IN-DEPTH

Mergers & Acquisitions Litigation

JAPAN

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In-Depth: Mergers & Acquisitions Litigation (formerly The Mergers & Acquisitions Litigation Review) offers a high-level overview and analysis of the main litigation issues and trends surrounding M&A activity in key jurisdictions worldwide. It examines the most common types of disputes and claims that may be pursued, while also highlighting the procedural and substantive law affecting the legal merits of such claims.

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Japan

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Summary

INTRODUCTION
YEAR IN REVIEW
LEGAL AND REGULATORY BACKGROUND
SHAREHOLDER CLAIMS
COUNTERPARTY CLAIMS
CROSS-BORDER ISSUES
OUTLOOK AND CONCLUSIONS
ENDNOTES

Introduction

Merger and acquisition-related litigation in Japan has been increasing since around the enactment of the Companies Act in 2005. Most notable is the significant increase in appraisal proceedings in connection with public M&A transactions. In appraisal proceedings, minority shareholders petition a court to determine the fair price of their shares. The Supreme Court of Japan has rendered a number of decisions clarifying the rules and principles regarding appraisal rights. Given the availability of appraisal rights in various types of M&A transactions, post-closing damages claims against individual directors are not prevalent in Japan. Although not common in the public M&A context, pre-closing claims for injunctive relief are also possible, especially in connection with hostile takeovers and transactions involving material procedural issues such as self-dealing in conflicted transactions.

Litigation involving private M&A transactions is also increasing in Japan. Disputes often arise in connection with claims for post-closing indemnification for breaches of representations and warranties. As the use of earn-out provisions appears to be gradually expanding even in mid-to-large-scale transactions, post-closing litigation may also increase with respect to calculation and other issues relating to earn-outs in Japan.

For private M&A transactions where the target company is a Japanese company, the Tokyo District Court has been the most popular jurisdiction for settling disputes. However, there is a growing trend of parties preferring arbitration as a dispute resolution mechanism, especially for cross-border transactions.

Year in review

In 2023, and thus far in 2024, there have not been many significant developments in the law and practice of M&A litigation in Japan.

Over the past couple of years, there have been several lower court decisions on appraisal claims based on the framework of the *JCOM* decision that have added a little more colour to the factors that constitute a generally accepted fair process.[1] In this regard, the Fair M&A Guidelines published by the Ministry of Economy, Trade and Industry (METI), which will be explained below, have been changing the practice of public M&A transactions, especially in conflicted transactions such as management buyouts and acquisitions of controlled companies by controlling shareholders. As activist investors in Japan are recently showing increasing interest in appraisal rights, the METI guidelines will continue to affect the court's determination once shareholders bring claims in connection with such transactions involving listed subsidiaries.

Another interesting and important development over the past few years has been an increasing number of hostile or unfriendly transactions, including unsolicited tender offers by Japanese companies, which have historically been very cautious about making such offers. This trend has led to new court decisions regarding disputes over takeover defences, and in 2021 and 2022 we saw several cases where the claimant shareholder sought a preliminary injunction to prevent the implementation of the Japanese version

of poison pills.[2] Of these, in a case where the rights plan was deployed by the board of directors without shareholder approval after the takeover battle began, the court enjoined the issuance of stock acquisition rights under the plan. In another case, where the poison pill defence was approved by a majority of minority shareholders (excluding the hostile acquirer, who held approximately 40 per cent of the voting rights) at the shareholders' meeting, the court upheld the use of the defensive measure. Further discussion is needed on the implications of these recent court decisions, but they will have some impact on the law and practice of takeover defence in Japan. In this context, the METI published on 31 August 2023 the first revision in nearly two decades to the guidelines for hostile takeovers. The 2023 METI guidelines address corporate takeovers with a focus on best practices for responding to not only hostile takeovers but also unsolicited or competing offers.

Also in connection with the increase of unsolicited offers, Japan has recently seen a pre-closing injunction case where a competing offeror filed a petition for a temporary restraining order to enjoin the target company from conducting a merger with another company.[3] Although the main issue in the court was over alleged irregularities with the target company's vote counting process at the shareholders' meeting that approved the merger, the dispute was essentially a fight over the control of the target company. As Japan has continued to see unsolicited, competing offers in late 2023 and early 2024, we may see another pre-closing litigation in the context of public M&A in the near future. In such court proceedings, the newly published 2023 METI guidelines would have a certain impact on the court decisions.

