Environmental Pollution

The EBA directs the legislature to prescribe compliance standards with respect to air, water, and ground pollution, noise, vibration, earth subsidence and noxious smells. This has resulted in the enactment of the Air Pollution Control Act (Act No. 97 of 1968), the Water Pollution Control Act (Act No. 138 of 1970), the Noise Regulation Act (Act No. 98 of 1968), the Vibration Regulation Act (Act No. 64 of 1976) and the Offensive Odor Control Act (Act No. 91 of 1971). Together, these laws address the following topics:

TOPIC	REGULATION
Emissions Limits	Emissions standards have been prescribed for different pollutants. If such pollutants are released into the air, ground, water, or other areas and exceed statutory limits, the party responsible for such emissions will be subject to penalties, including orders from the pertinent regulatory bodies to reduce emissions levels or cease emissions altogether.

TOPIC	REGULATION
Installation or Alteration of Potentially Polluting Machinery or Equipment	If a business operator plans to install or make alterations to machinery or equipment that may result in emission of pollutants, certain specifications of such machinery or equipment must be submitted to the local governor or relevant office prior to such installation or alteration. If it is found that such installation or alteration does not comply with the pertinent regulations, the governor or relevant office can issue an order to revise the installation or alteration plan to bring it into compliance.
Monitoring and Inspection	Business operators using equipment or machinery that emits certain pollutants need to monitor and record the quantity of emissions. The pertinent regulatory bodies may inspect factories or offices on site to check for compliance.

As indicated in the chart above, the release of certain hazardous substances into the air, ground, water, or other areas is permitted only up to certain statutory limits,[169] and notification to regulatory authorities is necessary to build new industrial plants that may release smoke, dust, polluted water or other materials.[170]

A company in violation of these laws can be subject to governmental orders to cease violations as well as possible fines. The responsible individuals at the company can also be personally subject to fines or imprisonment.[171] In addition, if a hazardous substance generated by a company's business activities causes damage to the health of any person, the company can be held be liable for such damages, whether or not the company was negligent.[172]

Many environmental statutes allow local governments to enact ordinances containing more rigorous environmental standards than those prescribed by the national government, and some local governments have enacted such stricter ordinances.

2. Laws and Regulations Aimed at Creating Recycling Society

There are two primary types of laws and regulations aimed at creating a "recycling society" in Japan: (i) those promoting the appropriate disposal of waste and (ii) those promoting recycling.

[169] The Air Pollution Control Act, art. 13.

[170] The Air Pollution Control Act, art. 6.

[171] The Air Pollution Control Act, art. 33 through 37.

[172] The Air Pollution Control Act, art. 25.

(A) Appropriate Disposal of Waste

The Waste Management and Public Cleansing Act (the "Waste Act," Act No. 137 of 1970) provides the basic framework for the regulation of waste disposal. Under the Waste Act, a company is required to follow the steps below:

METHOD OF DISPOSAL	ACTIONS REQUIRED
Self-disposal of waste	When a company disposes of its own waste, the company needs to comply with certain standards for keeping, transporting and disposing waste.
Disposal of waste by a licensed waste-disposal company	When a licensed waste disposal company is used, the company that creates the waste needs to enter into a written agreement with the disposal company that sets forth (a) the types and quantity of the waste and (b) the location of disposal. In addition, the company that creates the waste and the waste disposal company must keep records of the waste disposed to provide evidence that the waste is disposed properly. The forms for these records are called "manifests", and the most commonly used such forms are issued by the National Federation of Industrial Waste Management Associations.

A company that violates the Waste Act can be subject to fines, and the responsible individual at such company can also be fined or sentenced to imprisonment, or both.

(B) Promotion of Recycling

There are generally two types of laws and regulations relating to the promotion of recycling: those targeting businesses and those targeting specific products. Among those targeting business is the Act on the Promotion of Effective Utilization of Resources (Act No. 48 of 1991), which generally requires manufacturers of such products as paper, glass, iron and steel to promote recycling of their products.

Several acts regulate the recycling process depending on the item to be recycled. Different acts generally address, for example, packaging, household appliances, construction materials and used cars.[173]

3. PROMOTION OF RENEWABLE ENERGY

(A) Background

Prior to the Fukushima nuclear disaster in March 2011, Japan relied on nuclear power for roughly 30% of its energy needs, with 60% coming from conventional sources such as

[173] Act on the Promotion of Sorted Collection and Recycling of Containers and Packaging, Specific Household Appliance Recycling Act, Act on Promotion of Recycling and Related Activities for Treatment of Cyclical Food Resources, Construction Material Recycling Act, and Act on Recycling, etc. of End-of-Life Vehicles.

coal, oil and natural gas. Hydroelectric power accounted for 9% of Japan's energy resources, with other renewables – solar, wind, biomass and geothermal energy – contributing only 1% of the total power capacity of the nation. Since the disaster, however, most of Japan's nuclear reactors have been closed, leaving remaining sources to fill the power gap. In December 2012, 90% of all power in Japan was derived from fossil fuels.

In an effort to diversify the country's energy base, the Japanese Diet has taken an aggressive measure to encourage the development of renewable energy resources. The Act on Special Measures Concerning the Procurement of Renewable Electric Energy by Operators of Electric Utilities (Act No. 108 of 2011), which became effective on 1 July 2012, establishes a feed-in tariff ("**FIT**") regime for renewable energy. Under the Act, electric utility operators are required to purchase electricity generated from renewable sources ("**Renewable Electricity**") from suppliers for prices and durations fixed by the Minister of Economy, Trade and Industry (METI). This regime guarantees a market with fixed, and relatively high, prices for electricity generated from renewable resources, and is widely expected to spur investment in Japan's renewable energy supply industry.

(B) FIT System

An accredited supplier may apply to enter into an agreement with an electric utility operator. The electric utility operator must enter into an agreement with the Renewable Electricity supplier to purchase the Renewable Electricity, with certain terms determined by METI. The electric utility operators are also obligated to connect the suppliers to their power grid if the suppliers apply for such connection though under limited circumstances the operators can deny the connection for technical reasons.

