

# Cross-Border Joint Venture and Strategic Alliance Guide (Japan)

A Practical Guidance® Practice Note by  
Yoichiro Yukimura and Takao Shojima, Anderson Mori & Tomotsune



Yoichiro Yukimura  
Anderson Mori & Tomotsune



Takao Shojima  
Anderson Mori & Tomotsune

This Cross-Border Joint Venture and Strategic Alliance Guide (Japan) discusses relevant law and practice related to the formation and operation of cross-border joint ventures, including corporate and contractual joint ventures, in Japan. For other jurisdictions see the [Cross-Border Joint Venture and Strategic Alliance Resource Kit](#).

## Structures

### What are the standard forms of joint ventures / strategic alliances and common features of each?

In Japan, joint ventures (JV) take one of two forms:

- Corporate JVs, in an equity-based structure
- Contractual JVs, which are based on contractual relationships

### Equity-Based Structure

A corporate JV is a joint venture involving an independent legal entity (i.e., a company). This is the standard and most common form of JV in Japan.

Under the Companies Act (Act No. 86 of 2005, as amended), there are two types of companies to be used in a corporate JV:

- Stock company (*Kabushiki Kaisha*) (KK)
- Limited liability company (*Godo Kaisha*) (GK)

### KK

The KK is the most commonly used vehicle for a corporate JV. This is because it is the most prevalent corporate structure in Japan and therefore, the structure most people are familiar with.

The main features of a KK are as follows:

- The liabilities of shareholders in a KK are limited to the amount of their contributions to the KK.
- KKs are required to hold shareholders' meetings and must have at least one director.
- The decisions of a KK are generally made by its board of directors (if the KK does not have the board of directors, a majority of the directors).
- Profits are required to be distributed to each shareholder in proportion to the amount of the shareholder's contribution (except for class shares).
- KKs can be listed on Japanese stock exchanges.

### GK

The GK is sometimes also used as a JV entity, especially for joint ventures of a smaller size. This is because GKs are more flexible and cheaper to incorporate, govern, and operate.

The main features of a GK are as follows:

- The liabilities of equity holders in a GK are limited to the amount of their contributions to the GK.
- The decisions of a GK are made by the GK's equity holders themselves.
- Profits in a GK can be distributed to its equity holders in such proportion as provided for in the GK's articles of incorporation, regardless of the equity holders' contribution ratio.
- GKs cannot be listed on Japanese stock exchanges.

### ***Contractual Relationship***

Contractual JVs, which involve joint ventures without an independent legal entity, are used for forming JVs in limited cases. Contractual JVs can be formed under the following structures:

- General Partnership (*Kumiai*), under the Civil Code (Act No. 89 of 1896, as amended)
- Limited Liability Partnership (*Yugen Sekinin Jigyō Kumiai*) (LLP), under the Limited Liability Partnership Act (Act No. 40 of 2005, as amended; the LLP Act)

### ***General Partnership***

Contractual JVs can be formed by way of a partnership agreement. Under the Civil Code, a partnership agreement becomes effective when each of the parties promises to engage in joint business by making a contribution to such business.

The main features of a general partnership are as follows:

- All partners bear unlimited liability.
- The general partnership's business is managed based on decisions made by a majority of the partners, unless otherwise provided for in the partnership agreement.
- The partnership's profits and losses are allocated to the partners in proportion to the amount of each partner's contribution to the partnership, unless otherwise provided for in the partnership agreement.

### ***LLP***

The LLP structure has been available in Japan since 2005. An LLP is a partnership formed by partners who wish to limit their liability. An LLP is established by way of an LLP agreement, which must provide that each party will:

- Make a capital contribution to the LLP –and–
- Jointly conduct business activities with the objective of generating profits

Other features of an LLP include the following:

- All partners bear only limited liability.

- At least one of the partners in an LLP must be an individual domiciled in Japan or a legal entity with its head office or principal office located in Japan.
- The business of the LLP is managed by way of unanimous decisions of all partners, unless otherwise provided for in the LLP agreement.
- The LLP's profits and losses are allocated to the partners in proportion to the amount of each partner's contribution to the LLP, unless otherwise provided for in the LLP agreement.
- Certain information in the LLP agreement, including the name of the LLP, the business to be conducted by the LLP, and the names and addresses of the LLP's members must be stated in the LLP's commercial register.

### **What are some of the key corporate governance, tax, regulatory, and timing considerations that could impact the choice of structure?**

The following elements may affect the choice of JV structure:

- Segregation of JV from JV members
- Limitation of liability
- Size, prevalence, and familiarity
- Flexibility of organization
- Cost of incorporation and operation
- Tax considerations

### ***Equity-Based Structure vs. Contractual Relationship***

Corporate JVs are typically chosen as the JV structure when the preference is to separate the assets, debts, employees, and other aspects of the JV from those of its members.

On the other hand, contractual JVs are chosen if tax considerations are paramount. Specifically, tax is imposed at both the entity level and the member level in the case of corporate JVs, but is only imposed at the member level in case of contractual JVs.

### ***Equity-Based Structure: KK vs. GK***

If JV members in a corporate JV contemplate a certain size of business and prefer to have a prevalent and familiar entity structure, establishing the JV as a KK would be recommended.

If, however, the JV members prefer a structure that enables flexible governance, the GK would be recommended.

### ***Contractual JV: LLP vs. General Partnership***

JV members who wish to limit their liability should opt for the corporate JV route. Should they prefer the contractual JV structure for any reason, the LLP should be selected for purposes of limiting liability.

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All the partners in an LLP are required to be involved in the LLP's business. By contrast, the partners of a general partnership may entrust the partnership's business operations to certain members.

### **Can a joint venture or strategic alliance be formed for any purpose?**

#### ***Equity-Based Structure***

Corporate JVs can be formed for any legal commercial purpose as long as such purpose is substantive and objectively defined.

#### ***Contractual Relationship***

General partnerships can be formed for any purpose that is not illegal or against public policy.

LLPs can be formed for any legal commercial purpose that is not against public policy or for undue purposes of avoiding liability. That said, LLPs cannot conduct certain businesses (1) in respect of which it is inappropriate to limit partners' liability to their respective contributions, such as the businesses of legal or accounting service providers, and (2) that may result in unfair damage being caused to the LLPs' creditors, such as the businesses of horse or bicycle racing.

