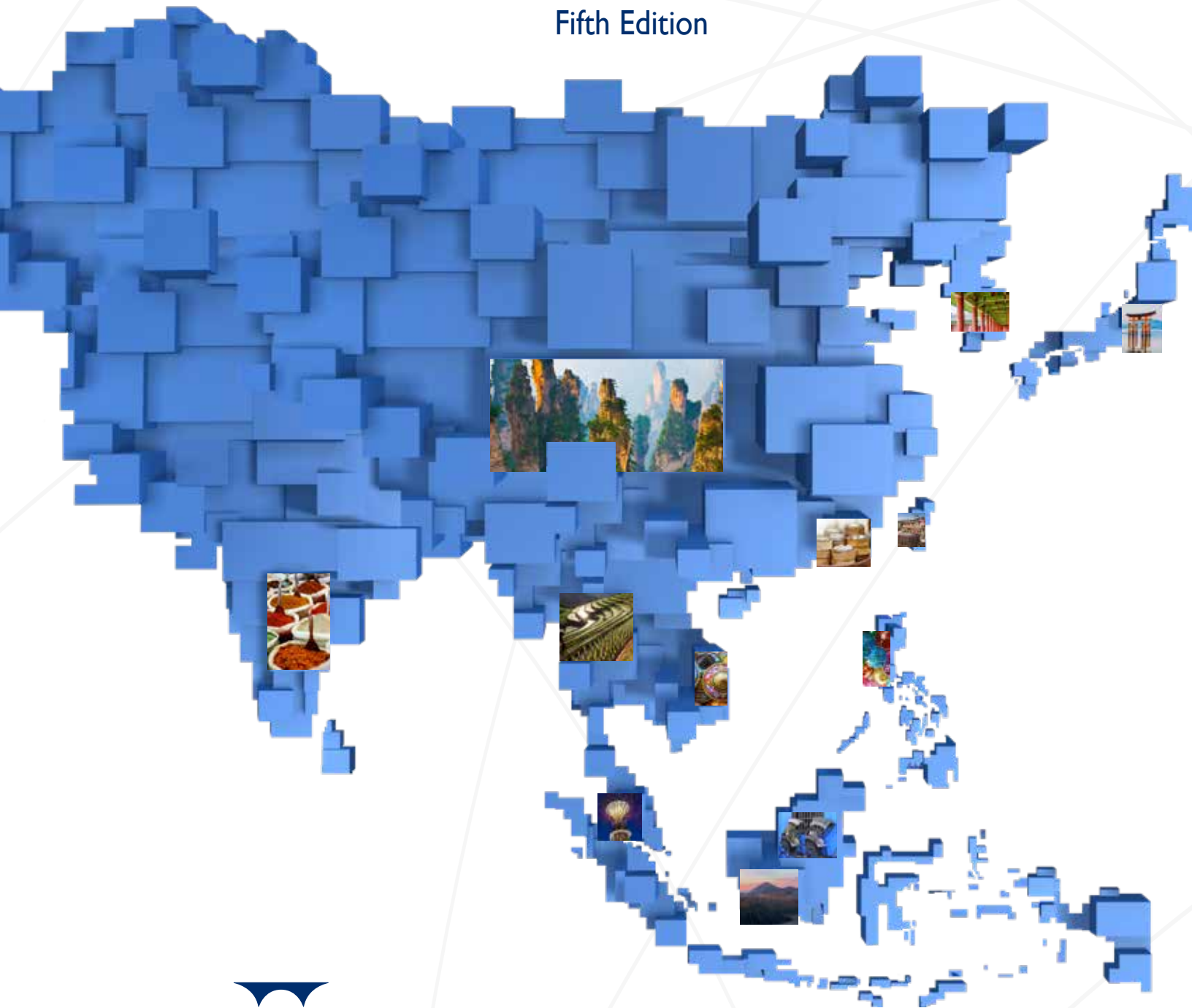


# ASIA

A Legal Guide for Business  
Investment and Expansion

Fifth Edition



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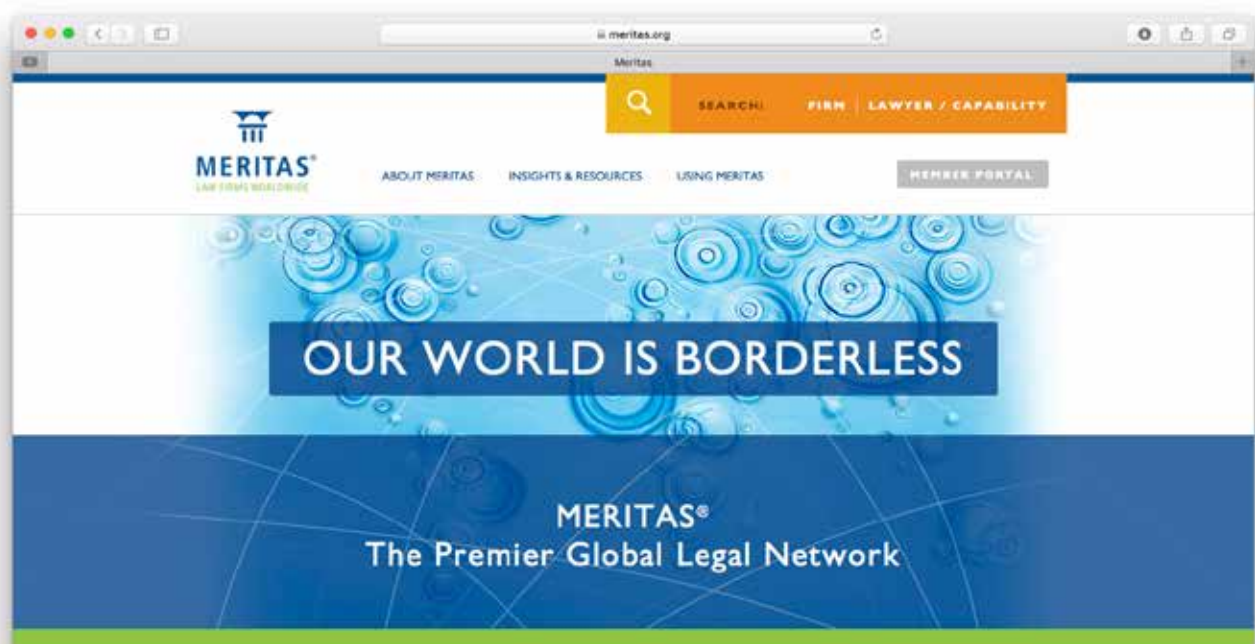
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# JAPAN

## FIRM PROFILE:

*Kojima*  
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Kojima Law Offices (KLO) handles all types of commercial transactions and corporate legal matters, including assisting American, European and other foreign corporations and individuals with inbound investments. We guide our clients through the intricacies of doing business in Japan's unique legal and business culture.

KLO assists clients in a broad range of areas, including Foreign Direct Investment (FDI) for Japan-bound investors. For over three decades, KLO has guided a wide variety of foreign clients – from an international beverage company to foreign governments to start-up businesses – to successfully establish operations in Japan. In the early 1990s, KLO was the first law firm to establish a legal mechanism to assist Japanese companies investing in India. KLO has extensive experience establishing joint ventures, creating strategic alliances, and handling mergers and acquisitions. We work with foreign companies to solve day-to-day problems, including regulatory compliance and employment issues.

With its strong litigation department, KLO has represented foreign governments before the Japanese courts, and has extensive experience representing both Japanese and foreign clients in international arbitrations.

