

Laws and Regulations on International Mergers and Acquisitions in Japan

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Introduction

Basic forms of M&A in Japan can be categorized into 4 types: Merger and Consolidation, Share Acquisition, Assignment of Business and Company Split. Among these 4 types, a Foreign Company may become an Acquirer of Shares under the Share Acquisition, and an Assignee Company under Assignment of Business. However, it may not be an Absorbing Company in a Merger or a Succeeding Company in a Company Split.

Under such circumstances, however, there have been strong demands urging for varieties in the form of business restructuring or corporate reorganization; precisely, calling for the emergence of Foreign Companies into corporate reorganization of Japanese companies in the business scene.

In line with the above reason, first of all, a (Forward) Triangular Merger and a Triangular Split were introduced in Japan in the amendment of the “Act on Special Measures concerning Industrial Revitalization” in 2003. By means of such Merger and Company Split, Foreign Companies may, although through their Japanese subsidiary companies, merge or succeed to a Japanese company now. Subsequently, at the enactment of the Companies Act in 2005, the (Forward) Triangular Merger and the Triangular Split were approved afresh thereunder.

With the above backgrounds, this paper introduces and focuses on the 4 basic types of corporate reorganization in Japan. It also refers to, from time to time, the (Forward) Triangular Merger and the Triangular Split as well as Share Exchange and Share Transfer, the systems to establish wholly owning parent companies, and mentions about Public Notice of Business Office, Registration, Financial Statements in Japan as a reference at the end.

1. Merger and Consolidation

(1) Introduction

(A) Definition and Type

(a) Both Merger and Consolidation are effected by an agreement (“Merger (Consolidation) Agreement”) executed between two or more companies (“Company(s)”).

In the case of a Merger, one of the Companies (“Absorbed Company(s)”) is dissolved and the other Company surviving the Merger (“Surviving Company”) succeeds thereto¹. In the case of Consolidation, all the Companies (“Consolidated Company(s)”) are dissolved and simultaneously a new company (“New Company”) is established where such New Company succeeds to all the Consolidated Companies².

(b) (Forward) Triangular Merger

The (Forward) Triangular Merger is a Merger where shares of a parent company or an affiliated company of a Surviving Company is delivered to shareholders of an Absorbed Company. As Foreign Companies may not effect Merger with Japanese companies in Japan, the (Forward) Triangular Merger was provided for at the time the Companies Act was enacted so that the Foreign Companies may substantially take over the Japanese companies through their Japanese subsidiary companies. However, a Reverse Triangular Merger is not approved³.

¹ Article 749 and onwards of the Companies Act

² Article 753 and onwards of the Companies Act

³ The practical steps of the (Forward) Triangular Merger by the Foreign Companies are as follows:

- 1) a Foreign Company establishes its subsidiary company in Japan;
- 2) the subsidiary company acquires its parent company's, the Foreign Company's, shares (Article 800 (1) of the Companies Act);
- 3) the subsidiary company merges a company (“Subject Company”); and
- 4) the subsidiary company (the Surviving Company) delivers to shareholders of the Subject Company (the Absorbed Company) the shares of the parent company, the Foreign Company.

(B) Succession of Shareholders

In the case of Consolidation, shareholders of a Consolidated Company are delivered shares of a New Company in lieu of the shares of the Consolidated Company, and the New Company succeeds thereto as its shareholders in accordance with the Consolidation Agreement⁴.

In the case of a Merger, shareholders of an Absorbed Company are not necessarily delivered shares of a Surviving Company, but may be delivered other properties such as monies, shares of parent companies of the Surviving Company, etc.⁵. Thus, in the case of a Merger, a Surviving Company does not naturally succeed to the shareholders of an Absorbed Company as the shareholders of the Surviving Company.

(2) Restraints under the Companies Act

(A) Merger (Consolidation) Agreement

Terms and conditions to be set forth in a Merger (Consolidation) Agreement are provided for in the Companies Act so as to protect shareholders etc.. It includes provisions of trade name, address, consideration of the Merger and Merger ratio, and effective day, etc.. Each Company shall keep at its head office documents or records that state or record (i) the contents of the Merger (Consolidation) Agreement and (ii) matters relating to reasonability of the terms and conditions of the Merger or Consolidation, to ensure fairness of the Merger (Consolidation) Agreement in terms of procedure⁶. The documents shall be kept from the day as provided by law until the effective day of the Merger or Consolidation for an Absorbed/Consolidated Company and until the day on which six (6) months have elapsed from the effective day for a Surviving Company.