Legal and regulatory background

In Japan, the Companies Act provides the fundamental statutory framework for M&A transactions and litigations. In conjunction with the Civil Code, the Companies Act also forms the legal basis for transaction agreements involving Japanese corporations. Although the Companies Act provides mandatory rules to be followed by parties in most types of M&A transactions, there is no specific governmental or regulatory agency that enforces those rules and regulates M&A activities under the Companies Act. In practice, those rules are ultimately enforced by courts through shareholder actions and lawsuits.

For public M&A transactions, the Financial Instruments and Exchange Act (FIEA) is an important part of the regulatory framework. The FIEA makes provision for, among other things, tender offers, public offerings, insider trading and the filing of large-scale shareholding reports. The Financial Services Agency of Japan or its regional bureau reviews and comments on documents filed under the FIEA, such as tender offer registration statements. Alleged violations of securities laws and regulations under the FIEA are subject to investigation by the Securities and Exchange Surveillance Commission of Japan. On 15 May 2024, the Japanese Diet enacted a bill to amend the FIEA, which includes an amendment to the rules concerning mandatory tender offers. The amendment will be effective not later than two years after the date of enactment.

In addition, the listing rules of stock exchanges further reinforce the regulatory framework for M&A transactions involving listed corporations. Those listing rules include a code of conduct for transactions between a listed corporation and its controlling shareholder, as well as timely disclosure obligations, corporate governance guidelines and delisting

requirements. The Tokyo Stock Exchange and other exchanges regulate M&A activities of listed corporations through review of relevant timely disclosure documents.

Further, guidelines published by the METI have had an impact on M&A practice in Japan. Most recently, the METI formulated the Fair M&A Guidelines in 2019, which propose best practices to address conflicts of interest with a focus on management buyouts and acquisitions of controlled companies by controlling shareholders. While these METI guidelines do not have any statutory effect, they have been, and are expected to be, considered by Japanese courts in rendering decisions on the fairness or reasonableness of transactions at issue.

The Antimonopoly Act, which provides merger control rules, also constitutes an important source for the regulatory framework governing M&A. The Japan Fair Trade Commission regulates transactions that may substantially restrain competition in violation of the Antimonopoly Act. In the context of cross-border transactions, the Ministry of Finance, METI and other relevant ministries regulate investment by foreign investors into Japanese corporations under the Foreign Exchange and Foreign Trade Act (FEFTA).

Shareholder claims

Shareholder claims: common claims and procedures

Appraisal actions are frequently brought by shareholders following the announcement of Japanese M&A transactions. Appraisal rights provide a statutory remedy for shareholders who are not satisfied with the terms on which they will lose their shares as a result of an M&A transaction. In an appraisal proceeding, shareholders often claim that the consideration for the transaction was inadequate due to a flawed process or conflict of interest. However, given recent developments in appraisal case law (explained below), courts usually first focus on the M&A transaction process at issue rather than the substantive valuation.

To bring an appraisal action, a shareholder must follow a process provided in the Companies Act, which includes:

1. voting against the transaction at the shareholders' meeting (if shareholder approval is required);
2. delivering an appraisal demand notice; and
3. filing a petition for appraisal within a statutorily specified time period.

Shareholders may also assert that a target company's directors breached their fiduciary duties[4] in connection with an unfair price or flawed process, including a material misstatement or omission in relevant disclosure documents. With respect to management buyouts, Japanese courts have held that directors of a Japanese corporation have duties to:

1. ensure the fairness of the M&A process;

2. make best efforts to ensure that fair value is received by the shareholders; and
3. disclose all material information within the board's control in seeking shareholder approval of the transaction (including a tender of shares).[5]

Although the scope of these decisions is still being tested, shareholders usually assert a breach of these duties in litigation involving any type of public M&A transaction, whether or not a management buyout. The 2023 METI guidelines state, in more general terms, that when the board of directors decides on a direction toward reaching agreement of an acquisition, the board of directors should negotiate diligently with the acquiring party with the aim of improving the transaction terms so that the acquisition is conducted on the best available transaction terms for the shareholders.

