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Bruce W. MacLennan

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ESTABLISHING A STOCK CORPORATION IN JAPAN AFTER THE 1990 REVISION OF THE COMMERCIAL CODE

Bruce W. MacLennan

Abstract: The most recent revision of the laws governing the incorporation of a *kabushiki kaisha*—stock corporation—in Japan brought an increased capitalization requirement, made it possible for one person to perform the incorporation, and removed the necessity of having a court-appointed inspector examine certain transactions undertaken in the process of incorporation. Additionally, FECL and Anti-Monopoly Law reporting requirements for inward direct investments have recently been liberalized. These and other revisions designed to increase creditor protection and streamline the process have changed incorporation procedures considerably. This comment examines these statutory changes and describes in detail the process of incorporating a subsidiary of a foreign corporation as a *kabushiki kaisha* under the new laws.

The corporate formation provisions of the Japanese Commercial Code underwent extensive amendment in 1990 as part of a continuing process of evaluation and revision of the Code and other commercial statutes that began in 1974.¹ With the implementation of these revisions on April 1, 1991, the process of corporate formation in Japan changed significantly for both domestic and foreign investors. This comment examines these changes and their effects on the formation process as it applies to the foreign corporation setting up a wholly-owned subsidiary² as a Japanese *kabushiki kaisha* (joint

¹ Misao Tatsuta, *Heisei ninen kaisei shōhō no kentō (kaisei shōhō no kaisetsu [1])* (An Examination of the 1990 Revision of the Commercial Code (Explication of the Revised Commercial Code, Part 1)), 1222 *Shōji hōmu* 7 (1990) ("Tatsuta"). When the Diet passed the 1974 amendment of the Commercial Code completing the regulatory foundation of a new auditing system, it also requested the Commercial Law Section (*Shōhō bukai*) of the Ministry of Justice's Legislation Review Commission (*Hōsei shingikai*) to review portions of the Commercial Code and submit recommendations for its overhaul. Consequently, the Commission set out in September of 1974 to write the *Kaisha hō* (Corporation Law) in colloquial *hiragana*. In 1981, midway through this initial review, the Code was amended to incorporate the results of the Commission's investigations up to that point. The Diet again requested that the Commission investigate the remaining areas and make recommendations. The 1990 revisions are the Commission's partial response to that charge. The scope of the review was expanded to include the *Yūgen kaisha hō* (Limited Liability Corporation Law), and other statutes not included in the Commercial Code. Several of the recommended revisions were toned down in the final draft sent to the Diet, however, and other areas which did not make it into the 1990 amendment will require revision in the future. Tatsuta at 7. See also Kikuji Sugawara, *Heisei ninen kaisei shōhō ni okeru jakkan no mondai no kōsatsu* (An Examination of Issues Concerning the 1990 Revision of the Commercial Code), 43 *Hōsō jihō* 319 (February, 1991).

² A viable alternative to the wholly-owned subsidiary is the joint venture with a Japanese partner. While the joint venture has its benefits, such as reduced initial capital outlays, most foreign investors

stock corporation) by the subscription method of incorporation. The discussion is organized in three sections: Part I, an overview of the Japanese *kabushiki kaisha* corporate form and the principal changes in the incorporation process wrought by the 1990 revision of the Commercial Code; Part II, a step-by-step examination of the incorporation process under the revised Code, noting the corresponding U.S. practice where appropriate;³ and Part III, a discussion of the 1990 amendment in light of the goals of the Legislation Review Commission. The Appendix provides as a reference the author's translation of Chapter IV (Stock Corporations) Section 1 (Formation) of the revised Japanese Commercial Code.