Under the Act, METI has the authority to determine the price per kilowatt hour of the Renewable Electricity as well as the duration of the agreement between the electric utility operator and Renewable Electricity supplier. METI sets prices and agreement durations before the beginning of April every year, and bases such prices and duration on the type and scale of the electric power facility where the Renewable Electricity is to be generated.

The 2013 prices and terms for the different energy sources are as follows:

(1) Solar Power

ELECTRICITY GENERATED	MORE THAN 10KW	UNDER 10KW	UNDER 10KW (SOLAR COGENERATION)
Procurement price	JPY 37.8 p/k Wh	JPY 38 p/k Wh	JPY 31 p/k Wh
Procurement term	20 years	10 years	10 years

(2) Wind Power

ELECTRICITY GENERATED	MORE THAN 20KW	UNDER 20KW
Procurement price	JPY 23.1p/k Wh	JPY 57.75 p/k Wh
Procurement term	20 years	20 years

(3) Hydroelectric Power

ELECTRICITY GENERATED	MORE THAN 1,000KW UNDER 30,000KW	MORE THAN 200KW UNDER 1,000KW	UNDER 200KW
Procurement price	JPY 25.2 p/k Wh	JPY 30.45 p/k Wh	JPY 35.7 p/k Wh
Procurement period	20 years	20 years	20 years

(4) Geothermal Power

ELECTRICITY GENERATED	MORE THAN 15,000KW	UNDER 15,000KW
Procurement price	JPY 27.3 p/k Wh	JPY 42 p/kWh
Procurement term	15 years	15 years

(5) Biomass Power

GENERATION METHOD	METHANE FERMENTATION GASIFICATION POWER GENERATION	UNUSED WOOD COMBUSTION POWER GENERATION	WOOD COMBUSTION POWER GENERATION	WASTE MATERIAL (EXCLUDING WOOD) COMBUSTION POWER GENERATION	RECYCLED WOOD COMBUSTION POWER GENERATION
Procurement price	JPY 40.95 p/kWh	JPY 33.6 p/kWh	JPY 25.2 p/kWh	JPY 17.85 p/kWh	JPY 13.65 p/kWh
Procurement term	20 years	20 years	20 years	20 years	20 years

Source: Agency for Natural Resources and Energy Website[174]

[174] http://www.enecho.meti.go.jp/saiene/kaitori/kakaku.html (in Japanese)

L. DISPUTE RESOLUTION

1. COURT SYSTEM

There are four levels of courts in Japan as mentioned below:

COURTS IN JAPAN	
i	Supreme Court
ii	High Courts
iii	District Courts
iv	Summary Courts

There are also separate courts that address issues related to family matters, which will not be addressed here.

(A) Supreme Court

The Supreme Court, the highest court in Japan, exercises final appellate jurisdiction. The Supreme Court can hear cases with grounds of violation of the Constitution, serious procedural breaches by the lower courts, and important issues concerning the construction of laws and regulations. Oral arguments and decisions in the Supreme Court are made either by the grand bench, composed of the entire body of fifteen justices sitting together, or by one of the three petty benches, each composed of five justices.

(B) High Courts

There are eight high courts in Japan, each with territorial jurisdiction over one of eight regions of Japan. The eight are located in Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takamatsu. High courts generally have appellate jurisdiction over judgments rendered by district courts and family courts, as well initial jurisdiction in certain criminal matters. In principle, a case in high court will be handled by a three-judge panel.

The Intellectual Property High Court is located in Tokyo and was established in April 2005 to handle cases relating to intellectual property, such as appeals from district courts in civil cases relating to patent rights and actions against trial decisions made by the Japan Patent Office.

(C) District Courts

There are 50 district courts in Japan, each with territorial jurisdiction over one prefecture-with the exception of Hokkaido Prefecture, which is divided into four districts. These district courts have branches of which there are 203 in total. The district court will generally be the court of first instance for civil and criminal matters, as well as the appellate court for judgments arising from a summary court. Cases heard in the first instance in district court are handled by one or three judges, and appeals from summary court are heard by three-judge panels.

(D) Summary Courts

There are 438 summary courts throughout the country. The summary courts have original jurisdiction over civil cases involving claims for amounts up to JPY 1.4 million and certain criminal cases. Summary court cases are adjudicated by a single summary court judge.

2. DISPUTE RESOLUTION PROCESS

Disputes may be settled through litigation in Japanese courts, arbitration, or conciliation, which is a process particular to Japan. Among the court proceedings, in addition to the processes undertaken for the varying kinds of civil litigation, there are further special proceedings for employment, collection of debt and bankruptcy matters as described below.

(B) Types of Litigation

(1) Basic Types of Civil Litigation

There are three basic types of civil litigation in Japan:

TYPES OF LITIGATION	DESCRIPTION
Ordinary litigation	Seeking resolution relating to property rights, repayment of a loan or damages
Family litigation	Seeking resolution of family matters[175]
Administrative litigation	(i) Seeking revocation of an act of an administrative agency; (ii) Seeking declaration of the illegality of an administrative agency's inaction; and (iii) Special kinds of actions seeking the application of laws and regulations for the protection of the general public interest, such as an action to nullify an illegal election.

(2) Specialized Procedure

In addition to the abovementioned three types of civil litigation, there are other proceedings to adjudicate certain kinds of disputes more efficiently and effectively.

(i) Small Claims

A plaintiff with a small claim of less than JPY 600,000[176] may select this procedure at the time of filing of an action with a summary court. If the plaintiff does request a small claims proceeding, the defendant can resist and request that the case be tried by the ordinary procedure.[177] Under the small claims procedure, the court will complete the trial and conclude oral arguments in one day unless the court finds a cause for continuation.[178] The losing party may file an objection with the same summary court.

(ii) Bill or Check Litigation

A plaintiff seeking payment of bills (*tegata*) or checks has the option of bringing a litigation specifically for bills or checks or ordinary litigation. In bill or check litigation, evidence is restricted to documentary evidence and examination of the parties in order to enable the court to render a speedy judgment.[179] If a party is dissatisfied with a judgment in bill or check litigation, that party may demand a retrial in ordinary litigation and the court must grant the right to have the case adjudicated through ordinary litigation.[180]

(iii) Demand Letter (*Shiharai Tokusoku*)

Upon the motion of a creditor in accordance with civil court procedure, a summary court clerk may issue a "demand for payment."[181]

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[175] Family matters are handled by the family court, and are only available after settlement could not be reached through conciliation proceedings.