Claims premised on a breach of fiduciary duties may be brought as either a direct or a derivative action. In a direct action, a shareholder files a lawsuit directly against the company or the directors for compensation of the shareholder's own personal damage. The action proceeds like a typical civil suit. On the other hand, a derivative action involves shareholders suing on behalf of the corporation for damage suffered by the corporation. In bringing a derivative action, shareholders must comply with the pre-suit demand requirement under the Companies Act.[6] For claims based on breach of fiduciary duties, shareholders must, without a comprehensive discovery system, plead and prove specific facts that demonstrate each defendant director's negligence or gross negligence depending on the nature of the claim. As such, it is generally easier for shareholders to bring appraisal actions rather than claims for breach of fiduciary duty, and thus appraisal claims are the most commonly asserted type of claim in public M&A transactions in Japan.

Shareholder claims: remedies

The remedies available in M&A litigation against a target company or its directors generally include pre-closing injunctive relief, post-closing monetary damages and appraisal of the fair value of shares.

Shareholders may also bring claims seeking a declaration of the invalidity of the subject transaction, such as a merger.[7] However, the bar for such a declaratory judgment is very high in Japan, and shareholders generally do not pursue this remedy, at least rarely in public M&A transactions.

Pre-closing injunctive relief

Shareholders may seek pre-closing injunctive relief against a company if certain conditions prescribed in the Companies Act are met. However, pre-closing injunctions are generally an extraordinary remedy and difficult for shareholders to obtain in connection with M&A transactions. To obtain such a statutory injunction against a company to prevent it from conducting a corporate reorganisation such as a merger or certain types of cash-out transactions, the plaintiff shareholders, in principle, must show a violation of law or the articles of incorporation, and a reasonable likelihood of damage to the shareholders.[8] A breach of fiduciary duty by directors is not generally considered a violation of law here and cannot constitute grounds for this type of injunctive relief. However, in cases where a breach of duty of disclosure is at issue, it could also be a violation of law if

it constitutes a violation of mandatory disclosure rules under the Companies Act or the Financial Instruments and Exchange Act (FIEA).

Shareholders may also bring claims for a statutory injunction against individual directors based on breach of fiduciary duties or violation of law or the articles of incorporation or a likelihood of such breach or violation.[9] To obtain this type of injunction, however, the shareholders are, in principle, required to demonstrate a high probability of irreparable harm to the company, not to the shareholders, caused by such breach or violation. In practice, this requirement of irreparable harm to the company raises the bar for shareholders to succeed in obtaining this type of pre-closing injunctive relief based on an alleged breach of fiduciary duties.[10]

Post-closing damages

Shareholders may pursue post-closing damages in the M&A context. As mentioned above, shareholders may bring a damages claim as either a derivative or a direct action. In practice, a derivative suit is usually not a favoured form of action in the M&A context.[11] More often we see shareholders bringing direct claims for damages against a corporation or its directors. In Japan, shareholders may bring statutory direct claims against individual directors if the shareholders sustain damage arising out of breach of fiduciary duties.[12] To bring statutory direct claims, shareholders must show wilful misconduct or gross negligence of the defendant individuals in their breach of duties. Shareholders may also bring direct claims against the corporation and its directors and officers based on tortious misconduct.[13]

In Japan, courts are not permitted to award punitive damages but have considerable discretion in calculating the amount of damages that plaintiff shareholders sustained. Courts may award quasi-appraisal damages to shareholders, calculating the amount awarded based on an assessment of the fair value of the shares, as would be the case in an appraisal action. In Japan, however, shareholders do not often pursue such quasi-appraisal damages post-closing, as actual appraisal claims are widely available in various types of M&A transactions.

Appraisal proceedings

Under the Companies Act, shareholders who are not satisfied with the terms on which they lose their shares in a target company as a result of an M&A transaction generally have the right to demand that their shares be purchased by the company (or in certain cases the buyer) at a judicially appraised fair value. Such appraisal rights are available in stock-for-stock deals as well. Even the shareholders of an acquiring corporation may have appraisal rights in transactions involving certain types of corporate reorganisations, such as mergers, company splits, business transfers and stock-for-stock exchanges, as long as the materiality threshold provided in the Companies Act is satisfied.