### **Are there any forms of joint ventures or strategic alliances that are more typically used in certain industries (such as real estate, pharmaceutical, or technology)? Why are such forms favored?**

Corporate JVs, especially those formed under a KK, are the preferred JV structure in Japan and are generally used across industries. In some cases, governmental permits or licenses will not be granted to contractual JVs for the conduct of certain businesses, such as the real estate and pharmaceutical businesses.

Contractual JVs in the form of general partnerships are, however, not uncommon in the construction industry, particularly when construction companies undertake large and complicated construction work, such as public infrastructure projects. Contractual JVs are more advantageous in such projects because contractual JVs can be formed on a project-by-project basis and can easily be dissolved upon completion of the relevant project. Additionally, no tax is imposed at the JV level.

Contractual JVs are also formed in the entertainment industry for purposes of producing entertainment content, such as animation works, movies, and TV programs. Broadcasting companies, advertising companies, publishing companies, and film distributors commonly use a contractual JV structure to allocate the risks associated with the production of entertainment content.

### **Are there any industries that would not permit or would not be conducive to a joint venture or strategic alliance?**

There is no industry in Japan where the formation or operation of JVs is entirely prohibited. There are, however, some restrictions on the participation of foreign members in JVs in certain industries such as aviation, telecommunications, and broadcasting. See Foreign Members/Partners below.

There are also certain restrictions on the formation of JVs in light of antitrust regulations. See Regulatory Environment below.

### **How is a joint venture or strategic alliance structured to minimize potential liability? Are there instances where parties to a venture or alliance may knowingly choose a vehicle without limited liability and, if so, why would such party make that choice?**

#### ***Equity-Based Structure***

A corporate JV is an entity independent and separate from its members. In a corporate JV, members' liabilities are limited to the amount they have invested in the entity. Additionally, the JV agreement would usually set forth the risk allocation between, and the liability limits of, the members.

#### ***Contractual Relationship***

Partners in a general partnership are subject to unlimited liability (i.e., the creditors of the general partnership may collect their debts not only from the assets of general partnership but also from the assets of the partners themselves). Liabilities as between the partners can, however, be limited in under the terms of the partnership agreement.

Regardless of this element of unlimited liability, general partnerships are chosen as the JV vehicle in some situations for various reasons, including reasons of tax.

The partners in an LLP have limited liability (that is to say, the creditors of an LLP may only collect their debt from the LLP's assets, and not from the partners' own assets). The LLP agreement between the partners would usually provide for the scope of the respective partners' liability.

## **Statutory Framework**

### **What is the applicable statutory framework for each structure discussed above?**

#### ***Equity-Based Structure***

Corporate JVs are regulated under the Companies Act. Matters such as JV formation, election of directors and corporate auditors, decision-making process, distribution

of dividends, and reorganization (among others) must be conducted in compliance with the Companies Act.

### ***Contractual Relationship***

The Civil Code provides the basic framework for general partnerships and covers such matters as partnership formation, rights and obligations of members, partnership decision-making process, allocation of profits and losses, and partnership withdrawal and dissolution.

The LLP Act provides the basic framework for LLPs and covers matters such as LLP formation and registration, rights and obligations of LLP members, LLP decision-making process, distribution of dividends, and partnership withdrawal, dissolution, and liquidation.

### **Are there statutory or other limits on the duration of a joint venture or strategic alliance?**

#### ***Equity-Based Structure***

There is no limitation on the lifespan of corporate JVs. Nevertheless, corporate JVs will be subject to such provisions in the articles of incorporation or JV agreement that provide for a specific JV term or events of termination.

#### ***Contractual Relationship***

Similarly, contractual JVs are not subject to any lifespan limits. As with corporate JVs, however, contractual JVs are subject to provisions in the relevant partnership agreement or LLP agreement regarding JV term or events of termination.

Although the LLP Act requires the term of an LLP to be provided under the LLP agreement, LLP members are free to choose the length of the LLP's term, and can also extend the original term of the LLP at any time through amendments to the partnership agreement.

### **Do joint ventures or strategic alliances have to be registered with any federal or local body?**

No registration with any administrative authority is required for either corporate JVs or contractual JVs other than registration of information for purposes of the commercial register regarding KJs, GKs and LLPs.

## **Regulatory Environment**

### **Are joint ventures or strategic relationships specifically regulated?**

There is no regulation in Japan that applies specifically to JVs. As stated above, however, the formation and operation of corporate JVs and contractual JVs must be carried out in accordance with the Companies Act, the Civil Code, and the LLP Act (as applicable).

In addition, there are some regulations of general application that affect all business vehicles (including JVs). These regulations include the following:

### ***Foreign Investment Regulations***

The Foreign Exchange and Foreign Trade Act (Act No. 228 of 1949, as amended; the FEFTA) places certain restrictions on the participation of foreign members in JVs in certain industries. The FEFTA may also require foreign members in a JV to file prior or post-factum notifications with the Minister of Finance and the competent minister (through the Bank of Japan). See Foreign Members/Partners below.

Additionally, there are some industry-based regulations that restrict foreign members from investing in a JV in specific industries, such as the aviation, telecommunications, and broadcasting industries.

### ***Antimonopoly Regulations***

Under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947, as amended; the Antimonopoly Act), JVs that substantially restrict competition in a particular field of trade are prohibited.

Further, the Antimonopoly Act requires the formation of a JV by any of the following routes to be notified in advance to the Japan Fair Trade Commission (JFTC), if certain thresholds are met:

- Share transfer
- Merger
- Company split
- Share transfers by multiple companies
- Business transfer

### ***Share Transfer***

Notification of formation of a JV by way of share transfer is required if both:

- The total domestic sales revenue of the company acquiring shares in the JV company exceeds Japanese Yen (JPY) 20 billion, and the total domestic sales revenue of the JV company exceeds JPY5 billion.
- The shareholding ratio of the acquiring company in the JV after the share transfer exceeds a 20% or 50% threshold.

For this purpose, "total domestic sales revenue" means the aggregate of:

- Revenue generated from domestic sales (that is, the amount of products and services provided domestically) by a company
- and–
- Revenue generated from the domestic sales of the corporate group to which the company belongs (that

is, the company's subsidiaries, the company's parent company that is not a subsidiary of another company, and the subsidiaries of the parent company)

### **Merger**

Notification of formation of a JV by way of merger is required if both:

- Total domestic sales revenue of any of the JV members exceeds JPY20 billion, and the total domestic sales revenue of another JV member exceeds JPY5 billion.
- The parties to the merger are not within the same corporate group.