[176] Code of Civil Procedure, art. 368, para 1

[177] Code of Civil Procedure, art. 373, para 1

[178] Code of Civil Procedure, art. 370, para 1

[179] Code of Civil Procedure, art. 352, para 1

[180] Code of Civil Procedure, art. 357 and art. 361

[181] Article 382 of Code of Civil Procedure

This demand orders a debtor to deliver a certain amount of money or the like to the creditor. The summary court clerk will issue such letter when the motion from the creditor appears to have a legitimate basis. The debtor may file an objection to the demand within two weeks from the day of its service, and such objection will invalidate the demand for payment and retroactively convert the motion for demand of payment into a normal court action made on a claim.[182] Failure to file an objection in a timely manner makes the demand for payment enforceable.[183]

(iv) Labor Tribunal Proceeding

Labor tribunal proceedings are designed for prompt and appropriate resolution of disputes between employers and workers such as disputes over dismissals or labor contracts.

Under this procedure, a labor tribunal committee composed of one judge and two labor tribunal commissioners manages the disputes.[184] Labor tribunal commissioners are individuals who have specialized knowledge and experience in labor problems.[185] At the proceedings, the committee works to bring the parties to agreement. If the parties cannot reach an agreement despite the committee's efforts, the committee may render a judgment itself.

LENGTH OF LABOR TRIBUNAL PROCEEDINGS (2012)		
Total cases	3,697	100%
Less than one month	107	2.9%
1 – 2 months	1,350	36.5%
2 – 3 months	1,363	36.9%
3 – 6 months	865	23.4%
6 – 12 months	12	0.3%
Average length of each case (days)	72.4	

Source: *Public Report of Supreme Court concerning Review with regard to Expeditious Trials released on 12 July 2013 under the Act on Expeditious Trials*

Labor Tribunal proceedings usually complete within three hearing sessions. Each party can appeal the committee's decision within two weeks after the receipt of the decision. If such an appeal is made, the case will be forwarded to ordinary civil court.

[182] Article 395 of Code of Civil Procedure
[183] Article 393 of Code of Civil Procedure
[184] Labor Tribunal Act, art. 7 and 8.
[185] Labor Tribunal Act, art. 9, para 2.

(3) Procedure for Insolvent Debtor

(i) Bankruptcy Proceedings

Bankruptcy proceedings aim to divide a debtor's property among the creditors where the property is not sufficient to satisfy their claims in full. Upon petition of either a creditor or the debtor, a district court will investigate the case, make an order of commencement of bankruptcy proceedings if it deems appropriate and appoint a bankruptcy trustee.[186] Thereafter, under the supervision of the district court, the bankruptcy trustee will liquidate the assets of the debtor and distribute the proceeds to the creditors.

(ii) Civil Rehabilitation Proceedings

The purpose of a civil rehabilitation is to restructure or discharge the debts of a corporate or individual debtor while still generally allowing the debtor to maintain control over its, his or her property. The civil rehabilitation process begins when a debtor or a creditor files a petition for civil rehabilitation proceedings with a competent district court.[187] The court will often appoint a supervisor in a corporate rehabilitation case and an individual rehabilitation commissioner in an individual rehabilitation case. Unless the court appoints a bankruptcy trustee, the debtor keeps the right to dispose of its, his or her assets and to continue to operate its, his or her business after the commencement of proceedings. The debtor (or the trustee if one is appointed) prepares and submits a proposed rehabilitation plan.[188] If the plan is approved, all of the debtor's debts are discharged other than those provided for in the law or the plan.[189] The supervisor, if one is appointed, is charged with overseeing the debtor's implementation of the plan for three years.[190]

(iii) Corporate Reorganization Proceedings

The purpose of a corporate reorganization is to reorganize the business of a KK, a corporation similar to US C corporation, that is having extreme difficulty in paying its debts but still has a viable business that can continue operation.

On petition of a KK, a creditor of the KK, or the shareholder of the KK, a district court will, if appropriate, issue an order to commence reorganization proceedings.[191] The court will appoint a trustee (or trustees). Under the supervision of the court, the trustee will take control over the business and assets of the KK and will draft a proposed reorganization plan that includes the discharge of certain debts and instalment plans for the repayment of others. The reorganization plan comes into force if it is adopted at the meeting of interested persons (including shareholders and creditors) and confirmed by the court.

(4) Conciliation Proceedings

Conciliation (*Chotei*) is a dispute resolution process unique to Japan: its function is to resolve disputes not by means of a formal court decision but by compromise of the parties concerned with the assistance of a judge or a part-time judicial officer (*Chotei-kan*) or a conciliation committee. Because conciliation proceedings are simple and inexpensive, they are widely used. This type of proceeding is available to settle all types of civil disputes.

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[186] Bankruptcy Act, art. 30, para 1.
[187] Civil Rehabilitation Act, art. 21.
[188] Civil Rehabilitation Act, art. 163, para 1.
[189] Civil Rehabilitation Act, art. 178, para 1.
[190] Civil Rehabilitation Act, art. 186, para 2 and art. 188, para 2.
[191] Corporate Rehabilitation Act, art. 41 para 1.

As a rule, conciliation proceedings are commenced on petition of the parties concerned, but the courts may refer cases pending in regular court proceedings to conciliation. On the date of conciliation, the judge, part-time judicial officer, or committee will work with the parties concerned to attempt to settle the disputes by persuading them to compromise or by suggesting reasonable conciliation terms.

When a conciliatory settlement is successfully reached and the terms of conciliation are entered into the record, those terms have the same force and effect as a final and binding judgment. On the other hand, if conciliation is not successful, the proceedings come to an end with the dispute remaining unsettled. In that event, if the court or the part-time judicial officer deems it necessary, he or she may render a decision on the case which is effectively a court decision. Such decision is appealable by either of the parties.

(5) Procedure for Recovery

As part of a litigation, certain procedures can be undertaken to effect recovery of damages.