## CONTACT:

**HIROMASA OGAWA**  
ogawa@kojimalaw.jp

**HIDEKI KOJIMA**  
kojima@kojimalaw.jp

+81 3 3222 1401  
www.kojimalaw.jp/en





## 1. What role will the government of Japan play in approving and regulating foreign direct investment?

Foreigners are generally able to conduct business in Japan on an equal legal footing with Japanese citizens. Japan is keenly interested in promoting and expediting foreign direct investment. To enhance the process, the government has translated into English relevant Japanese laws and regulations, as well as other related information. These translations are available online at <http://www.japaneselawtranslation.go.jp/?re=02>.

The government offers various incentives and subsidies to promote investment in Japan. Among these are incentives provided under the Act for Promotion of Japan as an Asian Business Center. This law reduces corporate taxes and patent fees for certain government-certified global enterprises. In addition, companies planning to do business in areas affected by the devastating 2011 earthquake in the Tohoku region can benefit from less stringent regulations and a reduced tax burden.

See [http://www.jetro.go.jp/en/invest/incentive\\_programs/](http://www.jetro.go.jp/en/invest/incentive_programs/).

The Foreign Exchange and Foreign Trade Act (FEFTA) sets forth the treatment of “Foreign Investors” and “Foreign Direct Investment”, as FEFTA defines those terms. When either a foreign or Japanese investor sets up a corporation in Japan, the corporation is required to be registered at the appropriate legal affairs bureau. In addition, when foreign investors engage in any foreign direct investment, they are required to subsequently report that investment to the Ministry of Finance (through the Bank of Japan).

The general rule is that foreign investors may report their direct investments into Japan after the fact. However, FEFTA requires that foreign investors from 30 countries (including North Korea and Iraq) provide the relevant governmental authorities with prior notice. The same is true for the following industries/investments:

- Industries related to national security, public policy or public safety, such as weapons, aircraft, satellites, nuclear energy, electric power, gas, the supply of heat, telecommunications, broadcasting, water supply, railway services, transportation, medical products, and security services.
- Industries that the government reserves the authority to restrict, such as agriculture, forestry, fisheries, oil, leatherwear, air transport, and marine transport.

After reviewing the proposed investment, the government may order the foreign investor to modify or cancel the investment if the government believes a modification or cancelation is necessary.

## 2. Is it possible for foreign investors to conduct business in Japan without a local partner? What corporate structure is most commonly used and best for foreign investors?

With the exception of the industries listed in Question 5, foreign investors may own a 100% interest in any domestic corporate entity in Japan. Foreign investors may conduct business in Japan without a local partner.

## Corporate Structure

### TYPES OF LEGAL ENTITIES IN JAPAN

The Companies Act provides four types of corporate vehicles: a *kabushiki-kaisha* (KK), a *goudou-kaisha* (GK), a *goumei-kaisha*, and a *goushi-kaisha*. A KK is similar to a limited liability for-profit stock corporation in the United States, and is generally the option that most Japanese companies use. The minimum capitalization requirement is only JPY 1.

In addition to the above, foreign companies may set up and directly control a branch (*shiten*) or a representative office (*chuzai-in-jimusho*), neither of which is incorporated.

### Management Structure of a KK

A KK must have at least one director. Since 2015, all of a KK’s directors can reside outside of Japan.

A KK may have additional management bodies depending on the size of the company and its particular needs. These bodies can include a board of directors consisting of at least three directors, statutory auditors, a board of statutory auditors, a supervisory committee (*kansa-tou-iinkai*), an accounting advisor, an accounting auditor, committees and executive officers. Companies that foreign investors set up typically start off with a representative director, a board of directors, and a statutory auditor.

### 3. How does the Japanese government regulate commercial joint ventures composed of foreign investors and local companies or individuals?

The same FEFTA requirements discussed in Question 1 apply to a foreign investor's establishment of or participation in a commercial joint venture with a local firm, whether through subscription or through an acquisition of shares or equity in certain domestic companies.

### 4. What specific laws will influence the commercial relationship between local agents/distributors and foreign companies?

#### Applicable Law

Foreign companies and their local distributors or agents can contractually agree on the law that will govern their relationship. Japanese courts will adjudicate any dispute based on the parties' choice of law, but only to the extent that applying non-Japanese law does not violate Japanese public policy or any compulsory laws.