### **Joint Incorporation-Type Company Split**

Notification of formation of a JV by way of a joint incorporation-type company split is required if:

- Total domestic sales revenue of a JV member that will transfer the whole of its business to the JV (a full transfer company) exceeds JPY20 billion, and the total domestic sales revenue of another JV member that will also be a full transfer company exceeds JPY5 billion.

-or-

- Total domestic sales revenue of a JV member that qualifies as a full transfer company exceeds JPY20 billion, and the domestic sales revenue of the relevant business of another JV member that will transfer a substantial part of its business to the JV (a partial transfer company) exceeds JPY3 billion.

-or-

- Total domestic sales revenue of a JV member that qualifies as a full transfer company exceeds JPY5 billion, and the domestic sales revenue of the relevant business of another JV member that qualifies as a partial transfer company exceeds JPY10 billion.

-or-

- The domestic sales revenue of the relevant business of a JV member that qualifies as a partial transfer company exceeds JPY10 billion, and the domestic sales revenue of the relevant business of another JV member that will transfer part of its business to the JV exceeds JPY3 billion. -and-
- The parties to the joint incorporation-type company split are not in the same corporate group.

### **Absorption-Type Company Split**

Notification of formation of a JV by way of an absorption-type company split is required if:

- Total domestic sales revenue of a splitting company that qualifies as a full transfer company exceeds JPY20 billion,

and the total domestic sales revenue of the successor company exceeds JPY5 billion.

-or-

- Total domestic sales revenue of a splitting company that qualifies as a full transfer company exceeds JPY5 billion, and the total domestic sales revenue of the successor company exceeds JPY20 billion.

-or-

- The domestic sales revenue of the relevant business of a splitting company that qualifies as a partial transfer company exceeds JPY10 billion, and the total domestic sales revenue of the successor company exceeds JPY5 billion.

-or-

- The domestic sales revenue of the relevant business of a splitting company that qualifies as a partial transfer company exceeds JPY3 billion, and the total domestic sales revenue of the successor company exceeds JPY20 billion. -and-

- The parties to the absorption-type company split are not in the same corporate group.

### **Share Transfer by Multiple Companies**

Notification of formation of a JV by way of share transfers by multiple companies is required if both:

- Total domestic sales revenue of any JV member exceeds JPY20 billion, and the total domestic sales revenue of another JV member exceeds JPY5 billion.
- The parties to the share transfers are not in the same corporate group.

### **Business Transfer**

Notification of formation of a JV by way of a business transfer is required if:

- Total domestic sales revenue of a company to which any business is assigned (the assignee company) exceeds JPY20 billion, and the assignee company succeeds to the entire business of the assignor company whose domestic sales revenue exceeds JPY3 billion.

-or-

- Total domestic sales revenue of the assignee company exceeds JPY20 billion, and the assignee company succeeds to a substantial part of the business or the whole or a substantial part of the fixed assets used for the business of the assignor company (where the domestic sales revenue attributable to the business or fixed assets being transferred exceeds JPY3 billion). -and-

- The parties to the business transfer are not in the same corporate group.

## **Are there any antitrust matters to be considered in forming a joint venture or strategic alliance?**

### ***Antimonopoly Act***

The Antimonopoly Act prohibits unfair business practices and acts that substantially restrict competition in a particular field of trade.

The JFTC has the power under the Antimonopoly Act to issue a cease-and-desist order against a JV if the JFTC determines that the establishment of a JV constitutes an unfair business practice or substantially restricts competition in a particular field of trade. The JFTC has established two guidelines for determining whether a JV substantially restricts competition in a particular field of trade:

- Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (Business Combination Guideline)
- Guidelines Concerning Joint Research and Development under the Antimonopoly Act (R&D Guideline)

### ***Business Combination Guideline***

The Business Combination Guideline provides a safe harbor rule the applicability of which is based on the Herfindahl-Hirschman Index (HHI). The HHI is in principle calculated by summing the squared market share of each business operator. Specifically, the safe harbor rule for horizontal business combinations under the Business Combination Guideline applies where:

- The HHI after the establishment of a JV is 1,500 or less.
- The HHI after the establishment of a JV is more than 1,500 but does not exceed 2,500, and the increase in the HHI is 250 or less.
- The HHI after the establishment of a JV is more than 2,500, and the increase in the HHI is 150 or less.

The JFTC will determine, in cases where a JV does not fall under the safe harbor rule, whether the establishment of the JV will substantially restrict competition in a particular field of trade, taking into consideration the following factors:

- Market position of the JV and its group companies, as well as the circumstances surrounding its competitors
- Conditions surrounding the JV's transactions, such as the possibility of the JV knowing the business terms of its competitors, past market share, and past price movements
- Whether foreign importers operate or are likely to operate in the market
- Existence of barriers to entry
- Existence of competitive pressures from contiguous markets

- Existence of competitive pressure from those who demand such products/services
- Comprehensive business capability
- Efficiency of the JV's business and the economic circumstances of the JV and its group companies
- Business condition of the JV and its group companies
- Scale of industry area

### ***R&D Guideline***

The R&D Guideline, which applies to JVs performing joint research and development, regulates:

- Substantial restrictions on competition in the product and technology markets
- Any private monopoly with respect to technology
- Agreements on the performance of joint research and development (R&D)

In determining whether substantial restrictions on competition exist, the JFTC will consider whether the establishment of a JV substantially restricts competition, taking into account the following factors:

- Number of participants in the market and their respective market share
- Nature of the research being conducted
- Necessity of joint R&D
- Duration and scope of the joint R&D

The R&D Guideline also provides, in respect of private monopolies, that joint R&D may be deemed to create a private monopoly with respect to technology if all of the following occur:

- Total market share of the participants is substantially high.
- Joint R&D is performed for the purpose of developing a technology that is essential for the business of the participants in the joint R&D
- Any participant excluded from the joint R&D would face difficulty in conducting its business due to such exclusion and may thereby be excluded from the market.