Under Japanese law, courts have reasonable discretion to determine the fair value of the shares in appraisal actions.[14] When Japanese courts rely on a valuation methodology based on financial analysis to determine fair value, discounted cash flow is usually relied on more than other methodologies. However, courts often attempt to weigh several approaches and may ultimately set a value that does not match any of the petitioners'

suggestions. More importantly, it is generally considered that the fair value should reflect a fair distribution of the synergies (if any) from the transaction, which is contrary to some other jurisdictions.

Recently, a series of decisions of the Supreme Court of Japan have clarified that, as evidence of fair value in arm's-length transactions, courts may rely on the negotiated transaction price for cash-out deals[15] and the market price on delivery of appraisal demand for stock-for-stock deals.[16]

In *In re Appraisal of Jupiter Telecommunications Co, Ltd (JCOM)*, the Supreme Court stressed that the court should first review the procedural aspects of the transaction and, if the transaction is determined to have been conducted in a generally accepted fair process, the court does not need to look into the substance of the valuation and may rely on the transaction price or market price depending on the structure of the transaction.-[17] The Supreme Court suggested that factors determinative of a generally accepted fair process include measures to mitigate conflicts of interest, such as the use of an independent special committee and professional or expert advice and measures to provide shareholders with a fair opportunity to make a decision on the transaction, such as fair disclosure and elimination of coercion. Under this framework, a court will still strictly review the substantive valuation where there was a flawed sales process that impaired arm's-length negotiations or where there is evidence of market manipulation or unfair disclosure.

Shareholder claims: defences

Directors of Japanese corporations may be able to assert a variety of defences to claims brought against them for a breach of duty in connection with an M&A transaction. Depending on the claims being brought, these defences may include the business judgement rule, reliance and, possibly, fully informed and uncoerced approval of shareholders.

The Japanese version of the business judgement rule applies where the directors have:

1. made a business judgement (i.e., a decision to take or not take action in respect of a matter relevant to the business operations of a corporation, including an M&A transaction);
2. not violated any applicable law; and
3. not had a material interest in the subject matter of the judgement.

In these circumstances, the court will defer to the business judgement made by the directors and will review only whether the directors informed themselves about the subject matter of the business judgement to a reasonable extent and whether the judgement is grossly irrational.[18]

The reliance defence is also generally available where a defendant director has relied on information or professional or expert advice given or prepared by a fellow director of the corporation, an officer or employee of the corporation, or a professional adviser or expert retained by the corporation. However, the defendant director must have had reasonable grounds to believe the person providing the information or advice to be reliable

and competent in relation to the matters concerned and then relied thereon in good faith.-[19] The case law of the reliance defence is still under development in Japan, especially with respect to reliance on advice from outside professionals or experts such as legal and financial advisers.

Another possible defence is approval by a fully informed and uncoerced majority of the disinterested shareholders through a vote in favour of the transaction or a tender of shares. Under Japanese law, shareholder approval is not really a defence but may practically function as a defence because it is one of the most important factors considered by courts in determining the fairness of the transaction at issue.[20] In this regard, the Fair M&A Guidelines recognise the effectiveness of, but do not require, a majority-of-minority condition[21] while emphasising the importance of measures to secure arm's-length negotiations, such as a well-functioning special committee of independent directors in conflicted transactions. Given these guidelines, courts will now generally defer to the terms and conditions negotiated between the parties and the decisions taken by the target company's board (even in conflicted transactions), as long as there was a properly functioning special committee consisting of independent directors and approval by a fully informed and uncoerced majority of the disinterested shareholders.[22]

Shareholder claims: advisers and third parties

It is rarely seen, but it is theoretically possible under Japanese law for shareholders to bring claims against advisers and other third parties in the M&A context. The law and practice in this area are still developing in Japan.

Shareholder claims: class and collective actions

Japanese law does not provide for class or collective action proceedings in connection with M&A transactions. Although not usually relevant in the M&A context, Japanese law does permit collective civil actions by certified consumer protection organisations for the purposes of consumer protection. However, it is possible for plaintiff shareholders or their attorneys to solicit other shareholders to jointly seek appraisal or bring lawsuits and then ask the court to consolidate the proceedings of such actions.