(i) Civil Provisional Remedies

Civil provisional remedies allow courts to exercise control over an obligor's property while disputes are being resolved. If not for these remedies, prior to judicial resolution or settlement, a defendant could dispose of his or her property and thus prevent the plaintiff from actual recovery even if the plaintiff ultimately wins. To avoid this, an obligee may, with the ruling of the court, provisionally attach the alleged obligor's property prior to final resolution of a case.

(ii) Civil Execution

Civil execution is a procedure by which an obligee may compel an obligor's payment of a debt by seizure and sale of the obligor's property. For instance, if a debtor fails to make

a monetary payment due under a contract, the creditor, based upon a claim that has been affirmed by a judgment or a judicial settlement, may receive from the court the right to seize the debtor's property, sell it by auction, and distribute the proceeds for the satisfaction of his or her claim.

(C) Litigation Process and Rules of Procedure

Whether involved in basic litigation or a specialized proceeding, with minor modifications for each type, the following rules apply:

(1) Basic Process

A civil action is commenced by a plaintiff filing a petition together with evidence.[192] A complaint must specify the parties and contain allegations of the object and statement of claim for which the action is instituted. Revenue stamps of a certain value must be affixed to the complaint as a filing fee.

Once a complaint and a writ of summons are served on the defendant, the defendant is required to file a written answer with the court. Thereafter, several preparatory proceedings will be held in order to clarify core issues of the case and both parties will submit documentary evidence to the court and make oral arguments. Examination of witnesses is generally conducted after clarification of the issues based on the documentary evidence and oral arguments. After examination of all of the evidence, a judgment will be rendered. The timing of the process varies as shown in the chart below.

Length of civil cases in courts of first instance (2012).

LENGTH OF CIVIL CASES IN COURTS OF FIRST INSTANCE (2012)[193]		
Total cases	90,560	100%
less than 6 months	50,917	56.3%
6 months – 1 year	17,148	18.9%
1 year – 2 years	16,470	18.2%
2 years – 3 years	4,263	4.7%
3 years – 5 years	1,508	1.7%
More than 5 years	200	0.2%
Average length of each case (months)	8.9	

Source: *Public Report of Supreme Court Concerning Review with Regard to Expeditious Trials released on 12 July 2013 under the Act on Expeditious Trials*

[192] Code of Civil Procedure, art. 133, para 1.

[193] This chart excludes litigation brought by consumers seeking claw-back of amounts paid on certain loans accused of being made at inappropriately high interest rates. Due to a Supreme Court case in 2006 clarifying the legal standard by which such cases would be judged, these cases are frequently resolved in favor of the consumer much more quickly than other kinds of litigations that are brought to the courts.

(2) Jurisdiction and Foreign Application to Court

A foreign individual or foreign entity may avail itself of the Japanese court system by filing a lawsuit with a Japanese court. A lawsuit involving a foreign individual or foreign entity as a defendant can be filed if such foreign individual or foreign entity has a legal presence or properties in Japan.

If filing suit in Japan, a foreign company is required to submit a copy of its registration in the corporate register or equivalent of its home jurisdiction, certified by the relevant foreign authorities, that shows the name of the individual(s) who may represent the company. If there is no such corporate registry, an affidavit by the individual stating his or her representative power may be submitted instead.

(3) Language

In Japanese court proceedings, the parties are required to use the Japanese language[194] and all evidence submitted in a foreign language should be accompanied by a Japanese translation.[195]

(4) Discovery

Japanese courts have authority to order parties to produce documents based on relevance to the case, but a discovery proceeding as known in the US does not exist in Japan. Therefore, the ability to obtain potentially beneficial evidence from an uncooperative opposing party is limited.

(5) Jury Trials

There are no jury trials in civil litigation in Japan. All trials are held before professional judges only.

(6) Court Costs

Court costs such as filing fees, travel expenses and daily allowances for witnesses are borne by the losing party.[196] It should be noted, however, that attorneys' fees are not included within this category of "court costs" and so are unlikely to be awarded. Attorneys' fees are generally not awarded to the prevailing party other than in certain egregious tort cases.

(7) Appeals

A decision by a court of first instance may be appealed twice in Japan: when the court of first instance is a summary court, the highest court of appeals is a high court, and if the court of first instance is a district court, the highest court of appeals is the Supreme Court. Notwithstanding the foregoing, a case originating in a summary court can be ultimately heard by the Supreme Court in rare circumstances where the appeal is on the grounds of a violation of the Constitution. The process in the court of second instance is considered to be a continuation of the initial trial in the court of first instance, so it is permitted that additional factual information can be submitted during the appellate proceedings. However, because the parties generally try to present all of the allegations and evidence pertinent to the issues at the trial in the first instance court, the trial in the court of second instance is mostly focused on whether the judgment of the first instance court should be upheld given the reason for the appeal.

The losing party in an appeal to the court of second instance may file a final appeal with an appellate court with competent jurisdiction over the case. Not being a trial court, a final appellate court exercises its jurisdiction only over the proper application of law as it pertains

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194 Court Act, art. 74.

195 Regulation of Code of Civil Procedure, art. 138, para 1.

196 Code of Civil Procedure, art. 61.

to the facts that were established in the two inferior courts. The highest court of appeals is bound by the facts found by the earlier courts unless the fact-finding raises questions of law.

(8) Judicial Settlement

Many cases are resolved by judicial settlement. Judicial settlements are different from settlements agreed upon outside the court system between both parties in terms of enforceability (i.e., judicial settlements have the same effect and force as actual judgments). The court may encourage the parties to settle the case at any time while the case is pending. The court often sets several dates for settlement sesssions, suggesting appropriate terms and attempting to persuade the parties to make concessions in order to reach settlement.

(9) Enforceability of Foreign Judgments

Foreign judgments are enforceable in Japan after the legality and conclusiveness of the judgment have been reviewed by a Japanese court. A Japanese court will not re-examine the merits of a foreign judgment. For a foreign judgment to qualify for enforcement in Japan, it need only be a final judgment the enforcement of which in Japan would not violate Japanese law nor be contrary to Japanese public order or good morals. It is also required that courts in the foreign country would treat a Japanese judgment reciprocally by enforcing a judgment rendered in Japan by applying similar requirements to Japan's in its own recognition of foreign judgments.[197] As a general rule, if the foreign court had proper jurisdiction over the parties and the defendant received proper notice of the lawsuit, the judgment will be enforceable in Japan.