Additionally, the R&D Guideline categorizes agreements on joint R&D into the following:

- Arrangements that in principle do not constitute unfair business practices (such as, for example, the prohibition of participants from conducting independent research in the same areas as those in the joint R&D for the duration of the joint R&D)
- Arrangements that could constitute unfair business practices (such as, for example, the prohibition of participants from introducing a technology similar to the

technology that is being researched under the joint R&D beyond the scope necessary for the joint R&D)

- Arrangements that are at high risk of constituting unfair business practices (such as, for example, the prohibition of participants from conducting independent research in the same area as those in the joint R&D after termination of the joint R&D)

## Formation

### What are the procedures in forming a joint venture or strategic alliance?

#### *Equity-Based Structure*

A corporate JV is formed by registering the incorporation of the relevant company with the relevant Legal Affairs Bureau.

#### *KK*

The key steps involved in the incorporation of a KK are as follows:

- Preparation of the KK's articles of incorporation
- Notarization of the articles of incorporation by a notary public
- Contribution of capital by the incorporators and other subscribers
- Election of directors (and corporate auditors, if any) upon incorporation
- Examination by directors (and corporate auditors, if any) of the legality of the KK's formation and whether procedures in respect of capital contributions by the incorporators and other subscribers have been completed
- Registration of the KK's incorporation in the commercial register maintained by the Ministry of Justice, at the location of the KK's head office (The registration process will typically be completed within approximately two weeks after the date on which the application is filed, but the incorporation date of the company will be deemed the date of application.)

#### *GK*

GKs are easier to incorporate than KKs. The key steps involved in the incorporation of a GK are as follows:

- Preparation of the GK's articles of incorporation
- Contribution of capital by the GK's members
- Registration of the GK's incorporation in the commercial register maintained by the Ministry of Justice, at the location of the KK's head office

As with the case of KKs, the registration process in respect of a GK will typically be completed within approximately two

weeks after the date on which the application is filed, but the incorporation date of the company will be deemed the date of the application.

While the KK/GK is being incorporated, the members of the corporate JV typically enter into a JV agreement that governs the relationship between the JV members.

#### *Contractual Relationship*

A general partnership is formed by way of a partnership agreement. No formalities are required for purposes of entering into a partnership agreement. It is, however, common to prepare a written partnership agreement to avoid any doubt as to the matters agreed upon among the partners.

An LLP is formed by way of a written LLP agreement, in which each of the partners will agree to make a capital contribution to the JV and jointly conduct business activities for the purpose of generating profits. Based on the terms of the LLP agreement, each partner will make a capital contribution to the LLP.

An LLP agreement must set forth the following information:

- Name of the LLP
- District in which the office of the LLP is located
- Names or corporate names, and the addresses of the partners
- Date on which the LLP agreement takes effect
- Duration of the LLP
- Object and amount of the partner's capital contributions
- Business year of the LLP

In addition to the above, the LLP agreement may provide for any other matter to the extent permissible under the LLP Act.

The members in an LLP must include at least one individual who is domiciled in Japan or a legal entity with its head office or principal office in Japan. Certain information in the LLP agreement must be registered in the commercial register.

### What documentation/agreements are required to form a joint venture or strategic alliance?

#### *Equity-Based Structure*

To incorporate a KK or GK, articles of incorporation must be prepared. Further, in case of a KK, the articles of incorporation must be notarized by a notary public.

In addition, shareholders/equity holders of a corporate JV usually enter into a JV agreement on or before the formation of the JV. The JV agreement sets forth and governs the rights and obligations of JV members. Ancillary agreements, such as business alliance agreements and distributorship agreements, will also be executed together with the JV agreement in some cases.



### ***Contractual Relationship***

A partnership agreement is required to be entered into upon the formation of a general partnership or an LLP. No registration is required in respect of the partnership agreement of a general partnership. LLP agreements, however, have to be registered in the commercial register.

**If there is no documentation forming the joint venture or strategic alliance, is there a standard form that exists by default? Are there any attendant risks of falling within that category?**

### ***Equity-Based Structure***

The Companies Act prescribes certain default rules in respect of, among others, capital structure and governance. These rules generally apply to KKGs/GKs except where their articles of incorporation provide otherwise. Although there are certain mandatory rules that cannot be circumvented through the articles of incorporation or the JV agreement (such as, for example, the rule that distribution of dividends in a KK must be prorated based on each shareholder's shareholding ratio), other rules can be changed through the provision of different rules in the articles of incorporation or JV agreement to the extent permitted under the Companies Act.

### ***Contractual Relationship***

A partnership agreement and LLP agreement must be entered into for purposes of forming a Contractual JV. Both the Civil Code and the LLP Act provide default rules that govern the general partnerships/LLPs. Partners who wish to avoid the application of such rules must stipulate different rules in the partnership agreement or LLP agreement.

**What filings with governmental authorities (if any) are required to form the joint venture or strategic alliance?**

### ***Equity-Based Structure***

No specific filing with governmental authorities is required for purposes of forming a corporate JV, other than registration of the incorporation in the commercial register regarding KKGs, GK, and LLPs.

The following filings may, however, be required in certain circumstances, such as the following:

- Filing of a notification with the Minister of Finance and the competent minister (through the Bank of Japan) under the FEFTA
- Filing of a notification with the JFTC under the Antimonopoly Act

For more details, please see Regulatory Environment above.

### ***Contractual Relationship***

No specific filing with governmental authorities is required for purposes of forming a general partnership.

The registration of an LLP agreement must be undertaken at the relevant Legal Affairs Bureau within two weeks from the effective date of the LLP agreement.

## **Becoming a Member/Partner**

**What are the different levels of equity and voting participation in the various forms of joint ventures and strategic alliances? How flexible is each of the structures?**

### ***Equity-Based Structure***

#### ***KK***

A KK may issue both common shares and class shares. The Companies Act permits class shares to confer rights that are different from those conferred by common shares with respect to voting rights, rights to dividends, rights to appoint directors and corporate auditors, among others. To issue class shares, the articles of incorporation of a KK have to be amended by way of a shareholders' special resolution passed by a supermajority (two-thirds or as required by the articles of incorporation) at a shareholders' meeting.

#### ***GK***

A GK may provide a more flexible framework for its equity holders to participate in decision-making and dividend distributions. For instance, a GK's articles of incorporation can be drafted in a way that permits corporate decisions of the GK to be made only by certain equity holders to whom such power is entrusted (*gyoumu shikko shain*), rather than by all equity holders. Additionally, a GK is not required to allocate its profits and losses to equity holders in proportion to the number of shares they hold in the GK, if so provided for in the articles of incorporation. For more details, see Management below.