A typical Japanese compulsory law is the Anti-Monopoly Act. This law seeks to eliminate unfair trade practices by prohibiting resale price restrictions and other unreasonable restrictions on a business partner's activities.

#### Unfair Termination of Agreements

Distribution and agency agreements typically have effective fixed terms lasting from 1-5 years. For agreements without a fixed term, a party may terminate those agreements without cause after providing the other party with proper notice. Japanese courts basically honor termination-related

terms and conditions contained in distribution and agency agreements. However, a party will find it more difficult to terminate agreements that have been in effect for a long period of time. Specifically, Japanese courts will not allow such agreements to expire at the end of their term or to immediately terminate. The courts have not articulated a clear-cut standard for what constitutes a "long-term" agreement. However, courts may consider an agreement to be "long term" if it has been in effect for more than five years. A party will need a justifiable reason for refusing to renew or for terminating long-term agreements. In other instances, courts require an "adequate" prior notice period for such agreements, and will order a party that fails to give adequate notice to pay compensation for lost profits, the specific amount of which will correspond to the prior notice period.

### 5. In what manner does the Japanese government regulate proposed merger and acquisition activities by foreign investors? Are there any specific areas or industries that are heavily restricted or completely prohibited to foreign investors?

Japan does not allow the following industries to be entirely foreign-owned.

#### Common Telecommunication Carriers

A foreign investor may own no more than one third of Nippon Telegraph and Telephone Corporation (NTT). Apart from NTT, there are no restrictions on foreign ownership of common telecommunication carriers in Japan.

#### Airline Companies

Non-Japanese citizens, foreign investors or foreign governments may directly own no more than one-third of Japanese airline companies such as Japan Airlines and All Nippon Airways.

#### Transportation Companies

Non-Japanese citizens, foreign investors or foreign governments may directly own no more than one-third of Japanese transportation companies.

#### Broadcasting Companies

Foreign ownership of Japanese broadcasting companies is limited to one-fifth. This is true whether the foreign ownership is direct or indirect.

#### Mining Business

Only Japanese nationals and Japanese legal entities can have mining rights in Japan.

The Japanese government must retain a certain ownership share of certain companies, including those listed below.

#### Post Office

The Japanese government must own at least one-third of Japan Post Holding Co., Ltd.

#### Airport Operating Companies

The Japanese government must own 100% of the company that manages the Kansai International Airport.

#### Tobacco Business

The Japanese government must own at least one-third of Japan Tobacco Inc.

#### Expressway Business

The Japanese government must own at least one-third of certain companies involved in the establishment and/or operations of expressways in Japan.

#### Antimonopoly Regulation

The Anti-Monopoly Act prohibits mergers, acquisitions, and certain other activities that would result in a substantial restraint on competition.

In addition, the Fair Trade Commission must be given prior notice of mergers, acquisitions and certain other activities involving companies over a certain value.

## 6. How do local labor statutes regulate the treatment of employees and expatriate workers?

### Local Employees and Expatriate Workers

There are no limitations on the employment of foreign expatriate workers, all of whom must have a work visa. Workers in certain fields (such as engineers, intra-company transferees, and skilled laborers) must obtain a specific type of work visa for their respective jobs and notify the local job-placement office.

The Labor Standards Act (LSA) prohibits discriminatory treatment of employees on the basis of nationality. These legal protections apply equally to both local employees and expatriate workers as long as they provide the labor in Japan. Regardless of the governing law set forth in the employment agreement, Japanese courts will still apply the minimum labor standards under the LSA and other statutes.