I. INTRODUCTION

The Kabushiki Kaisha

The current Japanese Commercial Code, which took effect on June 16, 1899,⁴ initially recognized four corporate forms: the general partnership corporation (*gōmei kaisha*),⁵ the limited partnership corporation (*gōshi kaisha*),⁶ the stock limited partnership corporation (*kabushiki gōshi kaisha*) and the joint stock corporation (*kabushiki kaisha*, or "K.K.").⁷ The 1938 revision of the Commercial Code added the limited liability corporation (*yūgen kaisha*) to this group, and in 1950 the stock limited partnership

prefer the wholly-owned subsidiary because it affords greater control over business operations while reducing exposure of proprietary technology. See Fred M. Greguras, *Selling Software to Japan: Choosing the Right Business Relationship*, in 14-1 East Asian Executive Reports 8 (International Executive Reports, Ltd., 1992) ("Greguras"). The procedures for establishment of a wholly-owned subsidiary are applicable, with some variations, to the establishment of a joint venture. See Bank of Tokyo, *Setting Up Enterprises in Japan* 121 (Japan External Trade Organization, 1984) ("JETRO") for a very general list of the main steps in the formation of a joint venture prior to the 1990 revision of the Commercial Code. The JETRO list is still useful if modified according to the statutory changes noted in this article (especially those concerning incorporation inspection and notifications). For a thorough treatment of the current notification requirements, refer to CCH International, *Japan Business Law Guide* ¶70-100, *et seq* (1991) ("CCH").

³ For comparison purposes, this paper cites the Model Business Corporation Act (as revised in 1984) ("MBCA"), and the Model Business Corporation Act Annotated (Prentice Hall Law & Business, 1992) ("MBCA Ann").

⁴ See generally Katsurō Ueyanagi, *Kaishahō no enkaku* (History of Corporation Law), in 1 Shinpan chūshaku kaishahō (Commentary on Corporation Law, New Edition) 9 (1985) ("Ueyanagi").

⁵ The *gōmei kaisha* is similar to the U.S. partnership, but has formal status as a legal entity and is formed through the execution of formal articles of incorporation and registration. See Dennis S. Karjala, *The Closely Held Enterprise Under Japanese Law*, vol. 7 no. 2 BU Intl L J 232-3 (1989) ("Karjala").

⁶ The *gōshi kaisha* is analogous to the U.S. limited partnership. Karjala at 233.

⁷ *Id.*

corporate form was abolished.⁸ Of the four corporate forms currently recognized by the Code, the *yūgen kaisha* and the *kabushiki kaisha* are of relevance to foreign investors wishing to establish business operations in Japan.⁹

Traditionally, however, foreign investors have ignored the *yūgen kaisha* corporate form, opting instead for the greater prestige of the *kabushiki kaisha*. The *yūgen kaisha* has been used primarily for small, closely-held Japanese companies having no need for extensive operational formalities¹⁰ and lacking sufficient capital to incorporate as a *kabushiki kaisha*.¹¹ As a consequence, the *yūgen kaisha* did not project the image of stability, substance and commitment necessary for a foreign enterprise to successfully conduct business with Japanese financial institutions and corporations.¹² Because the *kabushiki kaisha* remains the alternative that most foreign

⁸ For an English-language history of the Japanese Commercial Code, see Thomas L. Blakemore and Makoto Yazawa, *Japanese Commercial Code Revisions—Concerning Corporations*, 2 Am J Comp L 12 (1953).

⁹ Other alternatives for a foreign corporation initiating business operations in Japan are the liaison office and the branch office. These alternatives entail less time and expense to set up, but are incapable of supporting a substantial business presence. While the liaison office, for example, need not undergo commercial recording and its activities are not taxed, it is restricted to market research and information gathering and may not engage in commercial activity. See Fukui, *Commentaries on the New Foreign Exchange Control Law 52* (Taisei Publishing, 1980). The establishment of a branch office is less expensive and time-consuming than a *kabushiki kaisha* incorporation, but liability for the acts of the branch in Japan can extend to the foreign parent corporation: a branch doing business in Japan is deemed sufficient basis for the courts to establish jurisdiction over the foreign parent. Minji soshō hō (Code of Civil Procedure) art 4(3). For a Japanese judicial decision based on article 4(3), see *George v International Air Service Co.*, 10 Japanese Annual of International Law 160 (Tokyo District Court, 1965). Note, however, that statute expressly limits the liability of the shareholders of a *kabushiki kaisha* to the extent of their holdings. Comm Code art 200.

¹⁰ Dan Fenno Henderson, *Rethinking the Close Corporation in Japan* at 2, paper prepared for the International Academy of Commercial and Consumer Law, (Melbourne, August 23-27, 1988) ("Henderson, *Rethinking the Close Corporation in Japan*").