Creditors and shareholders of each Company may, during its business hours, request for inspection of such documents, and for delivery of a

⁴ Article 753 (1)(6), Article 753 (1)(7), Article 755 (1)(4) of the Companies Act

⁵ Article 749 (1)(2)(b) through (e), Article 749 (1)(3), Article 751(1)(3) of the Companies Act

⁶ Article 782 (1), Article 794 (1), Article 803 (1) of the Companies Act, Article 182 (1)(1) through (3), Article 182 (3) through (5), Article 191 (1), Article 204(1) and (2) of the Ordinance for Enforcement of the Companies Act

transcript or extract of the documents by paying the fees designated by such a Company⁷. By this means, the shareholders are able to judge the fairness, etc. of the terms and conditions of the Merger or Consolidation, and the creditors are able to decide whether they should state their objections to the Merger or Consolidation.

In the case of a (Forward) Triangular Merger, the following shall be specified as the above “matters relating to reasonability of the terms and conditions of the Merger or Consolidation”:

- (1) reasons for selection of such properties as consideration of the Merger;
- (2) rights in and to and conversion method of the consideration of the Merger;
- (3) in the case where there are minor shareholders in the Absorbed Company of which it is the subsidiary company of the Surviving Company, provisions setting out not to harm the interest of such minor shareholders⁸.

(B) Procedure for Approval

In order for companies to effect a Merger, each Company shall obtain the approval of a Merger (Consolidation) Agreement by a resolution of a shareholders meeting. A resolution of approval shall be passed by a special resolution of a shareholders meeting.

In a Merger, there are “Simple Merger System” of the Companies Act and “Summary Merger System” that do not require procedure for approval. These systems may be available in certain cases where there is only slight influence on shareholders in terms of category.

The Simple Merger means that a Surviving Company is able to effect a Merger without the approval thereof by a resolution of a shareholders meeting when the following amounts do not exceed one fifth (1/5) of the amount of the Surviving Company’s net assets⁹: (1) the amount obtained by multiplying the number of shares of the Surviving Company to be delivered when the Merger is effective, by the amount of net assets per share and (2) bonds and the sum of the book value of the Surviving

⁷ Article 782 (3), Article 794 (3), Article 803 (3), Article 815 (4), Article 976 (4) of the Companies Act

⁸ Article 182 (3) and (4) of the Ordinance for Enforcement of the Companies Act

⁹ Article 784 (3), Article 796 (3) of the Companies Act, Article 196 of the Ordinance for Enforcement of the Companies Act

Company's other assets to be delivered when the Merger is effective.

The Summary Merger means that a certain Company ("Controlled Company") is able to effect a Merger without approval thereof by a resolution of a shareholders meeting when the other Company ("Special Controlling Company") holds nine tenths (9/10) or more of the voting rights of all shareholders of the Controlled Company¹⁰.

(C) Procedure for Protection of Shareholders

When effecting a Merger, a Company shall notify its shareholders thereof and the trade name and domicile of the other Company by twenty (20) days prior to the effective day. When effecting Consolidation, a Consolidated Company shall notify its shareholders thereof and the trade names and domiciles of other Consolidated Company and New Company within two (2) weeks from the day of resolution of the shareholders meeting.

Shareholders dissenting from the Merger or Consolidation may exercise the right to request for purchase of their shares.

In the case where the Summary Merger System is used, the shareholders of the Controlled Company may demand that the Controlled Company refrain from effecting the pertinent Merger in the following events: (i) the Merger violates the applicable laws and regulations or articles of incorporation; or (ii) the Merger Agreement is grossly improper in light of the financial status of the Company and the shareholders of the Controlled Company are likely to suffer disadvantage¹¹.

(D) Procedure for Protection of Creditors

Creditors of each Company may state objections to the Merger or Consolidation.

If there are creditors who may state objections, each Company shall give public notice and notices (separately to each known creditor) (i) of effecting the Merger or Consolidation, (ii) of the trade name and domicile of each Company, (iii) of matters regarding a Financial Statement of the

¹⁰ Article 784 (1), Article 796 (1), Article 468 (1) of the Companies Act

¹¹ Article 784 (2), Article 796 (2) of the Companies Act

Absorbed/Consolidated Company and the Surviving or New Company and (iv) of a statement to the effect that the creditors may state their objections within the applicable period (may not be less than one month).

In the case where creditors do not raise any objections within the period (iv) above, such creditors shall be deemed to have approved the Merger and Consolidation (Article 789 (4), Article 799 (4), Article 810 (4) of the Companies Act). However, if creditors raise objections, the Company shall (i) make payment, (ii) provide reasonable security to such creditors or (iii) entrust equivalent property to a Trust Company, etc. for the purpose of having such creditors receive the payment.

Each Company shall complete the procedure on objection raised by the creditors before the effective day of the Merger and Consolidation (Date of formation of the New Company in the case of the Consolidation).