### ***Contractual Relationship***

In contractual JVs, partners in a general partnership or LLP have the flexibility to apply different levels of rights and participation on a partner-by-partner basis if so provided in the partnership or LLP agreement. Accordingly, different partners may have different rights in terms of decision-making, allocation of profit and losses, and limitation of liability (among others). Notwithstanding this, every partner in an LLP is required to participate in the business of the LLP and is not allowed to entrust all of his/her rights in respect of decision-making to any other partners. Furthermore, LLP partners must unanimously approve of certain key matters.



## **What forms of contributions (e.g., cash versus in-kind) may be made by members/partners?**

### **KK**

Only the incorporator of a KK has the right to contribute share capital in forms other than cash at the time of the KK's incorporation, provided that contribution in kind is permitted under the KK's articles of incorporation. A court-appointed inspector (*kensayaku*) will also assess the fairness of the contribution in kind and submit a report of such assessment to the court. However, the foregoing will not apply in the following cases:

- The total value of the contribution in kind specified in the KK's articles of incorporation does not exceed JPY5 million.
- The contribution in kind comprises securities for which a market price is available, and the value of the securities as specified in the KK's articles of incorporation does not exceed their corresponding market price.
- The reasonableness of the value of the contribution in kind as specified in the articles of incorporation is verified by an attorney, a legal professional company, a certified public accountant, an auditing firm, a tax accountant, or a tax accountant corporation.

Upon the issuance of shares by the KK after its incorporation, share capital can be contributed to the KK in any form other than cash by any person. Although it is still necessary for the KK's articles of incorporation to permit such forms of contribution, broader exemptions will apply with respect to the requirement of assessment of such contribution by an inspector.

### **GK**

Contributions in kind are also permitted in case of a GK. Unlike in the case of a KK, however, no assessment by an inspector on the fairness of the contribution in kind is required in respect of a GK.

### **General Partnership**

A partner in a general partnership is permitted to make cash contributions, contributions in kind, or contributions through provision of services. No assessment by an investor is required regardless of the form of contribution.

### **LLP**

A partner in an LLP may make contributions in cash or in kind. Unlike in the case of a general partnership, however, no contribution through provision of services is permitted under the LLP Act.

## **Should contributions to the joint venture or strategic alliance be documented? If so, what is the typical form of documentation?**

Contributions from JV members are typically documented in the JV agreement, partnership agreement, or LLP agreement. In the case of a KK, certain documentation apart from a JV agreement is required for purposes of registration, including an offer notice and an allotment notice by the KK, and an application for subscription by the shareholder. These documents can be combined in a single subscription agreement (*sousuu hikiuke keiyaku*), in which the contribution amount, contribution date, number of shares to be issued, amount of increased capital, and capital reserves are provided for.

## **Are there any statutory or other requirements regarding the number (i.e., minimum or maximum) or type of members (as in age requirements or legal status; individual or juridical person) in the joint venture or strategic alliance?**

No minimum or maximum requirement applies in respect of the number of JV members for both corporate and contractual JVs, except that a contractual JV, such as a general partnership or LLP, has to be terminated if only one partner is left.

A minor, an adult ward (*seinen hi koukennin*), a person under curatorship (*hi hosanin*), a person under assistance (*hi hojonin*), and a juridical person are all eligible to be shareholders or members in a KK or GK, and have legal capacity to enter into a JV agreement, partnership agreement, or LLP agreement. Notwithstanding this, an agreement with a minor, adult ward, person under curatorship, or person under assistance can be cancelled if it is entered into without the consent of a parent or other legal representative. Accordingly, such consent should be obtained in advance. Also, see Foreign Members/Partners below.

In case of a GK, when an equity holder to whom the decision-making power is entrusted (*gyoumu shikko shain*) is a juridical person, it must appoint an executive officer (*shokumu shikkosha*), who is in charge of the business operations of the GK, and notify the other GK's equity holders of the name and address of the executive officer of such juridical person.

Also, in case of an LLP, a partner that is a juridical person must appoint an executive officer (*shokumu shikkosha*), who is in charge of the business operations of the LLP, for purposes of entry into the LLP agreement. The other partners of the LLP must also be notified of the name and address of the executive officer of such juridical person.

## Can a public sector body be a member/partner in the joint venture or strategic alliance?

There is no specific restriction that prohibits a public sector body from being a member in a JV.

The Japanese government has the right to hold shares in certain KJs. The law does not expressly restrict the government from contributing capital into any entity as long as the government's budget (that includes such investment) is approved by parliament. There are, however, not many cases in which the government holds shares in KJs. In some cases, government ownership of shares in a KJ is due to the KJ being initially a public service provider, before being privatized, with governmental ownership of some shares in the KJ attributable to such legacy. In some other cases, the government contributes capital into entities that are established as "special government-affiliated corporations" (*tokushu-hojin*) under specific laws, and as a result hold shares in such entities.

There are many entities whose shares are held by local governments (joint public-private ventures). Under the Local Autonomy Act (Act No. 67 of 1947, as amended), a local government wishing to hold a stake in a JV must first obtain the approval of the local assembly for the budget that includes such investment. Due to its capital contribution coming from public funds, the local government may, if permitted by its shareholding ratio, exercise control to a certain extent over the JV. Situations where the local government may exercise control include the following:

- Where the local government owns 25% or more of the shares in the JV, an audit committee member appointed by the local government has the right to audit the financial matters of the JV.
- Where the local government owns 50% or more of the shares in the JV, a head of the local government can (1) request the JV to report its income, expenses, and forecasts; (2) conduct an investigation on the execution of the JV's budget; and (3) request that the JV take appropriate measures based on the local government's investigation and the JV's reports.

## What restrictions, other than contractual ones, are there on a member/partner transferring its interest in the joint venture or strategic alliance?

### KK

In the case of a KK, transfer of shares must be implemented in accordance with the Companies Act and the articles of incorporation of the company. In respect of private companies, restrictions are placed (through provisions in the articles of incorporation) on the transfer of shares by

requiring such transfer to be approved by the board or shareholders. In the case of companies that issue share certificates (*kabuken hakko kaisha*), transfers of shares will only be effective when the relevant share certificates are delivered to the transferee. Where the company is a non-share certificate issuing company (*kabuken fuhakko kaisha*), transfers of shares in the company will be effective upon agreement being reached between the transferor and the transferee. In both cases, the transfer will be perfected when it is registered in the shareholders register of the company. Where a listed company is concerned, share transfers must comply with the Financial Instruments and Exchange Act (Act No. 25 of 1948, as amended) and the listing rules of the relevant stock exchange.