¹¹ The required capitalization of a *yūgen kaisha* prior to the 1990 revision was 100,000 yen (Article 9 of the Limited Liability Company Law (Yūgen kaisha hō; hereinafter, "LLCL"), 1938 Law Number 74); 350,000 was necessary for a *kabushiki kaisha* (Old Comm Code arts 165, 169. Pre-1990 Commercial Code Provisions will be cited herein as "Old Comm Code art"; Commercial Code provisions as amended in 1990 will be cited simply as "Comm Code art"). The LLCL was revised in concert with the Commercial Code in 1990; under the revised LLCL the minimum capitalization of a *yūgen kaisha* is now 3 million yen, and that of a *kabushiki kaisha* under the revised Commercial Code, 10 million yen (Comm Code art 168-4).

¹² See Greguras at 8. The 1990 LLCL capitalization requirement increase, however, may well enhance the stature of the *yūgen kaisha* in the eyes of potential creditors and make it an attractive alternative for the increasing number of smaller foreign corporations entering the Japanese market. The intended result of the *kabushiki kaisha* and *yūgen kaisha* capitalization increases is to move these corporate forms out of the reach of small enterprises with a high risk of failure, and thus protect creditors. See Tatsuta at 8.

investors resort to when establishing a subsidiary in Japan, this comment examines the incorporation procedures for a *kabushiki kaisha*.¹³

OVERVIEW OF THE 1990 CHANGES¹⁴

The 1990 revision simplified the procedures for incorporating a subsidiary of a domestic corporation. The old statute required seven promoters, whereas a single promoter can now incorporate a company.¹⁵ Promotive¹⁶ incorporations no longer need to be reviewed by a court-appointed inspector,¹⁷ a time-consuming and expensive process;¹⁸ now the directors and auditors of a newly-formed corporation may themselves review promotive incorporation transactions.¹⁹ The pre-1990 Code only permitted subscription incorporations²⁰ this relaxed inspection requirement.²¹ This

¹³ Like the U.S. corporation, the Japanese *kabushiki kaisha* has perpetual life unless otherwise provided in the articles of incorporation (Comm Code arts 404, 94) and limits shareholder liability to investment capital. Comm Code art 200. See Griffith Way, Rosser H. Brockman, and Otsuka Masatami, *Business Operations in Japan*, in Tax Management, Foreign Income Portfolios 51-7th, A-5 (Tax Management, Inc. 1984) ("Way, et al").

¹⁴ See generally Yoshio Ōtani, *Kaisei shōhō no gaiyō* (Summary of the Revised Commercial Code), in 120 Bessatsu shōji hōmu 6 ("Ōtani, Gaiyō"); see also Yoshio Ōtani, *Shōhō to sono ichibu o kaisei suru hōritsu no kaisetsu* (Explanation of the Law Partially Amending the Commercial Code), 1222 Shōji hōmu 2 (1990). Mr. Ōtani is an official of the Civil Affairs Bureau of the Ministry of Justice and an authority on the Commercial Code. The two articles mentioned give an overview of the 1990 revision. For more information regarding how the law will operate under certain specific circumstances, see Yōhei Muramatsu (interlocutor) and Yoshio Ōtani, *Kaisei shōhō shitsumu ōtō* (Questions and Answers on the Revised Commercial Code), 120 Bessatsu shōji hōmu 26. See also Muramatsu's article *Saitai shihonkin seido e no taiō* (Coping With the Minimum Capitalization System), 120 Bessatsu shōji hōmu 57, for a discussion of the interim measures governing the transition of existing *kabushiki kaisha* in compliance with the new 10 million yen minimum capitalization requirement. Also briefly treating this and other issues directly relating to formation is M. Kitazawa, *Kaisei shōhō no kaisetsu (2): kaisha no setsuritsu* (Explanation of the Revised Commercial Code (2): Corporate Formation), 1222 Shōji hōmu 12 (1990).

¹⁵ Comm Code art 165.

¹⁶ *Hokki setsuritsu*. This is a statutory incorporation procedure whereby the promoters subscribe for all of the shares to be issued upon incorporation. There is no U.S. analog for the promoters-only method of incorporation.