(D) Arbitration

Although arbitration is not common in Japan, arbitral awards granted both within and outside of Japan have the same effect as final and conclusive Japanese court judgments. A valid arbitration agreement constitutes a bar to court proceedings: a matter that is brought before a court that is subject to an arbitration agreement will be dismissed by the court if the defendant invokes the arbitration agreement as a defense unless the court finds that the arbitration agreement is null and void, cancelled, or for other reasons invalid, or that arbitral proceedings are incapable of being held according to the terms of the arbitration agreement.[198] It should be noted, however, with regard to arbitration clauses in consumer contracts, that consumers may unilaterally cancel such clauses even after the execution of a contract.

An arbitral award has the same effect as a final and conclusive judgment, although if a party seeks the enforcement of an arbitral award, it must obtain an enforcement decision made by a court.[199] Japan has signed and ratified both the 1927 Geneva Convention as well as the 1958 New York Convention, making arbitral awards rendered in countries that are signatories to those conventions enforceable in Japanese courts.

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[197] Courts in Japan have enforced judgements rendered in California, Nevada, New York, Hawaii, etc., but a Japanese court will not at present enforce a judgment rendered in China.

[198] Arbitration Act, art. 14, para 1.

[199] Arbitration Act, art. 45, para 1 and art. 46.

Statistics of arbitration cases in Japan Commercial Arbitration Association ("**JCAA**")

YEAR	2006	2007	2008	2009	2010
International	11	12	12	17	21
Domestic	0	3	0	1	6

Note: *International:* at least one of the parties is non-Japanese
Domestic: both parties are Japanese

Source: *JCAA Newsletter, January 2012*[200]

[200] http://www.jcaa.or.jp/e/arbitration/docs/newsletter27.pdf

M. MERGERS AND ACQUISITIONS

1. INTRODUCTION

Most forms of mergers and acquisitions (**"M&A"**) available in other jurisdictions are also available in Japan. There are, however, aspects to Japanese law and the Japanese legal system which distinguish M&A transactions in Japan from those in other jurisdictions.
We provide below a brief summary of the most common types of M&A transactions and associated legal issues that often arise.

2. SHARE PURCHASE

As in most jurisdictions, share purchases of Japanese companies are simpler and less expensive in comparison to asset purchases or business transfers. Upon closing, the purchaser will own the company, including all of its assets and liabilities. For private M&A transactions, shares of Japanese companies may or may not be certificated. If the target company issues certificates for its shares the share certificates evidencing the shares purchased must be delivered to the purchaser at closing[201]. If the share certificates have been lost, additional steps must be taken[202] to cancel the share certificates (even if the company is a wholly owned subsidiary) which could impact the transaction schedule.

3. BUSINESS TRANSFER

In a business transfer, the seller of the target business sells the individual assets and liabilities constituting the business to a purchaser pursuant to an asset transfer agreement. If the target business is the entire business or a material part of the business of the seller, resolutions of both the shareholders[203] and the board of directors[204] of the seller are required unless certain requirements for exemption are satisfied[205]. If a purchaser takes the entire business of another company, a shareholders resolution is also required for the purchaser[206]. A shareholder of the seller (or the purchaser, if the purchaser takes the entire business of the seller) who objects to such business transfer may request the company to purchase its shares for fair value[207].

The purchaser will assume only those rights and obligations provided in the asset transfer agreement. As a result, the purchaser will need to evaluate the assets and liabilities to be transferred to determine the appropriate consideration.[208]
If the assets include third party contracts, consent from each third party is required to transfer the contracts in the business transfer scheme.

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201 Companies Act, art. 128, para 1.

202 Companies Act, art. 223.

203 Companies Act, art. 467, para 1.

204 Companies Act, art. 362, para 4, no. 1.

205 For a seller, if the book value of transferred business is 20% or less of the total assets of the seller, a shareholders' resolution of the seller is not necessary (Companies Act, art. 467, para 1, no. 2). Furthermore, if 90% or more of the seller's voting rights are owned by the purchaser, a shareholders' resolution can be exempted (Companies Act, art. 468, para 1). For a purchaser, if the consideration is 20% or less of the net assets of the purchaser, a shareholders' resolution of the purchaser is not necessary (Companies Act, art. 468, para 1).

206 Companies Act, art. 467, para 1, no. 3.

207 Companies Act, art. 469, para 1.

208 Note: Japan has not adopted an equivalent of the UCC and there is no formal, searchable system for recordation of security interests if a company uses its assets as collateral for a loan. Therefore, extra attention should be paid in due diligence to the company's financial statements and appropriate protection (e.g., indemnity) should be included in the purchase agreements.

The business transfer will become effective on the closing date. However, the parties will need to take certain steps required to transfer individual assets such as recordation or notification in order to perfect the transfer of certain assets.

The treatment of employees is potentially more difficult in a business transfer than in a share purchase. The seller will need to obtain the consent of each employee to resign from their existing positions and these employees will then enter into new employment contracts with the acquiring entity (normally the purchaser or its acquisition entity).

4. MERGER

In Japan, there are two types of mergers available under the Companies Act:

(A) Merger by Absorption (*Kyushu Gappei*)

A merger by absorption[209] is a commonly used merger method in Japan and involves two or more companies where one or more companies merge into (and are "absorbed" by) the surviving company. Companies absorbed by the surviving company cease to exist legally on the effective date of the merger.

(B) Merger by Incorporation (*Shinsetsu Gappei*)

Merger by incorporation[210] is where two or more companies merge into a newly incorporated company where only the newly incorporated company survives and the other companies cease to exist legally on the effective date of the merger.

[209] Companies Act, art. 2, no.27 and art. 749.
[210] Companies Act, art. 2, no.28 and art. 753.