Restrictions under the Antimonopoly Act and the FEFTA are also applicable to the transfer of shares in a KK.

### GK

In principle, equity holders in a GK are not permitted to transfer their equity interest in the GK to a third party without the consent of all the other equity holders, unless the GK's articles of incorporation provide otherwise. However, equity holders who are not in charge of managing the business of the GK may transfer their equity interests in the GK to a third party with the consent of all managing equity holders.

As with the case of KJs, restrictions under the Antimonopoly Act and the FEFTA are applicable to transfers of equity interests by an equity holder of a GK.

### General Partnership and LLP

Partners in a general partnership or LLP are not permitted to transfer their interests in the general partnership or LLP to a third party without the consent of all the other partners, unless the partnership agreement or LLP agreement provides otherwise.

## Restrictive Covenants

### What restrictive covenants can apply to members/partners relating to corporate opportunity, non-competition, and non-solicitation?

It is common for a JV agreement to specify the non-competition obligations of the JV members during and following the termination of a JV agreement in order to prevent any JV member's business from competing with the JV's business. JV agreements may also contain provisions regarding corporate opportunity and non-solicitation.

There are no statutory constraints on JV members' non-competition obligations (except for such constraints under

the Companies Act that apply to an equity holder who manages the business of a GK) and no established court precedents on this issue, although it is generally understood that non-competition clauses should be reasonable in order to be valid and enforceable. The courts will determine the validity of a non-competition clause by taking into consideration various factors, such as the duration of the obligation, the geographical scope of the obligation, and the scope of the restricted business. Non-competition clauses should also be considered from the perspective of anti-trust regulations.

## Management

### **How is the joint venture or strategic alliance managed in the different structures? Are there statutorily mandated supermajority provisions?**

#### *Entity-Based Structure*

##### *KK*

JVs in the form of a KK often have a board of directors comprising directors who are collectively in charge of making decisions in relation to the management and operation of the joint venture. Under the Companies Act, a KK with a board of directors is required to have at least three directors. Resolutions of the board must be made by the majority vote (or such higher threshold, if required under the articles of incorporation) of the directors present at the relevant board meeting where the majority of the directors (or such higher threshold, if required under the articles of incorporation) entitled to participate in the vote are present. It is generally understood that the chair of the board cannot have a casting vote. Proxies for directors, as well as proxy voting, are not permitted.

A KK with a board of directors is required under the Companies Act to appoint at least one representative director from among its directors by way of a resolution of the board. Under the Companies Act, a representative director is authorized to manage the KK's operation and represent the KK vis-à-vis third parties. Kks are not legally required to appoint a so-called CEO. Considering the role of a representative director, however, a KK that wishes to appoint a CEO will often give such title to a representative director.

Shareholders' meeting approval is required for certain key matters in respect of a KK. Under the Companies Act, shareholders' meeting approvals are given by way of two main types of resolutions: ordinary resolutions and special resolutions.

Matters decided upon by way of an ordinary resolution include the election of directors and statutory auditors, remuneration for directors and statutory auditors, approval of financial statements, and decisions to distribute surpluses as dividends. An ordinary resolution must be passed by a majority of voting rights (or such other threshold as stated in the articles of incorporation, except in respect of certain matters) of the shareholders present at the relevant shareholders' meeting, where shareholders holding a majority of voting rights (or such other threshold as stated in the articles of incorporation, except in respect of certain matters) who are entitled to exercise their vote are present at the meeting.

Matters requiring shareholders' approval by way of a special resolution include amendments to the articles of incorporation, entry into M&A transactions (such as mergers and company splits), capital reduction, and company dissolution. A special resolution must be passed by at least two-thirds of voting rights (or such higher threshold as stated in the articles of incorporation) of the shareholders present at the relevant shareholders' meeting, where shareholders holding a majority of the voting rights (or one-third or more as stated in the articles of incorporation) who are entitled to exercise their vote are present at the meeting.

Apart from the Companies Act and the articles of incorporation, a JV agreement may also provide for certain matters in respect of a KK to require the approval of shareholder(s) who hold a certain percentage of voting rights. However, even if such required approval is not obtained, resolutions passed on such reserved matters by shareholders' meeting or the board will not automatically become void. The dissenting shareholder(s) may, however, take remedial actions as permitted under the JV agreement, such as exercising put and/or call options or making a claim for indemnification.

The Companies Act allows a KK to issue class shares with veto rights for certain matters to be resolved at the board or shareholders' meeting. If such class shares are issued, those matters have to be resolved at the meeting of such class shareholders, in addition to a resolution passed by the board or shareholders' meeting. The rights attached to class shares must be stipulated in the KK's articles of incorporation and corporate register, the latter of which is publicly available.

##### *GK*

The Companies Act contemplates that all equity holders will in principle participate in the GK's management, and the business of the GK will be decided upon by a majority of equity holders (in terms of headcount), unless otherwise stated in the GK's articles of incorporation.

If the articles of incorporation specify certain equity holder(s) as managers of the GK's business, the management of the GK will in principle be based on the decisions of such equity holder (or the majority of such equity holders (in terms of headcount), as applicable, unless otherwise stated in the articles of incorporation).

## ***Contractual Relationships***

### ***General Partnership***

The Civil Code contemplates that all partners will in principle participate in the management of a general partnership, and business of the general partnership will be decided by a majority of partners (in terms of headcount); provided, however, that a partnership agreement can appoint a specific partner(s) or third party(s) to manage the business of the general partnership.

### ***LLP***

The LLP Act contemplates that all partners will in principle participate in the management of the LLP, and the business of an LLP must be decided upon by unanimous consent of all partners; provided, however, that an LLP agreement can stipulate some other threshold (except for decisions regarding (1) the disposal and acquisition of material assets and (2) borrowings of substantial amounts, both of which must be approved by two-thirds or more of the partners).

## **What mechanisms are there for resolving deadlocks on major decisions?**

JV agreements generally include certain mechanisms for the resolution of deadlocks. Such mechanisms vary on a case-by-case basis. For example, a JV agreement for a KK (i.e., a shareholders' agreement) typically stipulates that a shareholder may exercise a put and/or call option or may request the dissolution and liquidation of the KK if deadlock on major decisions occurs and cannot be resolved after deadlock resolution procedures (such as escalation to and discussion by the senior management of the respective shareholders) have been exhausted.