¹⁷ Comm Code arts 173-2, 184.

¹⁸ Old Comm Code art 173(1). This procedure requires that an attorney appointed by the court ascertain whether capital has been fully paid in and whether property contributed in kind was delivered. The inspection procedure was routinely circumvented by Japanese domestic investors by including a token "outside subscriber" in the group of promoters. Thus the incorporation would qualify as a subscription incorporation under article 175, which did not require such inspection.

¹⁹ Comm Code art 173-2. Although the 1990 revisions relaxed the inspection requirements for promotive incorporations, they stiffened the regulations governing the paying-in of capital. Payments for shares must now be entrusted to a bank or trust company, to enhance creditor protection. Comm Code art 170(2).

²⁰ *Boshū setsuritsu*. This is a statutory incorporation procedure whereby shares are offered for subscription by outside non-promoters as well as promoters.

change is of little practical consequence to the foreign investor for whom logistical concerns mandate a subscripive incorporation procedure anyway. The reduction of the required number of promoters from seven to one means that the foreign investor can now incorporate by the subscripive method with only two persons: the investor/subscriber plus a Japanese attorney engaged as a promoter to prosecute the incorporation.

The 1990 revision also implemented a minimum capitalization system,²² making it more difficult for undercapitalized corporations to incorporate as *kabushiki kaisha*. The Code now requires ten million yen in capital to incorporate a *kabushiki kaisha*.²³ The increase may prompt many investors to seriously consider incorporation as a *yūgen kaisha*. The 1990 revision purposely precludes even that alternative, however, for the many small enterprises unable to meet the new three million yen capitalization requirement for *yūgen kaisha*.

The 1990 revision considerably reduces the time and expense of transferring certain assets to a new corporation. The pre-1990 Code required that a court-appointed inspector review any transaction involving in-kind contributions and post-formation acquisitions.²⁴ The amended Code exempts transactions involving real estate, shares or other property up to five million yen in value from such inspection, permitting the directors and auditors of the new corporation to review the transactions themselves.²⁵

Finally, the revised Code exempts two incorporation expenses from review by a court-appointed inspector even if the corporation is to bear them: notary fees for attestation of the articles of incorporation, and bank or trust company fees for handling share payments.²⁶

²¹ Old Comm Code arts 170, 173.

²² *Saitei shihonkin seido*.

²³ Comm Code art 168-4. The older version of the Code did not specifically provide a minimum capitalization requirement; however, the seven stipulated promoters (Old Comm Code art 165) were each required to purchase at least one share of stock. Old Comm Code art 169. The minimum issuing price of stock was set by statute as 50,000 yen per share. Old Comm Code arts 167(2), 168-3. The result was an implicit minimum capitalization requirement of 350,000 yen.

²⁴ Old Comm Code arts 168(5, 6), 173. The statute required that a court-appointed inspector determine whether the value of the property contributed matched its value as stipulated in the articles of incorporation.

²⁵ Comm Code art 173(2), (3). The exempted transactions are described in detail in part II, section 5, *infra*.

²⁶ Comm Code art 168(1) item 8 (*See Appendix*).

II. THE INCORPORATION PROCESS

A Japanese *kabushiki kaisha* comes into existence upon registration²⁷ of its name, business objectives, and other specified corporate characteristics.²⁸ While it is true that a U.S. corporation also comes into existence upon filing its articles of incorporation,²⁹ the Japanese incorporation process is far more complex than its U.S. counterpart and differs significantly on several points. The following discussion examines the Japanese process in detail and notes differences from U.S. procedures by comparison with the Model Business Corporation Act.

Of the two methods³⁰ for creating a stock corporation in Japan, promotive (or "promoter-only") incorporation³¹ and subscripitive incorporation,³² the subscripitive method continues to be the most feasible for the foreign investor.³³ This comment therefore describes the subscripitive incorporation method.³⁴

²⁷ The local Legal Affairs Bureau (*Hōmukyoku*), a branch of the Ministry of Justice (*Hōmusho*), registers incorporations.

²⁸ The items required to be registered are listed in Comm Code art 188.