(C) Common Procedures

The following are common procedures that are available to both a merger by absorption and a merger by incorporation:

ITEMS	DESCRIPTION
Shareholders resolution[211]	Shareholders resolutions are required from each party unless certain exemption requirements are met.[212]
Protection of creditors[213]	Each party must give individual notice of the merger to each known creditor as well as general notice to any "unknown creditors" by way of public announcement in the official gazette called the *Kampo*. Notice to each creditor is not required if the company makes a public announcement in both *Kampo* and a method as provided in its articles of incorporation, which must be either the company's website or a daily newspaper. If a creditor objects, the party must settle the debt or provide collateral security.
Buying shares from shareholders who object[214]	A shareholder who objects to the merger may request the company to purchase its shares for fair value. Warrant holders of non-surviving companies may also request the company to purchase the warrants.

In both types of mergers, upon the effective date of merger all assets and liabilities of the non-surviving companies automatically transfer to the surviving company by operation of law.

5. COMPANY SPLIT

(A) Overview

The Company Split (also called a spin-off or demerger) is one of the corporate acquisition procedures available under the Companies Act. The basic concept of the company split is that the assets and liabilities constituting a particular business will be transferred to an acquirer in its entirety or partly. The acquirer may be a newly incorporated entity under the company split procedures ("**New Incorporation Type Company Split**", "*Shinsetsu-Bunkatsu*") or it may be an existing company which receives the business assets and liabilities in accordance with the proceedings ("**Absorption Type Company Split**", "*Kyushu-Bunkatsu*"). In each type of the company split, parties to the company split may be three or more. We refer to the entity which receives the business, either new or existing, as the "purchaser."

[211] Companies Act, art. 783, art. 795 and art. 804.

[212] For the surviving company, if the consideration of the merger is 20% or less of the net assets of the surviving party, a shareholders' resolution of the surviving company is not required (Companies Act, art. 796, para 3.). For a non-surviving company, if 90% or more of the non-surviving company's voting rights are owned by the surviving party, a shareholders' resolution of the non-surviving company is not required (Companies Act, art. 784, para 1.).

[213] Companies Act, art. 789, art. 799 and art. 810.

[214] Companies Act, art. 785, art. 787, art. 797, art. 806 and art. 808.

A company split is often used for a company to sell a division as part of its on-going effort to shed its unwanted businesses. The Supreme Court has stated if a company split would be detrimental to creditors, such creditors who technically can seek the repayment only from the company with the unwanted business, may collect their debts from the company retaining any profitable business as if there were no company split.[215]

(B) Company Split Procedure

In a case of either a New Incorporation Type Company Split or an Absorption Type Company Split, a company split starts with the preparation of a company split plan or agreement. The plan should include the following items:[216]

ITEMS TO BE DETERMINED	
i	Business to be spun-off
ii	List of the assets and liabilities of the business to be transferred
iii	Consideration to be exchanged for the business
iv	Effective date

In addition to preparation of the plan or agreement, completion of the company split follows several procedures that are basically identical to those in a merger:

ITEMS	DESCRIPTION
Shareholders resolution[217]	(i) New Incorporation Type Company Split Shareholders resolution of the target company is necessary unless the volume of the business to be transferred is small. (ii) Absorption Type Company Split Shareholders' resolutions of both the purchaser and target company are required unless the exemptions are met.[218]

[215] 66 Minshu 10, 3311 (Sup. Ct., Oct. 11, 2012)

[216] Companies Act, art. 758 and art. 763.

[217] Companies Act, art. 783, art. 795 and art. 804.

[218] For a seller, if the book value of transferred business is 20% or less of the total assets of the seller, a shareholders' resolution at the seller is not necessary (Companies Act, art. 784, para 3 and art. 805). Furthermore, if 90% or more of the seller's voting rights are owned by the purchaser, a shareholders' resolution can be exempted (Companies Act, art. 796, para 1). For a purchaser, if the consideration is 20% or less of the net asset of the purchaser, a shareholders' resolution at the purchaser is not necessary (Companies Act, art. 796, para 3).

ITEMS	DESCRIPTION
Protection of creditors[219]	(i) New Incorporation Type Company Split A target company's creditor who will no longer be able to seek repayment from the target company because of the company split must be given individual notice of the demerger plan. In addition, public notice to all unknown creditors must be given in the official gazette (*Kanpo*). Individual notice to each creditor is not required if the company makes a public announcement in the official gazette and by another means provided under its articles, such as on its website or through a daily newspaper. If a creditor objects, the party must settle the debt or provide collateral security.[220] (ii) Absorption Type Company Split Creditors are protected in the same way as mentioned above in the case of a New Incorporation Type Company Split.[221]
Buying shares from shareholders who object[222]	(i) New Incorporation Type Company Split An objecting shareholder may request the company to purchase its shares. (ii) Absorption Type Company Split A shareholder of either a purchaser or a target company who objects to the split may request the corresponding company to purchase its shares.

After these procedures have been completed, the company split plan may proceed. The company split will become effective either upon the filing of the company split registration documents with the Legal Affairs Bureau (for the New Incorporation Type Company Split)[223] or upon the effective date of the company split agreement (for the Absorption Type Company Split).[224]

(C) EMPLOYMENT ISSUES

In a company split where the entire "going concern" of the target business is assumed by the purchaser, the Act on the Succession to Labor Contracts upon Company Split (the "**ASLCCS**") will apply to how employees are treated in the split. The ASLCCS can apply to both a New Incorporation Type Company Split and an Absorption Type Company Split.

[219] Companies Act, art. 789, art. 799 and art. 810.
[220] Companies Act, art. 810
[221] Companies Act, art. 789
[222] Companies Act, art. 785, art. 787, art. 797, art. 806 and art. 808
[223] Companies Act, art. 764, para 1.
[224] Companies Act, art. 759, para 1.

A summary of the protections afforded to employees under the ASLCCS is as follows:

SUMMARY	
i	An employee who is (i) mainly assigned to the target business and (ii) specifically designated to be transferred may be transferred to the purchaser without the individual employee's consent.
ii	The purchaser will in principle assume the existing employment terms.[225]
ii	The seller must make an effort to obtain the understanding and cooperation of all employees to be transferred.[226] The outline and the reason of the company split and the impact on the company's financials should be explained to the employees.
iii	The seller is legally obliged to provide notice, in writing, as to the split-plan or agreement to the employees who will be transferred for employees' consideration at least two weeks before the shareholders' meeting to approve the company split.[227]
iv	An employee (i) who is mainly assigned to the target business but not included in the transfer to the purchaser; or (ii) who is not mainly assigned to the target business but included in the transfer to the purchaser has the right to object within two weeks of receipt of the notice.[228] If such an objection is made, the employee will be deemed to be transferred to the purchaser or will be deemed to remain with the seller, as the case may be.[229]

(D) Comparison of Company Split and Business Transfer

One of the biggest differences between a business transfer and a company split is the necessity to obtain consents to transfers of assets, liabilities, contracts, and workforce.