Shareholder claims: insurance and indemnification

In Japan, unlike Delaware and some other states in the United States, a company cannot include an exculpation clause in its articles of incorporation eliminating the personal liability of directors and officers for monetary damages for certain types of breaches of fiduciary duty (e.g., duty of care). Although Japanese law provides for some limitations on the amount of liability that directors will owe to the corporation, such limitations are not available for directors concurrently serving as officers and do not cover direct claims by shareholders.[23] Prior to a recently published amendment to the Companies Act (explained below), Japanese law has been unclear on the requirements and procedures for a company to indemnify or advance the legal fees of its directors in shareholder litigation. As a result, directors' and officers' (D&O) insurance plays a significant role in shareholder litigation against directors and officers of Japanese corporations.

In Japan, D&O insurance generally covers damages and defence costs payable in relation to claims by shareholders against directors and officers for monetary damages incurred by shareholders. If a director or officer has acted with gross negligence or in bad faith, D&O insurance usually is not available.

In this regard, a recent amendment to the Companies Act came into effect on 1 March 2021. The amendment includes codification and clarification of rules applicable to a company's indemnification of damages and advancement of legal fees and other defence expenses to eligible directors and officers, as well as procedural rules regarding D&O insurance. It remains to be seen whether and how this amendment will change the M&A litigation landscape in Japan.

Shareholder claims: settlement

There are generally no special issues with respect to settling M&A litigation. In a derivative action, however, the company is prohibited in principle from entering into a settlement with plaintiff shareholders without involvement of a court unless the settlement is unanimously approved by all shareholders.[24] If a settlement is made after the filing of a derivative lawsuit and with the involvement of the court, the settlement will be binding on the company and other shareholders as long as the company affirms such settlement upon execution.[25]

Shareholder claims: other issues

Under Japanese law, the court with exclusive jurisdiction to hear shareholder litigation regarding the legality or validity of M&A transactions and breaches of fiduciary duty (except for post-closing direct claims) is the district court with jurisdiction over the headquarters of the company.[26] Forum selection clauses in a company's articles of incorporation or other constitutional documents are not permitted.

Counterparty claims

Counterparty claims: common claims and procedures

In M&A litigation between a seller and a buyer, claims commonly arise out of the terms of the purchase agreement, including claims for breaches of representations and warranties or covenants. These claims are often made pursuant to indemnity provisions in the purchase agreement, the provisions of which increasingly include an exclusive remedy clause. In addition, a buyer may assert claims premised on fraud under tort law, including a claim for fraudulent misrepresentation in the formation of the agreement.

Counterparty claims in the M&A context may be subject to the statute of limitations depending on the nature of claim, but transaction agreements usually also provide contractual limitations and procedures for indemnification claims, which are generally enforceable under Japanese law.

Counterparty claims: remedies

For counterparty claims in the M&A context, indemnification is the most commonly pursued remedy. Other remedies include damages and specific performance or injunction.[27]

Indemnification

In Japan, purchase agreements generally include indemnity provisions, which cover claims and damages arising from a breach of the indemnitor's representations and warranties or covenants set forth in the purchase agreement.

In disputes over breaches of representations and warranties, the calculation of the damage incurred by the plaintiff (usually the buyer) is always an issue. There have been some court decisions that could be interpreted to hold that, depending on the language of the indemnity provision, the amount of damage is equal to the difference between the purchase price and the value of the company as received,[28] while other courts seem to assume that only out-of-pocket expenses are recoverable.[29] The case law in this area is still developing in Japan.

As in other jurisdictions, indemnity provisions in Japan are often specified by the parties to be the exclusive remedy. Although it is uncertain whether Japanese courts will enforce such exclusive remedy provisions in the case of fraud or other types of tortious misconduct,[30] a plaintiff often brings only contractual indemnification claims, as they are usually easier to assert compared with damages claims based on provisions of the Civil Code.

Damages

Subject to any exclusive remedy clauses agreed on between the parties, a party to a contract is generally entitled to seek monetary damages as a remedy for breach of contract under the Civil Code.[31] If a party to an M&A agreement fails to perform its obligations thereunder, the other party may, in principle, seek recovery for the damage arising from such failure to perform. In addition, a party may pursue damages claims under tort law provisions of the Civil Code for any fraudulent misrepresentation made by the other party in connection with the subject M&A transaction.[32] Tort claims under the Civil Code are especially used for fraudulent misrepresentations with respect to issues not otherwise covered by the representations and warranties under the transaction agreements.