²⁹ MBCA §2.03. The articles of incorporation are filed with the Secretary of State.

³⁰ Defined in notes 16 and 20.

³¹ Comm Code art 170(1).

³² Comm Code art 174. *See also* JETRO at 123 (cited in note 2).

³³ The reasons for this are discussed in greater detail in part II section 6, "Attestation of Articles of Incorporation," *infra*.

³⁴ The procedures for promotive and subscripitive incorporation methods are virtually the same, with the addition of provisions governing share subscription offers in the latter case.

1. The Promoter³⁵

General Provisions

The revised Code provides simply that one or more promoters³⁶ must draw up the articles of incorporation.³⁷ Each promoter must also subscribe for at least one share in the new corporation³⁸ and sign the articles of incorporation.³⁹ A juridical person (corporation) may be a promoter.⁴⁰

³⁵ *Hokkinin*. The Japanese term encompasses the equivalent of the U.S. "incorporator" who performs the incorporation and signs the articles of incorporation, as well as some aspects of the U.S. "promoter" who handles pre-incorporation affairs but does not sign the articles of incorporation. The rights and liabilities of both the promoter and the incorporator are stipulated in U.S. corporate law. The Japanese Commercial Code, however, contains no exact equivalent for the U.S. "promoter." As a consequence, one who makes preparations for an incorporation but does not sign the articles of incorporation is not covered under Japanese corporation law. See Dan Fenno Henderson, *Threshold Advice to American Incorporations in Japan*, in John Owen Haley, ed. *Current Legal Aspects of Doing Business in Japan and East Asia* 76, 79-80 (American Bar Association, 1978) ("Henderson"). A problem in translation also arises in this connection. Lacking a precise conceptual U.S. equivalent for the Japanese term *hokkinin*, commentators have translated the term both as "incorporator" (e.g., Henderson) and "promoter" (e.g., the Eibun Hōreisha translation of the Japanese Commercial Code, and Haruhiro Nakatsu, *Stock Corporation Law*, 2 Japan Bus L J 355 (1981)). This comment employs the term "promoter" as the equivalent of *hokkinin*, in order to maintain consistency with existing translations of the Japanese Corporation Law. The term "investor" denotes the foreign parent company initiating the incorporation.

³⁶ The Japanese term *hokkinin* denotes "one or more promoters"; hereinafter "promoters" will therefore be used to denote "one or more promoters." Nearly all states in the U.S. require only one incorporator. See 1 MBCA Ann 100 (Supp 1991). Utah, requiring three incorporators, and Arizona, requiring two, are the only exceptions.

³⁷ Comm Code art 165. Because the Commercial Code provides in article 255 that a corporation shall have at least three directors and, in articles 280 and 254, at least one statutory auditor, four persons are still necessary to bring a new stock corporation into existence. Daini Tōkyō Bengoshikai, Kaishahō Kenkyūkai (Second Tokyo Bar Association, Corporation Law Research Group), *Kaisei shōhō no jitsumu to taisaku* (Practice and Procedure Under the Revised Commercial Code) 87 (Daichi Hōki Shuppan Kabushiki Kaisha, 1991) ("*Kaisei shōhō no jitsumu to taisaku*").

³⁸ Comm Code art 169; *Kakuchika v Kasahara Tetsudō*, 3405 Shinbun 14, (Gr Ct Cass (Great Court of Cassation), April 19, 1932). There is no U.S. requirement that a promoter subscribe for shares; the principal qualification pertains to age. 1 MBCA 102 (1991 Supp).

³⁹ Comm Code art 166. See *Yamada v Furuhashi*, 11 Taishin'in minji hanrei shū ("Minshū") 1257 (Gr Ct Cass, June 29, 1932), a court decision which defines a promoter as a person who has signed the articles of incorporation.

⁴⁰ *Igō Ginko K.K. v Matchii*, 19 Taishin'in minji hanketsu roku ("Minroku") 27, (Gr Ct Cass, February 5, 1913). *Kaisei shōhō no jitsumu to taisaku* states that where a promoter is a corporation, the notary attesting the articles of incorporation must ensure the business of the subsidiary being incorporated is within the scope of the promoter's business purposes as provided in its articles of incorporation. *Kaisei shōhō no jitsumu to taisaku* at 87. Practitioners note that this check is not required unless the promoter is a corporation. In U.S. law, a "person" can serve as an incorporator. MBCA §2.01. A "person" can be an "entity" (MBCA §1.40), defined as a "corporation or foreign corporation." *Id.* There is no equivalent requirement in U.S. law, however, regarding business purposes.