A company split in principle automatically transfers all assets and liabilities of the target business by operation of law, therefore there is a risk that a purchaser could also assume contingent liabilities of the target business. Since the parties may agree on the scope of assets and liabilities included in the company split, the company split plan or agreement should be drafted to exclude transfer of contingent and unknown liabilities.[230] By way of contrast, a business transfer only transfers the specific assets and liabilities provided in the asset purchase agreement, and is therefore less likely to raise contingent and unknown liability issues.

One of the other key differences is that a company split requires creditors protection procedures, but the Companies Act does not address such procedures for a business transfer. In addition to differences from a Companies Act perspective, the tax and accounting rules are different for these two transactions with the selection of the transfer method often being driven by tax considerations.

A business transfer and a company split have several common characteristics. The perfection of title to the transferred assets is required in both a business transfer and a company split. For example, recordation of transfer is required for real property.

[225] ASLCCS, art. 3.

[226] ASLCCS, art. 7.

[227] ASLCCS, art. 2.

[228] ASLCCS, art. 4 and art. 5.

[229] ASLCCS, art. 4, para 4 and art. 5, para 3.

[230] If the split agreement is properly drafted, the purchaser has the option to exclude specific assets and liabilities even if they are related to the spun-off business.

6. TENDER OFFERS

A tender offer refers to a process in which a bidder may offer to acquire all or over two-thirds of a listed company on a Japanese stock exchange, which is governed by the Financial Instruments and Exchange Act ("**FIEA**") (Act No. of 1948). A mandatory tender offer is triggered where a shareholder either acquires:

i	more than 5% of a publicly listed company's shares through private (off-market) purchases (except for acquisitions from 10 shareholders or less in a period of less than 60 days);[231]
ii	more than one-third of a listed company's shares through private (off-market) purchases;[232]
iii	more than one-third of a listed company's shares through both private (off-market) purchases and purchases on the stock exchange under certain circumstances (i.e., more than 10% acquisition within three months and more than 5% acquisition through private (off-market) purchases);[233]
iv	a listed company's shares which a competitor is acquiring in a tender offer if the shareholder (i.e., not the competitor) has more than one-third of the listed company's shares;[234] or
v	more than two-thirds of listed company's shares through private (off-market) purchases. In this case, the bidder is required to purchase all shares tendered.[235]

However, if a bidder already holds more than 50% of the voting right of the target company, a mandatory tender offer is not triggered unless the bidder acquires more than two-thirds of the target's shares.[236]

(A) Commencing Tender Offer

To commence a tender offer, a bidder must publicly announce the tender offer through EDINET[237] (Electronic Disclosure for Investors Network) or publication in daily newspapers.[238] The tender offer public notice must contain basic information such as:

NECESSARY INFORMATION FOR TENDER OFFER PUBLIC NOTICE	
i	Purpose(s) of the tender offer
ii	Class of shares being acquired
iii	Tender offer period
iv	Tender offer price
v	Target number of shares to be acquired in the tender offer

[231] FIEA, art. 27-2, para 1, no. 1.

[232] FIEA, art. 27-2, para 1, no. 2.

[233] FIEA, art. 27-2, para 1, no. 4.

[234] FIEA, art. 27-2, para 1. no. 5.

[235] FIEA, art. 27-13, para 4.

[236] FIEA, art. 27-2, para 1.

[237] If a bidder uses only EDINET as a method of the public announcement, the bidder must make known the commencement of the tender offer in a daily newspaper.

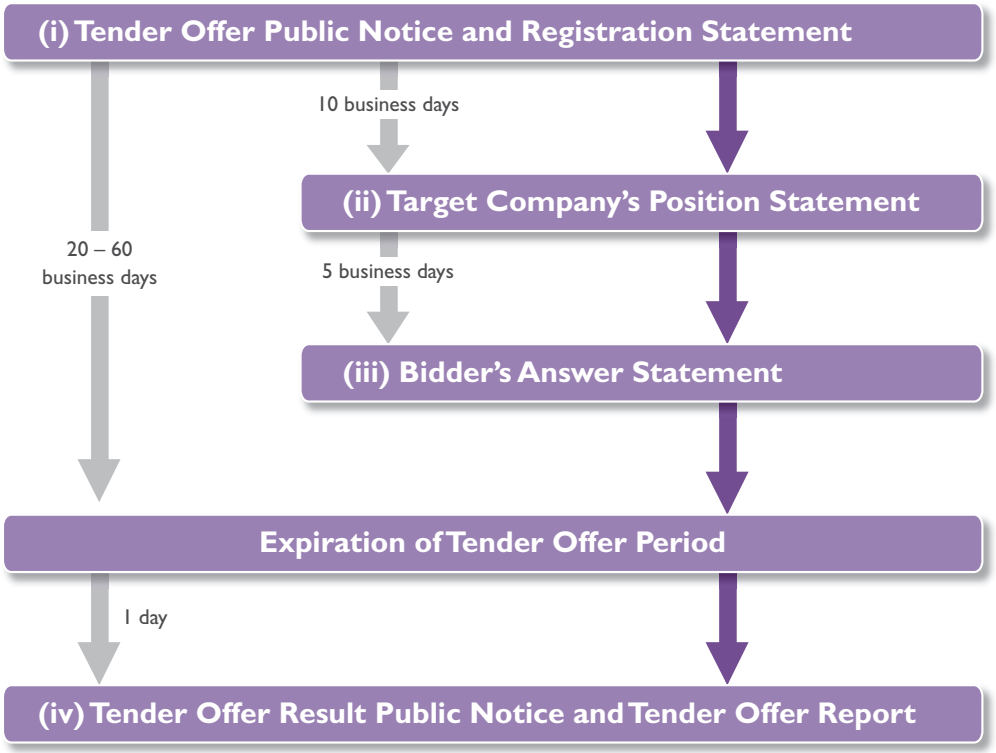
[238] FIEA, art. 27-3, para 1.