(E) Post-Disclosure

The Surviving Company of a Merger and the New Company of Consolidation shall, without delay after the effective day, prepare documents that state or record (i) the rights and obligations of the Absorbed/Consolidated Company to which the Surviving Company or the New Company succeeded by the Merger or Consolidation and (ii) any other matters prescribed by the applicable Ordinance of the Ministry of Justice as those concerning the Merger and Consolidation, and for a period of six months from the effective day or the date of formation, keep them at its head office and respond to the shareholders' and creditors' requests for inspection or requests for delivery of a transcript or extract of the documents.

(F) Registration

Each Company shall make registration of dissolution, change and incorporation within two (2) weeks from the effective day in the case of a Merger and from such a day as provided by law such as a day of a resolution of approval by a shareholders meeting in the case of Consolidation.

Dissolution of an Absorbed Company in a Merger may not be duly asserted against a third party until the registration thereof has been

completed.

(G) Actions Seeking Invalidation of Merger

In the event where there are errors in the procedure of a Merger or Consolidation, invalidation of the Merger and Consolidation may be asserted within six (6) months from the day on which the Merger or Consolidation became effective. A final judgment upholding invalidation of the Merger or Consolidation shall also be effective against third parties but not be retroactive.

Persons who may file actions seeking invalidation of the Merger or Consolidation shall be shareholders, directors, auditors, executive officers, liquidators, partners or liquidators of a Membership Company, trustees in bankruptcy of each Company, and creditors who did not give approval to the Merger or Consolidation on the effective day thereof. Defendants shall be the Surviving Company or the New Company.

(3) Restraints under the Anti-Monopoly Law

No Company shall effect a Merger or Consolidation where the effect thereof may be substantially to restrain competition in a particular field of trade or where unfair trade practices have been employed in the course of a Merger or Consolidation¹².

In order to secure effectiveness of such restraint, it is required to notify the Fair Trade Commission in advance where a Company with its total amount of the Domestic Sales is above certain amount effects the Merger or Consolidation. No Company which has notified in advance shall effect a Merger or Consolidation until the expiration of the thirty-day (30) waiting period from the date of acceptance of the said notification. The Fair Trade Commission shall issue a cease and desist order when it judges that the Merger or Consolidation is not approved.

In the event that the Company fails to give such prior notice to the Fair Trade Commission, the Company may be subject to a fine and may be filed an action seeking invalidation of the Merger or Consolidation by the Fair Trade Commission¹³.

¹² Article 15 (1) of the Anti-Monopoly Law

¹³ Article 18 (1) of the Anti-Monopoly Law

(4) Restraints under Financial Instruments and Exchange Act

In the case where a listed company shall become the Surviving Company and issue shares, it is not required to re-submit an Annual Securities Report thereupon since it is already obligated to submit it on a quarterly basis regardless of the Merger; provided, however, that when applicable to the cases specially provided by law, the listed company shall submit an Extraordinary Report upon the Merger¹⁴.

On the other hand, in the case where a listed company is the Absorbed/Consolidated Company and an unlisted company shall become the Surviving Company, the shareholders of the Absorbed/Consolidated Company are unable to obtain the Annual Securities Report of the Surviving Company which may become its decision-making information since the unlisted company is not obligated to submit the Annual Securities Report in the first place. Thus, the said unlisted company shall submit the Annual Securities Report to the prime minister so as to provide the shareholders of the Absorbed/Consolidated Company with decision-making information¹⁵.

In the case where a Merger is effected between/among unlisted companies and issue shares, submission of the Annual Securities Report is required only if an increase in the net assets is 100 million or more¹⁶.

(5) Restraints under Labor Law

As a Merger and Consolidation take general succession, a Surviving Company or a New Company shall comprehensively succeed to a labor agreement of an Absorbed/Consolidated Company.

Accordingly, issues on reduction of excess personnel or unification of the working conditions conducted at the time of a Merger or Consolidation shall be treated as matters of an ordinary dismissal for the purpose of

¹⁴ Article 24-5 (4) of the Financial Instruments and Exchange Act, Article 19 (2)(7)(3) of a Cabinet Office Ordinance regarding the Disclosure of Corporate Affairs and Other Related Matters

¹⁵ Article 4 (1), Article 4 (1)(2)(b) of the Financial Instruments and Exchange Act

¹⁶ Article 4 (1), Article 4 (1)(2)(a) Article 4(1)(5) of the Financial Instruments and Exchange Act

reorganization, relocation or dispatch, or disadvantageous change of collective agreement or rules of employment. To be specific, the dismissal for the purpose of reorganization shall generally fall under abuse of rights unless it satisfies the following 4 requirements: (1) necessity of personnel reduction (2) necessity in choosing the dismissal for the purpose of reorganization as the personnel reduction measures (3) reasonability for targeting such employees to be dismissed (4) reasonability of the procedures. In the case where relocation and dispatch are provided for by the rules of employment of a company, an employer is entitled to give such orders, provided that unless such orders shall be given under necessity of work and taking into consideration disadvantages or demerits an employee may have in terms of work and living, it shall fall under abuse of rights. Unless otherwise unreasonability is found, the disadvantageous changes made to the working conditions by a collective agreement shall be generally affirmed due to its negotiable nature between an employee and an employer. The disadvantageous changes in the rules of employment shall not be binding in general, provided that if changes are made for the purpose of unifying the working conditions into one and are found reasonable, it shall be binding also upon dissenting employees.