Specific performance and injunctions

Japanese courts can order specific performance (mandatory injunctions) as a remedy for breach of contract under the Civil Code.[33] For example, if a party to a sales contract fails to deliver certain unique goods, the other party may seek the enforcement of such delivery. In the M&A context, specific performance could be used to enforce the delivery of shares (or share certificates) in a stock purchase transaction. The party seeking specific performance must demonstrate the satisfaction of conditions precedent provided in the purchase agreement. The parties should be aware that, in practice, obtaining injunctive relief to force a deal to close is not easy and is often time-consuming, even in provisional proceedings.

In Japan, a court may also render a prohibitory injunction as a remedy for breach of contract. In a dispute among the parties to an M&A transaction, a party may bring a claim for a prohibitory injunction in the case of, among other things, a breach of a restrictive covenant in the transaction agreement. The court may impose a civil fine for a violation of an injunctive order. Although we do not often see the parties to mid-to-large-scale transactions seeking injunctive relief pre-closing, there was a high-profile court case in 2004 where the parties sought injunctions against breach of an exclusive negotiation clause in the memorandum of understanding for an M&A transaction.[34]

Counterparty claims: defences

Knowledge of breach of representations and warranties

Where a plaintiff brings an indemnification claim based on a breach of representations and warranties provided in a transaction agreement, a Japanese court will basically allow the defendant to assert, as a defence, the plaintiff's knowledge of the breach. Japanese courts, in principle, do not require a plaintiff buyer to demonstrate its reliance on the defendant seller's representations and warranties.

However, if the seller shows that the buyer had actual knowledge of the breach at the time of signing, the court will usually dismiss the plaintiff's claim with prejudice on the merits.-[35] In this regard, if the acquisition agreement expressly sets forth a 'pro-sandbagging' clause to the effect that the buyer's knowledge does not affect the buyer's indemnification claims, a Japanese court will probably respect such provision and will not deny a claim even where the seller can demonstrate the buyer's knowledge of breach. On the other hand, from a seller's perspective, it would be advisable to expressly provide an anti-sandbagging clause, even though the default rule in Japan appears to be anti-sandbagging when the agreement is silent on that issue.

Non-attributability

For a damages claim based on a breach of covenant in a purchase agreement, the defence of non-attributability may be available. The concept of non-attributability is not the same as, but is similar to, the concept of *force majeure*. If the non-performance of a contractual obligation was due to reasons not attributable to the non-performing party, a damages claim based on such non-performance will not be supported by the court.-[36] Such non-attributability defence would also be available where the plaintiff brings a contractual indemnification claim based on a breach of obligations under the transaction agreement, except for breach of representations and warranties.

Other contractual defences

In a dispute between the parties to an M&A transaction, claims are usually based on the terms of the contract, and those terms typically provide for various defences. Such contractual defences may include a time limitation for bringing claims, a cap on total liability and a deductible or threshold for indemnifiable claims.

Counterparty claims: arbitration

If the target company is a Japanese company, the forum for dispute resolution is typically specified to be Japanese courts. The Tokyo District Court has been the most popular jurisdiction for M&A transactions in Japan. However, there is a growing trend of parties preferring arbitration because arbitration can resolve disputes faster and because confidentiality can be maintained in arbitration compared with a court process.

Arbitration clauses are generally enforceable in Japan. Although arbitral awards require a court judgment for enforcement in Japan, Japanese courts basically respect arbitral awards.

As Japan has acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Japanese courts generally enforce arbitral awards granted by arbitration forums in foreign countries that have adopted the UN Convention.

Cross-border issues

In Japanese court proceedings for cases involving cross-border transactions, service of process and enforcement of judgments may become issues. As such, parties often prefer an arbitral forum for cross-border transactions. The reasons for choosing arbitration include the following:

1. the perception that an arbitral tribunal is generally more neutral;
2. the private or confidential procedure of arbitration (i.e., no disclosure of case documents);
3. the ease of enforcing an arbitral award in the relevant jurisdictions;[37]
4. the greater control over proceedings, including their speed; and
5. the ability to conduct arbitration proceedings in English (as opposed to Japanese, which is required for Japanese court proceedings).