### Basic Employment Conditions Relevant Labor Statutes, Rules of Employment and Labor Contracts

The LSA provides the minimum standards for basic employment conditions. The Minimum Wage Act, the Industrial Safety and Health Act, the Labor Union Act, the Child Care and Family Care Leave Act, among others, also deal with workers' rights and working conditions. Employers with at least 10 employees are required to establish rules of employment covering the basic conditions of

employment such as the payment of wages, work schedules, termination, and other issues. Individual labor agreements must be at least as favorable to employees as the relevant provisions of Japanese labor law or the company's rules of employment. The Labor Contract Act governs the execution and termination of labor contracts, as well as other issues regarding employment agreements.

### Term and Termination of Employment

Japanese labor law does not recognize the concept of "at-will" employment. Consequently, employment without a fixed term continues indefinitely until the employee reaches the company's mandatory retirement age.

Companies often find it difficult to terminate their employees in Japan. The Labor Contract Act prohibits an employer from dismissing an employee unless the employer has objectively reasonable grounds to do so, and the dismissal is considered to be appropriate under prevailing societal norms.

Companies have less leeway in dismissing a fixed-term employee in the middle of their term of employment. Even when the term expires, the company may still be required to renew the employment for an additional term if, for example, the company had repeatedly extended the employee's term of employment. In this case, the employer may need to establish reasonable grounds to justify a refusal to renew the employee's term of employment. Furthermore, if the company renews an employee's fixed-term contract and the employee has been with the company for more than five years, the employee's fixed-term status will automatically be converted to an indefinite status, which will continue until the

employee hits the company's mandatory retirement age.

### Social Security Programs

Both local employees and expatriate workers are eligible to receive workers' accident compensation insurance, employment insurance, health insurance, and pension, with certain exceptions depending on their employment status. Employers bear 50% to 100% of the premiums for these insurance programs. The specific premium and the amount that the employer is required to contribute depend on the type of insurance, the employee's pay, and the industry.

### Labor Disputes

#### Typical Labor Disputes

Typical labor disputes in Japan include unlawful termination, nonpayment of overtime wages, compensation for mental illness caused by workplace harassment or overwork, violation of an employee's confidentiality obligations, and the validity of noncompete agreements.

#### Dispute Resolution Venues

Japanese courts will generally take jurisdiction over a labor dispute if the employee provided their services in Japan. Japanese courts take approximately 12 to 18 months to hear and decide a typical labor case. As an alternative to or prior to filing a lawsuit, a party may choose to institute a claim with the court-affiliated labor tribunal. The labor tribunal is settlement-oriented. However, if the parties cannot reach an agreement, the panel will issue a judgment by the end of the third hearing. If either party raises an objection to the tribunal's decision, the case is transferred to the district court.

In addition to the above, parties are often able to resolve their disputes by consulting with the local Labor Standards Inspection Offices, as well taking advantage of the mediation services that the National Prefectural Labor Commissions offer.

### 7. What role do local banks and government agencies play in regulating the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?

Japan has been relaxing restrictions under the Foreign Exchange and Foreign Trade Act on financial transactions between Japanese residents and nonresidents, as well as on financial transactions involving foreign currencies. At present, most financial transactions require no filing or only post-transaction and/or post-payment filings with the relevant ministries (through the Bank of Japan) for monitoring purposes. Certain limited types of transactions require either prior approval or prior notification.

In general, transactions that require prior approval are limited to those involving certain individuals or organizations that are subject to international sanctions. Financial transactions related to the fisheries, leather, weapons, or narcotics industries require prior notification. Transactions that require post-transaction filings include certain inbound and outbound investments, securities transactions over a certain amount, and real estate transactions, among others. The conversion of local currency and letter of credit transfers do not require any post-transaction filings, but post-payment filings may be

applicable. The repatriation of funds overseas may or may not be subject to prior approval, prior notification, or post-transaction filings depending on the nature, purpose, amount and parties involved in the particular transaction.

The sending and receiving of payments between Japanese residents and nonresidents over jpy 30 million (except for payments for imports to or exports from Japan) are subject to post-payment filings, either with the relevant ministries (through the Bank of Japan) or with the bank handling the remittance. This post-payment filing requirement applies even if there is no need to make a post-transaction filing described above.