The tender offer period may be between 20 to 60 business days but may be extended under certain circumstances.[239] For cash offerings, the bidder must offer the same price to all shareholders.[240] Generally, the tender offer may not be withdrawn.[241]

(B) Registration and other Processes

At the same time the bidder publicly announces the tender offer, the bidder must also submit a tender offer registration statement to the Local Finance Bureau via EDINET.[242] The tender offer registration statement will explain in detail the information in the public announcement and will include additional, detailed information regarding the bidder and post-tender offer business strategy (including any delisting or squeeze-out of minority shareholders and explanation of the determination of the tender offer price). The tender offer registration statement must be submitted in Japanese.

The flow chart below shows the general timeline of disclosure made by a bidder and a target:



[239] FIEA, art. 27-2, para 2.
[240] FIEA, art. 27-2, para 3.
[241] FIEA, art. 27-11, para 1.
[242] FIEA, art. 27-3, para 2.

(C) Fairness Opinion; Management Buy-Out

While the FIEA requires the tender offer registration statement to include a detailed explanation of the method of calculation of the tender offer price, the bidder is not required to obtain a fairness opinion from a third party. In addition, the board of the target company is not required under the law to obtain a fairness opinion. However, in the context of a management buy-out, the tender offer registration statement must disclose an opinion letter (if any) and describe the steps the bidder and management followed to avoid and resolve any conflicts of interest.

7. REGULATORY REVIEW

(A) Share Purchase

The purchaser must file a report with the JFTC at least 30 days before the closing date, regardless of whether the target is a Japanese company or subsidiary of a foreign company, if:

(1) the purchaser and the other companies in the purchaser group of companies have domestic sales[243] over JPY 20 billion;

(2) the target and all the target company's subsidiaries have domestic sales over JPY 5 billion; and

(3) the ratio of voting rights that are held by the purchaser and the other companies in the purchaser group of companies in the target company comes to exceed either 20% or 50% by such share purchase.[244]

(B) Asset Purchase and Business Transfer

If the purchaser and the other companies in the purchaser group of companies have domestic sales of JPY 20 billion or more, the purchaser must file a report with the JFTC at least 30 days before the closing date regardless of whether the target assets or business is owned by a Japanese company or a foreign company if:

(1) the purchaser acquires the entire business of the target company and the target company has domestic sales over JPY 3 billion;

(2) the purchaser acquires a material portion of the target company's business and the target company's domestic sales that correspond with the material portion of the target company's business exceed JPY 3 billion; or

(3) the purchaser acquires the entire or a material portion of the target company's fixed assets and the target company's domestic sales that correspond with the fixed assets exceed JPY 3 billion.[245]

(C) Merger

All parties to a merger must file a report with the JFTC at least 30 days before the effective date of the merger if:

(1) one party to the merger either directly or through its group of companies has domestic sales over JPY 20 billion; and

(2) the other party to the merger either directly or through its group of companies has domestic sales over JPY 5 billion.[246]

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[243] For purposes of JFTC filings, domestic sales (i.e., sales in Japan) is calculated by aggregating the sales of the company's business offices in Japan and its subsidiaries in Japan, as of the date on which the most recent official (or audited) profit statement, prepared along with the balance sheet, was made. If a company is new and therefore has not completed a fiscal year end, these amounts will be measured as of the date of incorporation.

[244] The Anti-Monopoly Act ("**AMA**"), art. 10, para 2.

[245] AMA, art. 16, para 2.

[246] AMA, art. 15, para 2.

There is an exemption under the JFTC merger notice filings for mergers between companies within a company group. In the post-acquisition integration of two foreign companies who both have subsidiaries in Japan, a common integration approach is to transfer the shares of the Japanese subsidiaries so that they are both held by the same immediate parent company before merging the subsidiaries in order to avoid the merger notice filing with the JFTC.[247]

(D) Company Split

(1) New Incorporation Type Company Split

The parties to a New Incorporation Type Company Split must file a report with the JFTC at least 30 days before the effective date if both party A and party B meet any of the requirements provided in (a) through (d) below:[248]

	PARTY A	PARTY B (I.E., ONE OF THE OTHER PARTIES)
(a)	spins off all of its business and has domestic sales over JPY 20 billion	spins off all of its business and has domestic sales over JPY 5 billion
(b)	spins off all of its business and has domestic sales over JPY 20 billion	spins off a substantial part of its business and the business spun off has domestic sales over JPY 3 billion
(c)	spins off all of its business and has domestic sales over JPY 5 billion	spins off a substantial part of its business and the business spun off has domestic sales over JPY 10 billion
(d)	spins off a substantial part of its business and the business spun off has domestic sales over JPY 10 billion	spins off a substantial part of its business and the business spun off has domestic sales over JPY 3 billion

Note: All references to "*domestic sales*" above means the turnover from domestic sales in Japan of all group companies.

[247] AMA, art. 15, para 2.

[248] AMA, art. 15-2, para 2.

(2) Absorption Type Company Split

The parties to an Absorption Type Company Split must file a report with the JFTC at least 30 days before the effective date if both party A and party B fulfil either of the requirements provided in (a) through (d) below:[249]

	PARTY A (I.E., ONE OF PARTIES OTHER THAN A PURCHASER)	PARTY B (I.E., PURCHASER)
(a)	spins off all of its business and has domestic sales over JPY 20 billion	has domestic sales over JPY 5 billion
(b)	spins off all of its business and has domestic sales over JPY 5 billion	has domestic sales over JPY 20 billion
(c)	spins off a substantial part of its business and the business spun off has domestic sales over JPY 10 billion	has domestic sales over JPY 5 billion
(d)	spins off a substantial part of its business and the business spun off has domestic sales over JPY 3 billion	has domestic sales over JPY 20 billion

Note: All references to "*domestic sales*" above means the turnover from domestic sales in Japan of all group companies.

[249] AMA, art. 15-2, para 3.

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