2. Share Acquisition

(1) Outline

In the Companies Act of Japan, if shareholders acquire majority of the votes, they may pass a resolution of election and dismissal of a director. Further, if they acquire two thirds (2/3) of the votes, they may, in general, decide almost all matters with regard to a company.

(2) Restraints under the Companies Act

(A) Transfer Approval of Shares with Restriction on Transfer

Transfer of shares shall be in effect through both party's manifestation of intention as a fundamental rule, provided that in the case where articles of incorporation of a Subject Company provides for requirement of a company's approval on share transfer ("Non-Public Company"), not only the execution of agreements with shareholders is required, but also the approval by the Subject Company. An Approving body of such

approval shall be the board of directors for a Company with Board of Directors and the shareholders meeting for any other companies.

(B) Share Certificates and Shareholders Registry

Share certificates are not issued as a fundamental rule in the Companies Act. Transfer of shares in the case of a Company Not Issuing Share Certificate shall be in effect through both party's manifestation of intention. The statement and record in a shareholders registry shall be the perfection of transfer of shares against the said company and any other third parties.

On the other hand, in transferring shares in the case of a Company Issuing Shares Certificate, delivery of share certificates is required in addition to both parties' manifestation of intention.

(3) Restraints under Financial Instruments and Exchange Act

In the case where a Subject Company is a Non-Public Company, shares of the Subject Company may be acquired only by execution of a share transfer agreement with a shareholder (negotiated transaction) since Non-Public Companies are all unlisted companies.

In the case where a Subject Company is not a Non-Public Company ("Public Company"), shares may be acquired by (1) making purchase of shares inside of markets and/or (2) Off-Market Trading. The making of purchase of shares inside of markets comprises of On-Floor Trading and Off-Floor Trading. The Off-Market Trading means to purchase shares of a company off-market and is divided into a Negotiated Transaction and Tender Offer (Article 27 (2)(6) of the Financial Instruments and Exchange Act). The applicable scope of Tender Offer is provided by law (Article 27 (2)(1) of the Financial Instruments and Exchange Act). Because the provisions cover all cases of acquisition of the number of shares that is enough to control the Subject Company, M&A effected by Share Acquisition where the Subject Company is the Public Company is by Tender Offer in most cases.

(A) Tender Offer and Its Restraints

(a) Definition and Applicable Cases

Tender Offer shall mean a law of soliciting offer for purchase or

sales of shares from many and unspecified persons through public notice, and making purchase of shares outside of the markets¹⁷.

(b) Outline of Procedure and Restraints of Tender Offer

A Tender Offeror shall appoint a Tender Offer Agent, publicly notify the commencement of Tender Offer and commence the Tender Offer. The Tender Offeror shall, on the day when the public notice for commencing the Tender Offer is made, submit to the prime minister a Tender Offer Notification and send the copy thereof to the Subject Company and the stock exchange where the Subject Company is listed. Shareholders may apply for the Tender Offer from the commencement date thereof, and the Tender Offeror shall deliver to such applied shareholders Tender Offer Statements.

The Subject Company shall submit to the prime minister a Subject

¹⁷ The applicable case is where a Subject Company is required to submit an Annual Securities Report of the share (Article 27 (2)(1) of the Financial Instruments and Exchange Act) and where the pertinent Share Acquisition applies to any of the following (Article 27 (2)(1)(1) through (6) of the Financial Instruments and Exchange Act):

- (1): the holding rate of the share certificates exceeds 5% after making the purchase of share 'outside' of the markets;
- (2): making purchase of share 'outside' of the markets and the holding rate of the share certificates thereafter is over one third (1/3);
- (3): purchase and sales of the shares in the markets other than by means of auction where the holding rate is over 1/3 after the purchase;
- (4): in the case where share acquisition of over ten (10) % is conducted within three (3) months and over five (5) % of it is acquired not by means of Tender Offer, and outstanding shares of the Subject Company exceeds one third (1/3) if acquiring the rest;
- (5): during the period of Tender Offer made by other person with regard to the shares of the Subject Company, a shareholder with the holding rate of already over one third (1/3) conducts purchase of shares that exceed five (5) %;
- (6): other purchase of share specified by a Cabinet Order as being equivalent to purchase of share listed in any of the preceding items.