### 8. What types of taxes, duties, and levies should a foreign investor expect to encounter in negotiating an inbound investment in Japan?

A Japanese subsidiary of a foreign company is legally a domestic company and is therefore taxed the same as any Japanese company.

#### Corporation Tax

Corporate tax in Japan is imposed on a company's net taxable income, with the specific tax rate depending on the amount of capital. The top corporate tax rate is 23.4% until March 31, 2018. This rate will thereafter be lowered to 23.2% for income earned in the fiscal year that begins on or after April 1, 2018.

#### Income Tax Withholding

When a foreign company or nonresident earns certain types of income generated in Japan, the payer of that income is required to withhold estimated income tax from the payment. If a tax treaty applies to a

payment, there may be no need to withhold income tax or the tax rate may be lowered.

#### Corporate Inhabitant Tax

Corporate inhabitant tax is levied on a company with an office in Japan. The tax is calculated on the company's capital amount and the number of people it employs and/or the amount of corporate tax that it paid.

#### Corporate Enterprise Tax

Corporate enterprise tax is levied on a company's income, not its net profits. For a company with capital of jpy 100 million or more, corporate enterprise tax is levied based on the size of its business. The size of the company's business is based on its taxable income range, the sum of its employees' wages, its net interest expenses and net rental expenses, its paid-in capital, and its capital surplus.

#### Consumption Tax

Consumption tax is an 8% value-added tax on all transactions, including the transfer of goods, the leasing of assets, the provision of services in Japan, and the importation of goods (once those goods are delivered from the customs bonded area). The consumption tax is scheduled to increase to 10% on October 1, 2019.

#### Transfer Pricing

Transfer pricing regulations under the Special Taxation Measures Act apply to any transactions with related foreign companies that are not made at arm's-length.

#### Japanese Branch (Permanent Establishment)

If a foreign company sets up a branch office in Japan, the Japanese tax authorities will treat that branch as a permanent establishment (PE). As such, the foreign company will be taxed in Japan on the income



attributable to the Japanese branch office. Income not attributable to the Japanese branch office will be taxed in the jurisdiction where the foreign company is subject to tax.

**9. Do comprehensive intellectual property laws exist in Japan and do they provide the same levels of protection for foreign investors as local companies? Will local courts and tribunals enforce IP laws uniformly, regardless of the nationality of the parties?**

Japan has strong protections in place for intellectual property rights, with robust enforcement mechanisms available when those rights are violated. Japan is a signatory to all major IP-related treaties, including the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

**Patents**

Patentable inventions include a product, a process, or the process of producing a product. The term “product” includes computer programs, living organisms (e.g., bacteria) and business methods, usually in the form of the invention of a computer program.

**Utility Model Patents**

A utility model patent may cover an idea that is not advanced enough to be patentable but nevertheless has industrial applications with regard to its shape or structure, or because a certain combination of items or objects makes it industrially useful.

**Design**

Design rights may protect designs that have an industrial use and that meet other statutory requirements. (If the design has sufficient artistic elements, it can also receive copyright protection.)

**Trademarks (including service marks)**

A mark must be registered with the Japanese Patent Office in order to be protected under the Trademark Act. The Trademark Act does not require the mark to be used in order for the mark to be registered. However, if the trademark holder fails to use the registered trademark in Japan for three consecutive years or longer, the mark will be rescinded if someone files a rescission request with the Japan Patent Office.

The Unfair Competition Prevention Act may protect an unregistered mark if the mark is famous or well known among consumers.

**Copyright**

Japanese copyright law protects original works that fall within the literary, scientific, artistic or musical domains. Computer programs are copyrightable.

Japanese copyright law also protects an author’s moral rights (e.g., the right to make the work public, the right to determine how the author’s name appears on the work, and the right to maintain the integrity of the work). Authors may not assign their moral rights to others.

**Trade Secrets**

The Unfair Competition Prevention Act can protect certain information as “trade secrets”.