A foreign national may serve as a promoter, but in practice the foreign investor usually retains a Japanese attorney to act as promoter in his or her stead. This is more convenient because the promoter must be present for consultations with various Bank of Japan and ministry officials during the incorporation process, sign the articles of incorporation before a notary,⁴¹ and obtain the certification of payment for shares from the financial institution handling the payments. Moreover, all documentation (government forms, notices, and guidelines) is written in Japanese, and consultations with officials are held in Japanese. A foreign promoter who is not proficient in Japanese requires extensive translation and interpretation, delaying the incorporation and increasing its expense.

To expedite the process, therefore, a Japanese national acting as promoter⁴² subscribes to one share, and the foreign investor subscribes to the remainder of the shares as an outside subscriber. The Japanese promoter transfers his or her single share to the foreign investor immediately upon incorporation.⁴³ This procedure spares the foreign investor the time and expense of a four- to six-week stay in Japan, but the foreign investor is thus precluded from taking advantage of the more efficient promotive incorporation procedure available under the revised Code.

*Promoter Liability*⁴⁴

The 1990 Code revisions left intact provisions which require the promoters and directors of the new corporation to purchase any shares remaining unsubscribed when the corporation comes into existence,⁴⁵ and which make the promoters and directors liable for unreceived payments for shares.⁴⁶ The 1990 amendment added provisions making promoters and directors jointly and severally liable to the corporation for undelivered contributions in kind⁴⁷ and for any shortfall to the corporation in the event the

⁴¹ A foreign promoter's signature is acceptable if supported by a notary public's affidavit certifying the validity of the signature. See JETRO at 126 (cited in note 2).

⁴² Under the old article 165, seven promoters were required. These were often recruited from among the staff of the law firm, with the result that the attorney responsible for the project, associates and members of the paralegal staff often served as temporary promoters.

⁴³ Way, et al, at A-5 (cited in note 13).

⁴⁴ Under U.S. law, incorporators do little more than sign the articles of incorporation and have no statutory liability. See 1 MBCA Ann 96. On the other hand, if the incorporator promotes the corporation, the incorporator may be liable for pre-incorporation contracts and secret profits. MBCA §2.04.

⁴⁵ Comm Code art 192(1).

⁴⁶ Comm Code art 192(2).

⁴⁷ *Id.*

value of any contributed property is lower than the value stipulated for it in the articles of incorporation.⁴⁸

The 1990 revision did not change Code provisions governing promoter liability. Promoters are jointly and severally liable to the corporation for 1) damages accruing from their negligence in connection with the incorporation;⁴⁹ 2) their promotive acts⁵⁰ in the event the corporation does not come into existence;⁵¹ and 3) damages accruing to third parties as a consequence of bad faith or gross negligence.⁵² Promoters may also be held jointly and severally liable with directors and auditors as specified in other provisions of the Commercial Code.⁵³ Finally, any non-promoter who permits the use of his or her name on documents in connection with the incorporation⁵⁴ incurs the same liability as a promoter.⁵⁵

2. Preparatory Steps

Once the foreign investor has engaged a Japanese attorney to act as promoter, the Second Tokyo Bar Association recommends that the promoter take the following steps prior to formally initiating the incorporation process:⁵⁶

- 1) Ascertain whether similar trademarks exist in the Trademark Registry at the Legal Affairs Bureau branch office in the ward where the head office of the new company is to be located;⁵⁷

⁴⁸ Comm Code art 192-2. The value of contributions in kind is determined at the time the corporation comes into existence. *Id.*

⁴⁹ Comm Code art 193(1).

⁵⁰ Legal obligations under agreements executed in connection with the incorporation.

⁵¹ Comm Code art 194(1).

⁵² Comm Code art 193(2).

⁵³ Comm Code art 195.