Foreign investment regulations may also be an issue in cross-border transactions. There was a major amendment to the Foreign Exchange and Foreign Trade Act (FEFTA) in 2020. Although Japan has long required foreign investors to make a notification and undergo screening prior to investments in designated business sectors, the amendment has expanded the scope of covered transactions. For the past few years, the government has tightened its review of foreign direct investments, and this tendency will continue following the amendment to the FEFTA.

Outlook and conclusions

While the uncertainty caused by global geopolitical tensions remains, Japanese companies have again started making investments and are now actively engaging in

M&A transactions, even unfriendly ones. In the coming year, we will probably see more pre-closing injunctive actions involving unfriendly or competing offers.

Endnotes

1 See, e.g., *In re Appraisal of S-VANCE Ltd*, the Osaka District Court decision, 18 January 2017; *In re Appraisal of Kokusan Denki Co, Ltd*, the Tokyo High Court decision, 30 January 2017; *In re Appraisal of URAI Co Ltd*, the Osaka High Court decision, 29 November 2017; *In re Appraisal of Mitsui Life Insurance Company Limited*, the Tokyo High Court decision, 27 February 2019; *In re Appraisal of FamilyMart Co, Ltd*, the Tokyo District Court decision, 23 March 2023; *In re Appraisal of NTT Urban Development Corporation*, the Tokyo District Court decision, 12 May 2023. ^ Back to section

2 *In re NIPPO Ltd*, the Nagoya High Court decision, 7 April 2021 (approved by the decision of Nagoya High Court on 22 April 2021); *In re Japan Asia Group Limited*, the Tokyo District Court decision, 2 April 2021 (approved by the decision of Tokyo High Court on 3 April 2021); *In re Fuji Kosan Company, Ltd*, the Tokyo District Court decision, 3 June 2021 (approved by the decision of the Tokyo High Court on 10 August 2021); *In re Tokyo Kikai Seisakusho*, the Tokyo District Court decision, 29 October 2021 (approved by the decision of Tokyo High Court on 18 November and the decision of the Supreme Court on 29 November 2021); *In re Mitsuboshi Co, Ltd*, the Osaka District Court decision, 1 July 2022 (approved by the decision of the Osaka High Court on 21 July 2022 and the decision of the Supreme Court on 28 July 2022). ^ Back to section

3 *In re Kansai Super Market, Ltd*, the Osaka High Court decision, 7 December 2021 (which overturned the preceding decisions of the Kobe District Court and was later approved by the decision of the Supreme Court on 14 December 2021). ^ Back to section

4 Under the Companies Act, directors of a Japanese corporation owe duties to the corporation to act in compliance with the applicable law, articles of incorporation and resolutions adopted at shareholders' meetings, as well as to act in the best interests of the company. As agents for the corporation, directors also have duties to conduct the affairs of the corporation with the care of a good manager. In this chapter, the fiduciary duties of a director refer to such duties that a director owes under the Companies Act. For duties of compliance and loyalty, see Article 355 of the Companies Act; for duty of care, see Article 330 of the Companies Act and Article 644 of the Civil Code. ^ Back to section

5 *In re REX Holdings, Inc*, the Tokyo High Court, 17 April 2013; *In re Charle Co, Ltd*, the Osaka High Court, 29 October 2015. ^ Back to section

6 Article 847 of the Companies Act. ^ Back to section

7 For declaration of invalidity of certain types of corporate reorganisations, including mergers, company splits and share-to-share exchanges, see Article 828 of the Companies Act. ^ Back to section

8 For injunctions in connection with corporate reorganisations, including mergers, see Articles 784-2, 796-2 and 805-2 of the Companies Act; for injunctions regarding cash-out transactions, see Articles 179-7, 171-3 and 182-3 of the Companies Act. ^ Back to section

9 Articles 360, 385, 399-6, 407 and 422 of the Companies Act. In a recent case involving the sale of a subsidiary by Seven & i Holdings, the plaintiff shareholders, who were also employees of the company, filed a petition to the Tokyo District Court seeking an injunction to prevent the sale from being completed. The District Court dismissed the petition, stating that, among other things, the plaintiffs failed to show a breach of duty owed by the defendants under the business judgement rule. ^ Back to section