## **What procedures apply for electing and removing managers in joint ventures and strategic alliances?**

### ***Entity-Based Structure***

#### ***KK***

Generally, joint ventures in the form of a KK often establish a board of directors to make decisions in relation to the management and operations of the JV. Under the Companies Act, election and dismissal of directors requires approval by way of an ordinary resolution at a shareholders' meeting. A KK may dismiss directors at any time without any reason,

provided that the KK compensates the dismissed director for damages incurred as a result of dismissal without justifiable grounds.

Apart from the Companies Act and the articles of incorporation, JV agreements also often give shareholder(s), depending on their shareholding ratio, the right to appoint and dismiss a certain number of director(s) (and representative director(s)).

#### ***GK***

The Companies Act contemplates that all equity holders will in principle participate in the management of the GK. All equity holders' names and addresses must be stipulated in the articles of incorporation, and participation in the GK as an equity holder will become effective when the articles of incorporation are amended to include the information of the new equity holder. The unanimous consent of equity holders is required to amend the GK's articles of incorporation, unless otherwise stated in the articles of incorporation. The removal of certain equity holders can be effected only in limited instances through legal action with the approval of a majority of the other equity holders.

If the articles of incorporation specify that certain equity holder(s) will manage the GK's business, such equity holder(s) can only be dismissed from its management position by the unanimous consent of the other equity holders based on justifiable grounds, unless otherwise stated in the articles of incorporation.

## ***Contractual Relationships***

### ***General Partnership***

The Civil Code contemplates that the business of a general partnership will in principle be decided upon by a majority of partners (in terms of headcount). A party becomes a partner by entering into a partnership agreement. A partner can be removed from a general partnership on justifiable grounds by way of the unanimous consent (or such other threshold as stated in the partnership agreement) of the other partners.

If a partnership agreement appoints a partner(s) to manage the business of a general partnership, such partner(s) can be dismissed from its management position by way of the unanimous consent of the other partners based on justifiable grounds.

### ***LLP***

The LLP Act contemplates that the business of an LLP will in principle be decided by way of the unanimous consent of all partners. A party becomes a partner by being a party to the LLP agreement. A partner can be removed from an LLP by way of unanimous consent (or such other threshold as stated in the LLP agreement) of the other partners based on justifiable grounds.

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# Allocating Profits, Losses, and Distributions

**How are profits, losses, and distributions allocated among partners/members? Are there legal or regulatory restrictions that may limit the ability of the partners/members to make such allocations on their own?**

## *Entity-Based Structure*

### *KK*

Under the Companies Act, shareholders' liabilities are limited to the amount that they pay in. As for profit sharing, a KK can issue class shares that give no right to dividends if the issuance of such class shares is permitted in the articles of incorporation. Other than issuing class shares, a KK cannot pass resolutions for the distribution of profits in a way that violates the principle of shareholder equality, such as distributing some profits to some shareholders while distributing no profits to other shareholders who own the same class of shares.

Additionally, the amount of dividends that are distributed to shareholders must fall within a legally defined range calculated based on the surplus amount as at the last day of the most recent financial year and adjusted for items set forth in the Companies Act.

### *GK*

Under the Companies Act, equity holders' liabilities are limited to the amount that they pay in. Profit and loss are allocated to each equity holder in proportion to the respective amounts they have contributed to the GK, unless otherwise stated in the articles of incorporation.

Additionally, the book value of dividends distributed to equity holders as profits cannot exceed the amounts of profits as at the date of distribution.

## **Contractual Relationships**

### *General Partnership*

Under the Civil Code, partners' liabilities are unlimited. The allocation of profit and loss can be freely agreed upon by all the partners. If no such agreement is made, profit and loss will be allocated to each partner in proportion to the respective amounts they have contributed to a partnership.

### *LLP*

Under the LLP Act, partners' liabilities are limited to the amount that they pay in. The allocation of profit and loss can be freely agreed upon under the LLP agreement or other written agreement entered into between all partners.

If no such agreement is entered into, profit and loss will be allocated to each partner in proportion to the respective amounts they have contributed to the partnership.

Additionally, partnership assets that exceed the distributable amount as at the distribution date, as calculated in accordance with the LLP Act, cannot be distributed to partners. Further, if a partnership distributes an amount that exceeds the surplus, as calculated in accordance with the LLP Act, the unanimous consent of all partners is required for such distribution to be valid and certain matters must be stipulated in a LLP Agreement.

## Indemnification

**What indemnification provisions would apply in a joint venture or strategic alliance?**

JV agreements often contain a general indemnification provision requiring a JV member to indemnify the other JV member(s) for damages incurred as a result of breach of the JV agreement. A JV agreement can also limit the scope of damages payable under such indemnification.

Even if no indemnification clause is provided for in a JV agreement, a JV member may claim for the damages against the other JV member(s) in the case of a breach of JV Agreement under the Civil Code. In such claims, the damages recoverable will be ordinary damages plus special damages, the incurrence of which should be foreseeable by the breaching party. Tort claims may be also possible.

## Exit or Termination

**How does a partner/member exit a joint venture or strategic alliance?**

### *Entity-Based Structure*

#### *KK*

Shareholders in a KK generally exit by transferring their shares to other shareholder(s) or to third party(s). Other exit strategies include taking the KK public, if so expected by the KK's shareholders, or dissolving and liquidating the KK.

Transfers of shares in a KK are usually restricted by the KK's articles of incorporation by requiring the approval of the board of directors or shareholders' meeting. Typically, a shareholder will have established certain business links to the KK's operation or business (such as seconding its employees to a KK, purchasing goods produced by the KK, or providing the KK with certain services); accordingly, transfers of shares in a KK by a shareholder is normally restricted for a certain period of time under the terms of a JV agreement. Even after the expiration of such period, transfers of shares in a

KK are commonly subject to certain restrictions under the JV agreement, such as the offer of first refusal rights and tag-along rights to the other shareholders. This is because a joint venture is normally based on the close relationships between shareholders, and the party that becomes the new shareholder is a matter of primary concern for other shareholders.