Company's Statement. In the case of a friendly bid or offer, the Subject Company's Statement with approval is generally submitted on the commencement date thereof. On the other hand, in the case of a hostile tender offer, questions/inquiries to the Tender Offeror and requests for extension of period for purchase may be given in the Subject Company's Statement. When the Subject Company enters the inquiries/questions, the Tender Offeror shall submit an Answer to the prime minister.

Acceptance of the shareholders' applications shall end at the same time the tender offer period terminates. The Tender Offeror shall publicly notify or announce the result of the Tender Offer on the following day of such termination date, and submit to the prime minister a Tender Offer Report. The Tender Offeror shall send notification of the purchase to the applied shareholders without delay and submit to the prime minister a Report of Possession of Large Volume within five (5) business days. Thereafter, payment is made, and receipt and delivery of shares are conducted.

(B) Report of Possession of Large Volume

Regardless of the ways of Share Acquisition, when the Subject Company is a Public Company and an acquirer ("Acquiring Company") shall hold shares that exceed five (5) % of the outstanding shares of a Subject Company, submission within five (5) business days of a Report of Possession of Large Volume stating the number of shares held, holding ratio, purpose of holding, status of the acquisition and disposition during the latest sixty (60) days, and details of acquired funds is required. If the number of shares held becomes less than half during the sixty (60) days and the holding rate decreases by more than five (5) %, it is required to submit a Report of Change stating that the large volume is being transferred in a short time. The report shall include a party to which the shares are transferred and the consideration thereof.

If there was an increase or a decrease in the holding rate by over one (1) % or changes were made in such reports thereafter, submission of a Report of Change is again required.

(4) Restraints under the Anti-Monopoly Law

No Acquiring Company shall acquire or hold shares of a Subject Company where the effect of such acquisition or holding of shares may be substantially to restrain competition in any particular field of trade, or shall acquire or hold shares of other companies through unfair trade practices.

In order to ensure/maintain this substantially, prior notification to the Fair Trade Commission is required in certain cases¹⁸. A company which had given a prior notification may not acquire shares until thirty (30) days of the waiting period has elapsed from the date of the acceptance of such notice. The Fair Trade Commission shall, from its judgment that the Share Acquisition is not approved, render a cease and desist order.

(5) Restraints under Labor Law

There is no restraint against the Share Acquisition under Labor Law. There is no personal responsibility against employees of major shareholders either.

3. Assignment of Business

(1) Outline

Assignment of Business shall mean a law which a stock company assigns its business, in whole or in part, to others as a transaction. Assignment of Business is not satisfied only by simply receiving aggregation of business properties or rights and obligations, or by simply utilizing the properties to which a company succeeded and run the same kind of business, but by succeeding to the know-how of an assignor company's manufacturing and selling.

Assignment of Business is specific succession and thus, as a fundamental rule, it is necessary to obtain separate approvals from the other contracted party of its position and obligation under individual agreements which constitute the business. Further, succession to the transfer of rights which requires perfection may not be asserted against

¹⁸ Article 10 (2) of the Anti-Monopoly Law, Article 16 of the Order for Enforcement of the Anti-Monopoly Law, Article 2, Article 2-2, Article 2-3, Article 2-5, Article 2-7 of the Ordinance for Enforcement of the Anti-Monopoly Law

third parties unless perfection is fulfilled.

(2) Restraints under the Companies Act

(A) Procedure for Approval

(a) Assignor Company

An assignor company which intends to assign its business shall obtain the approval for a contract relating to such law by the special resolution of the shareholders meeting no later than the day immediately preceding the effective day of the Assignment of Business; provided that if the assignment applies to either a Simple Assignment of Business (book value of the assets subject to be assigned does not exceed one fifth (1/5) of the net assets of an assignor company) or a Summary Assignment of Business (an assignee company of the assignment holds more than ninety (90) % of the voting rights of a Subject Company that assigns the business), the approval of the shareholders meeting is not required.

(b) Assignee Company

As a general rule, a resolution by a shareholders meeting is not required for an assignee company, provided that if receipt of the business applies to post-incorporation (execution of an agreement to acquire assets of such company that existed prior to such incorporation at consideration above certain rate against net assets, at any time within two (2) years after the incorporation, for the purpose of continuous use thereof for its business), a special resolution by the shareholders meeting is required. This is because there is a possibility that a company may circumvent restrictions against Contribution with Property by law.

When receiving the business of an assignor company in whole by Assignment of Business, because its position is similar to the one with a Surviving Company of a Merger, approval by a special resolution of a shareholders meeting is required; provided that even if the receipt is in whole, approval of a shareholders meeting is not required if it applies to the case where the sum of the book value of consideration of the assignment does not exceed one fifth (1/5) of an assignor company's net assets, or where an assignor company holds more than

ninety (90) % of the voting rights of an assignee company.

(B) Procedure for Protection of Shareholders

Dissenting shareholders may demand for share purchase. Requirements and effects of the exercise of rights are almost the same as in the case of the Merger and Consolidation.