**Other IP Rights**

The Act Concerning Layout of Integrated Semiconductor Circuits

protects the layout of integrated semiconductor circuits. The Seeds and Seedlings Act protects new plant varieties.

**Enforcement**

The courts enforce laws objectively regardless of the nationality of the parties. Japanese courts do not have juries; judges decide both the law and the facts. Japanese law does not allow punitive damages.

**10. If a commercial dispute arises, given the choice between local courts or an international arbitration venue, which would offer a more beneficial forum for fair dispute resolution for foreign investors?**

Japanese courts treat Japanese and foreign investors equally. Nonetheless, certain procedural inconveniences may make court a less attractive option for foreign investors. The Japanese Arbitration Act is modeled on the UNCITRAL Model Law on International Commercial Arbitration and has eased access to arbitration by foreign investors.

**Language**

Only Japanese may be used in Japanese courts, and litigants must translate all foreign-language evidence into Japanese. By contrast, the parties can agree to arbitrate in any language they choose.

**Judges/Arbitrators**

Judges are considered neutral, but they are not necessarily familiar with complex technical issues and specialized business practices. Despite this shortcoming, parties are not allowed to select a judge with such expertise. By contrast, parties to an arbitration can agree on the nationality, number, and expertise of the arbitrators.

### Openness/Secrecy of Forum

With a few limited exceptions, court proceedings, trials and judgments are considered matters of public record. However, parties to an arbitration can keep the proceedings and records private. This is a particular advantage in disputes over trade secrets and other cases involving sensitive information.

### Time Frame/Costs

A traditional court trial can be time consuming, with the average civil trial lasting approximately 6.5 months (more complex cases can take more than two years). The losing side may appeal, and the court may review both the lower court's findings of fact and conclusions of law. Parties may possibly introduce new evidence. Court hearings are spaced out and held every month or so. On the other hand, arbitral proceedings can be quicker, and parties cannot appeal an arbitral decision, i.e., the arbitral decision is final and conclusive. The parties bear all of the costs for arbitration proceedings (this differs from court litigation, where the parties do not pay any fees for the judges).

### Foreign Judgments/Arbitral Awards

Japanese courts will enforce a final and conclusive judgment issued by a non-Japanese court subject to certain conditions.

Japan is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Further, Japan has concluded bilateral treaties with various countries concerning the recognition and enforcement of foreign arbitral awards.

## 11. What recommendations can you offer for how best to negotiate and conduct business in Japan?

- Although technology allows for an unprecedented level of connectivity, many Japanese still appreciate personal connections, even in the business world. If possible, therefore, it is a good idea to ask a mutual contact or some other go-between to introduce you to potential business partners rather than initiating direct contact by cold calling.
- If you manage to set up a meeting with a prospective business partner, the Japanese side will generally appreciate receiving a written agenda of the meeting in advance. Many Japanese find it challenging to have meetings in English, even to the point where they need an interpreter. Providing a written agenda allows the Japanese side to have a clear idea of what to expect at the meeting, and should go a long way in putting their minds at ease.
- The very first meeting in Japan starts with a formal greeting and the exchanging of *meishi* (business cards). During this exchange, Japanese consider it polite to receive the other person's *meishi* with both hands, and it is customary to let the higher-ranked people go first. Look over the *meishi* for a moment and memorize the person's name and position. Do not just stuff it in your pocket.
- When negotiating with a Japanese party, take into account the longer time frame necessary for the Japanese side to conduct an internal review and make a final decision. In many companies (especially the larger ones), making a decision can require obtaining the approval of several divisions

and sections within the company. As a result, do not be surprised if the Japanese side sometimes takes longer than expected to respond, or if different people in the company repeatedly raise the same questions or topics at a later date. It does not necessarily mean the other side is not eager to proceed. It may just be that the person in charge of the negotiation does not have the full authority to make any final decisions on their own.