Under the Companies Act, a KK will be dissolved upon:

- The expiration of the company's duration as provided in its articles of incorporation
- The occurrence of any event of dissolution as provided in the articles of incorporation
- A resolution for dissolution of the KK being passed by shareholders' meeting
- A merger (where the company is liquidated as a result of the merger)
- Commencement bankruptcy proceedings in respect of the KK
- The rendering of a judgment ordering the dissolution of the KK pursuant to the provisions of the Companies Act

Apart from the above, the dissolution and liquidation of a KK would normally be limited only to certain circumstances as provided for in the JV agreement, such as when the purpose of the joint venture has been achieved, when bankruptcy procedures have been commenced against the joint venture or a JV member, where it is concluded that certain business milestones cannot be achieved, or when deadlock on major decisions cannot be resolved.

It is possible for a shareholder to exit by selling its shares to the KK itself. There are, however, some statutory restrictions under the Companies Act when a KK acquires any of its own shares, such as the requirement that the acquisition be approved by way of a resolution of the shareholders' meeting and the prohibition against the total acquisition price exceeding the KK's distributable amounts, which is defined in the Companies Act as the amount a KK can distribute to the shareholders as dividends.

## GK

Equity holders in a GK generally exit by transferring their equity interest in the GK to another equity holder(s) or a third party(s), withdrawing from the GK, or dissolving and liquidating the GK. Under the Companies Act, if the GK's articles of incorporation do not specify the equity holder who manages the GK's business, no equity holder is permitted to transfer its equity interest in the GK without the unanimous consent of the other equity holders, unless otherwise stated in the GK's articles of incorporation. Where the GK's articles of incorporation specify the equity holder(s) who manages the GK's business, an equity holder(s) is permitted to transfer

its equity interest in the GK with the unanimous consent of those equity holders who manage the GK's business, unless otherwise stated in the GK's articles of incorporation.

## Contractual Relationships

A partner exits by transferring its partnership interest, withdrawing from the partnership, or dissolving and liquidating the partnership.

## How is a joint venture or strategic alliance terminated?

A joint venture is terminated when the shares, equity, or partnership interests in the joint venture are transferred or withdrawn (subject to the joint venture being continue between the new and existing members under the existing or amended JV agreement), or when the joint venture is dissolved and liquidated.

## Is the termination of a joint venture or strategic alliance subject to the approval of any governmental body?

The termination of a joint venture is generally not subject to the approval of any governmental body.

# Foreign Members/Partners

## What statutes or rules govern joint ventures or strategic alliances with foreign parties?

There are two statutory restrictions based on nationality that may apply to the establishment of joint ventures: restrictions on foreign investments under the FEFTA and restrictions on foreign investments in certain industries, such as the telecommunications, broadcasting, consigned freight forwarding, and banking industries.

## What are the material provisions of such statutes or rules?

The FEFTA requires advance notice to be provided to the relevant authority if, among others, (1) the nationality of a foreign investor is not one of those specified in the Act (i.e., if the investor is not from the U.S., the UK, or one of the other 161 countries specified in the Act) or (2) the business of the company into which the foreign investment will be made falls under those industries designated by the Act (including the arms manufacturing, information processing devices, components or software manufacturing, information and communications services, crop farming, and livestock agriculture industries), unless exemptions are otherwise applied.

An entity that provides advance notice to the relevant authority in accordance with the FEFTA is prohibited in



principle from making the proposed investment for 30 days after the relevant authority receives the notice. If the proposed investment is found to have problems (such as where there are safety concerns), the governmental authority can recommend changing or prohibiting the proposed investment. The waiting period may be extended up to five months for the examination by the governmental authority. If the proposed investment is found to raise no issues, the waiting period would normally be shortened in two weeks.

Restrictions in relation to certain industries include (1) refusal by the governmental authority to provide a license or the approval necessary to conduct certain businesses, (2) prohibiting a company from registering any share transfer to non-Japanese entities, and (3) restricting non-Japanese entities from exercising their voting rights at shareholders' meetings.

**What constitutes a foreign member or partner of a joint venture or strategic alliance? If there is an attribution rule that traces the ultimate ownership of a local member/partner to a foreign entity, what are the equity-holding and voting-rights thresholds for deeming “control” at each ownership chain?**

For the purposes of FEFTA, “Foreign Investors” include, among others, (i) individuals who are non-residents of Japan; and (ii) corporations or other entities established in foreign jurisdictions (including Japanese branches of foreign companies) that have their principal offices outside of Japan. Japanese corporations which are majority owned by (i) and/or (ii) above are also Foreign Investors. Certain types of limited partnerships are also included in “Foreign Investors.”

As to restrictions in relation to certain industries, each applicable law regulates what constitutes a foreign member.

**Are there any economic incentives for foreign direct investments in a joint venture or strategic alliance?**

In order to facilitate foreign investments in Japan, the government offers several incentive programs. For example, the Act on Special Measures for the Promotion of Research and Development Business by Specified Multinational Enterprises (Act No. 55 of 2012) was promulgated to attract global enterprises wishing to establish an affiliated company in Japan with the aim of newly engaging in the R&D business or supervisory business. Under this program, acceleration of examinations and proceedings for patent applications, acceleration of waiting period under the FEFTA, acceleration of entry examination and other incentives are granted to new R&D and headquarters operations conducted in Japan by global companies that are certified by the relevant minister.

**Are there mandatory minimums or maximum equity investments or contributions for a foreign joint venture or strategic alliance member/partner?**

No mandatory requirements on minimum equity investments or contributions in kind apply to foreign JV members.

## List of Regulatory Authorities and Websites

### Japan Fair Trade Commission (JFTC)

The JFTC is an administrative commission that enforces the Antimonopoly Act and related regulations, including merger filing procedures and leniency programs. The JFTC announces various guidelines to clarify its views regarding the Antimonopoly Act and related regulations from time to time.

Further information on the JFTC can be found at: [www.jftc.go.jp/en/index.html](http://www.jftc.go.jp/en/index.html).

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### Yoichiro Yukimura, Partner, Anderson Mori & Tomotsune

Yoichiro Yukimura represents a broad clientele in domestic and cross-border M&A transactions including mergers, corporate restructurings, business integrations as well as the setting-up and dissolution of joint ventures. He regularly advises clients on general corporate and commercial matters.

### Takao Shojima, Partner, Anderson Mori & Tomotsune

Takao Shojima has substantial experience in domestic and cross-border mergers and acquisitions, joint ventures and alliances, corporate restructuring, takeover bids, company split, and private equity investments. Based on his experience in an Australian law firm when he mainly engaged in international transactions and cross-border investments, Takao advises Japanese clients expanding its business overseas and foreign clients entering into the Japanese market. Takao also deals with project finance and other financial transactions as well as energy and natural resources.

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