(C) Procedure for Protection of Creditors

Procedure for protection of creditors is not provided for in particular under the Companies Act. If creditors do not wish to effect succession, they may simply not agree to transfer of obligations and/or positions of contracted parties.

(3) Restraints under the Anti-Monopoly Law

As in the Merger and Consolidation, no Company shall effect Assignment of Business where the effect of such law may be substantially to restrain competition in any particular field of trade, or through unfair trade practices.

As in the Merger and Consolidation, it is required to notify the Fair Trade Commission in advance when the total amount of the Domestic Sales is above certain amount.

(4) Restraints under Financial Instruments and Exchange Act

A listed company entered into a contract of Assignment of Business may be requested to submit a Securities Registration Statement stating the pertinent contract as the important contract in the management, or an Extraordinary Report¹⁹.

(5) Restraints under Labor Law

Since, in the first place, succession to the position under individual agreements requires consent of employees, the contracted parties to such agreements, the employees may have a choice. Therefore, procedure for protection of employees is not provided for in particular under the Labor

¹⁹ Article 24, Article 24-5 (4) of the Financial Instruments and Exchange Act, Article 15 of the Order for Disclosure of Corporate Affairs and Other Related Matters

Law. If the employees reject to consent, they may be dismissed for the purpose of reorganization or transferred or dispatched, provided that in such a case, this issue shall be treated as the dismissal for the purpose of reorganization or transfer or dispatch mentioned in the foregoing.

4. Company Split

(1) Meaning and Type

Company Split shall mean any company split whereby a succeeding company or a new company incorporated after the Company Split (“Succeeding Company” and “New Company(s)” respectively) succeeds to any rights and obligations, in whole or in part, in connection with the business of a Stock Company(s) or a Limited Liability Company(s). As a Company Split is general succession, it is not required to obtain separate approvals from the other contracted party for transferring its position and obligation under individual agreements which constitute the business.

Succession to which portions of the rights and obligation of the business is decided in accordance with a Split Agreement in the case of the Absorption-type Company Split and with a Split Plan in the case of the Incorporation-type Company Split. The Absorption-type Company Split shall mean that another existing company (“Succeeding Company”) succeeds to any rights and obligations of the specific business of a company (“Splitting Company”), whereas the Incorporation-type Company Split shall mean that a new company to be incorporated under the procedure (“New Company”) succeeds to such rights and obligations.

In the case of the Absorption-type Company Split, where the Succeeding Company delivers its parent company’s shares to the Splitting Company in accordance with a Split Agreement is the “Triangular Split” which corresponds to the Triangular Merger in the Merger.

In the Incorporation-type Company Split, there is also a “Joint Incorporation-type Company Split” where two or more companies become the Splitting Companies and jointly incorporate one new company (Joint Venture Company, etc.).

(2) Restraints under the Companies Act

(A) Procedure for Approval

In the case of the Absorption-type Company Split, a Split Agreement is executed between the Companies, and in the case of the Incorporation-type Company Split, a Splitting Company independently prepares a Split Plan (Article 803 (1)(2) of the Companies Act), both of which require approval of a special resolution by a shareholders meeting. The procedure for approval may be simplified by using the system of a “Simple Company Split” and a “Summary Company Split” if applicable requirements are met²⁰.

The Simple Company Split System may be used by a Splitting Company when the sum of the book value of the assets that the Succeeding Company succeeds to does not exceed one fifth (1/5) of the Splitting Company’s net assets²¹. The above system may be used by a Succeeding Company when (1) the amount obtained by multiplying the number of shares of the Succeeding Company to be delivered when the Company Split is effective, by the amount of net assets per share and (2) the sum of the book value of the Succeeding Company’s bonds and other assets to be delivered when the Company Split is effective do not exceed one fifth (1/5) of the amount of the Succeeding Company’s net assets²². Either Company may effect a Company Split without the procedure for approval if it uses the Simple Company Split System.

The Summary Company Split may be used by a Controlled Company of the Absorption-type Company Split when a Special Controlling Company holds ninety (90) % or more of the voting rights of all the shareholders of the other Company (Controlled Company). It does not require procedure for approval²³.

(B) Procedure for Protection of Creditors

²⁰ Article 783 (1), Article 784 (1) and (3), Article 795 (1), Article 796 (1) and (3) of the Companies Act

²¹ Article 784 (3), Article 805 of the Companies Act, Article 187, Article 207 of the Ordinance for Enforcement of the Companies Act

²² Article 796 (3) of the Companies Act, Article 196 of the Ordinance for Enforcement of the Companies Act

²³ Article 784 of the Companies Act

Certain creditors²⁴ may state their objections to a Company Split.