## 12. What practical advice can you share with investors who decide to do business in Japan?

- Some foreign investors set up a company in Japan and allow the Japanese representative they have selected to run the company with little or no control or oversight from the foreign parent. In some cases, the foreign investor gives the Japanese representative full discretion to spend company funds and make decisions on the company's hiring practices and employee benefits. It is critically important to monitor the Japanese subsidiary or branch office on a regular basis to avoid any unpleasant surprises.
- Japanese companies and branches are required to create an official corporate seal that is registered at the Legal Affairs Bureau. The company customarily affixes this seal to important contracts and other documents rather than have someone sign those documents by hand. The company may be bound by any contract with the seal affixed to it, even if someone fraudulently used the seal without the company's knowledge or permission. To prevent the improper use of the seal, law firms sometimes agree to act as the custodian of the seal. The local

representative then uses the seal only after the client provides the law firm with specific instructions.

- A foreign investor needs to ensure that the subsidiary or branch maintains proper records. Otherwise, the investor can completely lose track of their rights (shareholder information is not registered or publicly available). Failure to maintain proper records can result in significant obstacles to a corporate reorganization or a sale of the business.
- The traditional Japanese wage structure provides for lifetime employment. A new employee right out of school typically receives regular promotions and retires at age 60 or 65. This system does not apply to individuals such as directors or CEOs who, unlike regular employees, are not entitled to higher pay or job security simply because they've worked for the company for a long period of time. To understand these types of personnel matters, consult a local lawyer or someone with expertise in this area.

### 13. Does Japan currently have any data privacy laws or regulations? How do they affect business activities?

Japan recently amended the Personal Information Protection Act ("PIPA") to provide a comprehensive and robust set of rules for the protection of personal information. PIPA protects personal information such as fingerprint data, facial-recognition data, and individual identification numbers, as well as an individual's name, date of birth, and contact information. All companies/individuals that maintain a database of personal information for business purposes ("Data Controller") are generally required to comply with PIPA. PIPA also applies to

a foreign company: (i) with a branch in Japan; and (ii) that obtains personal information on Japanese residents either from selling goods or providing services to those individuals.

The Data Controller's main obligations under PIPA are as follows.

- Specifying its purposes for using the personal information and refraining from handling the personal information to a greater extent than is necessary to achieve those purposes.
- Informing the person whose personal information the Data Controller has acquired the purpose for which the Data Controller used that personal information, or disclosing to the public in advance the purpose for which the Data Controller uses the personal information.
- Obtaining in advance the approval of the person whose personal information the Data Controller acquired for disclosure of that person's personal information to a third party, unless certain conditions are met.
- Taking necessary and appropriate action to ensure that the Data Controller is able to securely maintain control over the personal information.
- Keeping records of the personal information that the Data Controller provides to and acquires from third parties.

If the Data Controller wishes to transfer personal information to a third party outside of Japan (including to the Data Controller's subsidiary or affiliate), it must obtain the approval of each person whose personal information will be transferred, unless the Data Controller satisfies one of the following conditions.

- The third party is in a country that protects personal information at least as securely as Japan does.
- The third party internally maintains a system to protect personal information, as long as that system has standards consistent with those set by the Personal Information Protection Commission of Japan.
- An exception applies, such as the Data Controller needing to disclose personal information under applicable law.

If the Data Controller fails to perform any of the obligations discussed above, the relevant governmental authority may recommend that the Data Controller take certain steps to achieve compliance with PIPA. If the Data Controller fails to follow those recommendations and that failure is deemed unjustifiable, the authority may, under certain conditions, issue an order requiring the Data Controller to take the authority's previously recommended steps. If the Data Controller fails to comply with that order, the Data Controller faces punishment of up to 6 months' imprisonment or a maximum fine of 300,000 JPY.

### 14. Are there any recently passed laws or regulations in Japan that are expected to affect the activities of foreign investors in the future?

Nothing apart from those discussed above.

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**www.meritas.org**

800 Hennepin Avenue, Suite 600  
Minneapolis, Minnesota 55403 USA  
+1.612.339.8680