10 Irreparable harm to the company does not include shareholders' own damage, such as their loss due to an unfair merger price or decrease in the value of their shares. ^ Back to section

11 Shareholders of a target company usually lose their shares in the company and thus may not bring derivative actions post-closing. Derivative actions are more often brought in uncompleted M&A transactions where shareholders continue to hold the shares. See, e.g., *Charle*, footnote 5. ^ Back to section

12 Article 429 of the Companies Act. ^ Back to section

13 Articles 709 and 715 of the Civil Code. For a company's vicarious liability for tortious acts of representative directors or officers, see Article 350 of the Companies Act. ^ Back to section

14 *In re Appraisal of Tokyo Broadcasting System Holdings, Inc*, the Supreme Court of Japan, 19 April 2012. ^ Back to section

15 *In re Appraisal of Jupiter Telecommunications Co, Ltd*, the Supreme Court of Japan, 1 July 2014. ^ Back to section

16 *In re Appraisal of TECMO Ltd*, the Supreme Court of Japan, 29 February 2012. ^ Back to section

17 *JCOM*, footnote 15. ^ Back to section

18 See, e.g., *In re Apamanshop Holdings Co, Ltd*, the Supreme Court of Japan, 15 July 2010. ^ Back to section

19 See, e.g., *In re Yakult Honsha Co, Ltd*, the Tokyo High Court, 21 May 2008; *In re NFK Holdings Co, Ltd*, the District Court of Yokohama, 22 October 2013. If it is a reliance on a fellow director, officer or employee of the company, courts will consider the complexity of the structure and operations of the corporation, including its delegation system. ^ Back to section

20 For appraisal claims, see *TECMO*, footnote 16; for breach of fiduciary duty claims, see *REX Holdings*, footnote 5. ^ Back to section

21 The guidelines provide that the effectiveness and necessity of a majority-of-minority condition should be determined in light of the specific circumstances of the relevant transaction. ^ Back to section

22 In Japan, special committees sometimes comprise not only independent directors but also independent corporate auditors and even independent outside experts. ^ Back to section

23 For more details, see Articles 424 to 427 of the Companies Act. ^ Back to section

24 This is because a settlement with shareholders in a derivative action against directors usually includes an exemption of liabilities of the directors to the corporation, which requires unanimous approval of all the shareholders (Article 424 of the Companies Act). ^ Back to section

25 Article 850 of the Companies Act. If the company is not a party (as an intervener) to the derivative suit, the court must notify the company of the settlement and request the company to make any objection within two weeks. If the company does not respond within two weeks, the company is deemed to have affirmed the settlement. ^ Back to section

26 Articles 835 and 848 of the Companies Act. ^ Back to section

27 Another possible remedy at the pre-closing stage is termination. Changing the default rules under the Civil Code, a typical purchase agreement in Japan provides that a party may terminate the agreement before closing only upon, among other things, a material breach by the other party of covenants or representations and warranties, initiation of bankruptcy proceedings by or against the other party, or failure to close by the long-stop date. ^ Back to section

28 Decision of the Tokyo District Court, 17 January 2006; decision of the Tokyo District Court, 15 April 2011. ^ Back to section

29 Decision of the Tokyo District Court, 27 January 2012; decision of the Tokyo District Court, 4 November 2015. ^ Back to section

30 Decision of the Tokyo District Court, 17 January 2003, suggests that an exclusive remedy clause does not necessarily preclude tort claims in the case of a tortious misrepresentation. ^ Back to section

31 Article 415 of the Civil Code. ^ Back to section

32 Article 709 of the Civil Code. ^ Back to section

33 Article 414 of the Civil Code. ^ Back to section

34 *Sumitomo Trust Bank Limited v. UFJ Holdings, Inc*, the Supreme Court of Japan, 30 August 2004. ^ Back to section

35 Decision of the District Court of Tokyo, 17 January 2006. In Japan, however, case law is not clear on whether and how the buyer's constructive or implied knowledge of breach would affect the buyer's ability to enforce the seller's contractual indemnification obligations. ^ Back to section

36 Article 415 of the Civil Code. ^ Back to section

37 The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ensures enforcement of arbitral awards in the countries that have adopted the Convention. ^ Back to section

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