If there are creditors who may state objections, each Company shall give public notice and notices (separately to each known creditor) of the matters provided by law in the manner prescribed thereby²⁵. In the case where creditors do not raise any objections within the period prescribed by law, such creditors shall be deemed to have approved the Company Split, provided, however, that in the case where creditors raise objections within the pertinent period, the Company shall make payment or provide reasonable security to such creditors, or entrust equivalent property to a trust company for the purpose of having such creditors receive the payment²⁶.

(C) Procedure for Protection of Shareholders

Dissenting shareholders of each Company may demand for share purchase²⁷.

In the event that a Splitting Company takes the procedure of a Simple Company Split, its shareholders may not demand for share purchase. This is because as in the Assignment of Business, damages incur on the shareholders by a Simple Company Split is fairly small. On the

²⁴ (i) the creditors of a Splitting Company who will be unable to request the Splitting Company after the Company Split to perform the obligations (Article 879 (1)(2), Article 810 (1)(2) of the Companies Act).

(ii) the creditors of a Splitting Company in the case of distribution of shares, etc., the consideration of the Company Split, by the Splitting Company, to shareholders (Article 789 (1)(2), Article 810 (1)(2) of the Companies Act in parenthesis).

(iii) creditors of a Succeeding Company (Article 799 (1)(2) of the Companies Act).

²⁵ Article 789 (2) and (3), Article 799 (2) and (3), Article 810 (2) and (3) of the Companies Act, Article 188, Article 199, Article 208 of the Ordinance for Enforcement of the Companies Act

²⁶ Article 789 (4) and (5), Article 799 (4) and (5), Article 810 (4) and (5) of the Companies Act

²⁷ Article 785, Article 786, Article 797, Article 798, Article 806, Article 807 of the Companies Act

contrary, when a Succeeding Company effects a Simple Company Split, the dissenting shareholders may demand for share purchase.

In the case of a Summary Company Split, as in the Summary Merger, the shareholders of a Controlled Company may demand that the Controlled Company refrain from effecting the pertinent Company Split in the following cases: (1) where the pertinent Summary Company Split violates the applicable laws and regulations or articles of incorporation; or (2) where the terms on the amount to be delivered to a Splitting Company provided for in an Absorption-type Company Split Agreement are grossly improper in light of the financial status of the Company and where the shareholders of the Controlled Company are likely to suffer disadvantage.

(D) Actions Seeking Invalidation of Company Split

As in the Merger and Consolidation, in the event where there are errors in the procedure of a Company Split, invalidation of the Company Split may be asserted within six (6) months from the day on which the Company Split becomes effective.

Persons who may file such actions shall be shareholders, directors, auditors, executive officers, liquidators or trustees in bankruptcy of each Company, and creditors who did not give approval to the Company Split, on the effective day of the Company Split.

(3) Restraints under the Anti-Monopoly Law

(A) Restraints on Joint Incorporation-type Company Split

The Joint Incorporation-type Company Split which may be substantially to restrain competition in a particular field of trade, or to employ unfair trade practices in the course of a Company Split shall be prohibited. Further, as in the Merger and Consolidation, it is required to notify the Fair Trade Commission when the total amount of the Domestic Sales is above certain amount.

(B) Restraints on Absorption-type Company Split

There is no prohibited Company Split in terms of category; provided that a Splitting Company shall notify the Fair Trade Commission in

advance where succession to the business is in whole²⁸.

(4) Restraints under the Financial Instruments and Exchange Act

As in the Merger and Consolidation, submission of a Securities Registration Statement or Extraordinary Report may be required²⁹.

(5) Restraints under Labor Law

(A) Prior Consultation

A Succeeding Company or a New Company may succeed to employment agreements without consent of individual employees in accordance with the provisions set forth in a Split Agreement or a Split Plan; provided that a Splitting Company shall be obliged to give prior notice to specified employees as provided later on³⁰. The Splitting Company shall consult with such employees prior to giving the notice³¹, provided that it shall not bear an obligation to reach an agreement with the employees in the said Prior Consultation.

(B) Prior Notice to Employees

The Splitting Company shall, two (2) weeks prior to the shareholders meeting in which the Split Agreement and the Split Plan are to be approved, give a written notice of matters provided by law to certain identified employees³² who are employed by the Splitting Company³³:

²⁸ Article 15 (2)(3) of the Anti-Monopoly Law, Article 19 of the Order for Enforcement of the Anti-Monopoly Law

²⁹ Article 2-2, Article 4 (1)(2), Article 24-5 (4) of the Financial Instruments and Exchange Act, Article 19 (2)(7), Article 19 (2)(15) of the Order for Disclosure of Corporate Affairs and Other Related Matters

³⁰ Article 2 (1) of the Law concerning succession to an employment agreement in connection with the Company Split

³¹ "Prior Consultation." Article 5 of the Supplementary Provisions on the Act Revising a Portion of the Commercial Code, Etc. of 2000

³² (i) a person who chiefly engages in the business to which the Succeeding Company or the New Company succeeds ("Employees Chiefly Engaged in Succession." Article 2 of the Act on the Succession to Labor Contracts upon Company Split);

(ii) a person other than the Employees Chiefly Engaged in Succession and whose succession to the labor agreement to the Succeeding Company or the

(C) Right of Objection by Employees³⁴

In the case that the Split Agreements or the Split Plans provide for a Succeeding Company's or a New Company's succession to employment agreements on the Employees Chiefly Engaged in Succession, such succession is effected without the consent of the employees. If there is no such provision in the Split Agreements or the Split Plans, the Employees Chiefly Engaged in Succession may, within the period provided by the law, state an objection to the Splitting Company in writing. The succession to the employment agreements subject to the objection to the Succeeding Company or the New Company becomes effective at the time of the Company Split.

The Employees Designated to Succession may, within the applicable period, state objections to the Splitting Company in writing. The Surviving Company or the New Company shall not succeed to such employment agreements.

5. Share Exchange and Share Transfer

Share Exchange and Share Transfer are conducted for the purpose of making a Subject Company a wholly owned subsidiary company. These are effective systems in M&A as these may eliminate minor shareholders completely from a Subject Company. However, as it is explained below, occasions where these systems may be used are limited due to the reason that they require approvals by the special resolution of a shareholders meeting.

(1) Share Exchange

In Share Exchange, all shares of shareholders of a Subject Company are

New Company is designated in the Split Agreement or the Split Plan
("Employees Designated to Succession")

³³ Article 1, Article 2 (1) of the Act on the Succession to Labor Contracts upon Company Split

³⁴ Article 4, Article 5 of the Act on the Succession to Labor Contracts upon Company Split

transferred to a company that will become a parent company, and shares or monies, etc. of the parent company will be delivered to such shareholders in accordance with a Share Exchange Agreement executed between the Companies³⁵.

Each Company shall obtain approval for the Share Exchange Agreement by the special resolution of a shareholders meeting. Thus, Share Exchange is used by a parent company, for instance, which already holds by Tender Offer a certain amount of shares that is enough to control voting rights, to eliminate minor shareholders from a subsidiary company, the Subject Company, and make it a wholly owned subsidiary company.

It is understood that there is never Share Exchange where a Foreign Company becomes a wholly owning parent company. However, by a Foreign Company establishing its subsidiary company in Japan and then having such subsidiary company hold the pertinent Foreign Company's shares, and effecting Share Exchange where such subsidiary company is made a wholly owning parent company and the Subject Company is made a wholly owned subsidiary company, it may have the same effect as if the Foreign Company and the Subject company effected Share Exchange.

(2) Share Transfer

In Share Transfer, the number of shares shareholders of an existing stock company (a company that becomes a wholly owned subsidiary company. It may be more than one.) hold is transferred to another stock company to be incorporated during a procedure (a company that becomes a wholly owning parent company) in accordance with a Share Transfer Plan, and by this means, the shareholders of a company that becomes a wholly owned subsidiary company become the shareholders of a company that becomes a wholly owning parent company³⁶.

A company which intends to become a wholly owned subsidiary company shall obtain approval for a Share Transfer Plan by the special resolution of a shareholders meeting. In the case of a friendly takeover, by a wholly owning parent company after Share Transfer transferring all shares of the wholly owned subsidiary company to an acquirer, it may have the same

³⁵ Article 767 and onwards of the Companies Act

³⁶ Article 772 and onwards of the Companies Act

effect as if the acquirer and the Subject Company effected Share Exchange.

6. Public Notice of Business Office, Registration, Financial Statements in Japan

Lastly, necessity of public notice regarding establishment of a business office of a Foreign Company, its registration and a Financial Statement will be discussed in brief.

A Foreign Company is not required to establish a business office in Japan even when it wishes to carry out transactions in Japan, provided that it shall specify its representatives in Japan and register the Foreign Company. If no business office is established in Japan, the location(s) of the domicile(s) of its representative(s) in Japan shall be deemed to be the location of the business offices or the branch offices.

The registered Foreign Company (limited to one for which the same kind of Company or the most similar Company in Japan is a stock company) shall, pursuant to the provisions of the applicable Ordinance of the Ministry of Justice³⁷, give public notice in Japan of what is equivalent to a balance sheet or post it on the website, without delay after the conclusion of the same kind of procedure as the approval of the Financial Statement by the shareholders meeting or a procedure similar thereto³⁸; provided that the Foreign Company obligated to submit an Annual Securities Report under the Financial Instruments and Exchange Act shall not be required such public notice.

³⁷ Article 214 of the Ordinance for Enforcement of the Companies Act

³⁸ Article 819 (3), Article 933 (2)(4) of the Companies Act, Article 215, Article 220 (1)(6) of the Ordinance for Enforcement of the Companies Act