⁵⁴ Share application forms, advertisements soliciting share subscribers, a prospectus, etc.

⁵⁵ Comm Code art 198. Promoter liability extends to the attorney acting as a promoter for purposes of the incorporation as well, until the corporation comes into existence. The risk is minimal in most cases where no property is transferred to the new subsidiary. In the event of a property transfer, liability is customarily limited by a waiver of liability signed by an authorized official of the foreign parent corporation.

⁵⁶ *Kaisei shōhō no jitsumu to taisaku* at 87 (cited in note 37). A promoter meeting formally begins the incorporation process.

⁵⁷ The Bureau of Legal Affairs may refuse to register a trade name that too closely resembles a trade name already registered by another company in the same line of business in the relevant jurisdiction. Comm Code art 19. If the investor seeks to register a trade name in Tokyo, the trade name must be cleared in each of the Tokyo wards (*ku*) in which the corporation seeks registration.

- 2) Obtain a Legal Affairs Bureau determination that the intended business purposes of the subsidiary comply with Code requirements and are eligible for registration;
- 3) Determine what permits or licenses are necessary by checking governing regulations and inquiring at the appropriate agencies;⁵⁸
- 4) Select a bank to handle share payments and meet with its officials;
- 5) Obtain the promoter's seal certificate;⁵⁹ and
- 6) Have a corporate seal⁶⁰ made.

3. Promoter Meeting Minutes⁶¹

Once the local Legal Affairs Bureau branch office has determined that the business purposes of the corporation comply with Code requirements, the Promoter Meeting Minutes must be prepared whether there is one promoter⁶² or several, and whether the meeting is physically held or not.⁶³ The minutes are produced in a standardized format enumerating the following:⁶⁴

- 1) Name and business purposes of the new corporation,
- 2) Total number of shares to be issued by the corporation and the number of those which are to be issued at the time of incorporation,
- 3) Price of one par value share,
- 4) Number of shares to be subscribed for by the promoter,

⁵⁸ For example, licenses are required for the transfer of industrial rights or technical services from the foreign parent to the Japanese subsidiary. pursuant to the Foreign Exchange Control Law. Other licenses or approvals may be required by the administrative regulations governing the particular industry concerned.

⁵⁹ *Inkan shōmeisho*. In the unlikely event that the promoter is not a Japanese national, a certificate of signature issued by a notary public in the promoter's home country will suffice.

⁶⁰ *Daihyō shain*.

⁶¹ Prior to the 1990 revisions, some authorities advised that the promoters also execute a contract before drafting the articles of incorporation. The contract was to stipulate the items to be included in the articles of incorporation and other details of the incorporation process. See, for example, the discussion in JETRO at 127. However, the availability of one-promoter incorporation under the revised Code has obviated the need for such a contract. Promoters are deemed at this stage of the incorporation process to constitute a civil partnership (*hokkinin kumiai*) governed by the provisions of the Civil Code. See *Nakayama v Kondō*, 24 Minroku 1480, (Gr Ct Cass, 3rd Civil Dept., July 10, 1918).

⁶² Virtually all incorporations since the 1990 Code revision have been single-promoter.

⁶³ The Minutes, while not stipulated by statute, record information required by the bank handling share payments. The formal practice is to submit the Minutes to the bank in order to obtain the bank's certification that all subscriptions are paid in. (*Kaisei shōhō no jitsumu to taisaku* at 87. There is no analog in U.S. law for this requirement.) In practice, however, the bank or trust company may not observe this formality.

⁶⁴ A sample Minutes of the Promoter Meeting is published in *Kaisei shōhō no jitsumu to taisaku* at 91.

- 5) Number of promoters,
- 6) Promoter's share of the incorporation costs,⁶⁵
- 7) Details regarding contributions in kind,
- 8) Name of the promoter's representative, if any, and
- 9) Name and address of the financial institution designated to handle the payments for shares.

4. Provisional Registration

Investors often wish to register a trade name provisionally pending the completion of the incorporation process.⁶⁶ The application must be submitted to the Legal Affairs Bureau in the jurisdiction where the corporation's head office is to be located and must contain the following items: trade name, business purposes, address of the head office, names and addresses of all promoters, and the anticipated date of incorporation.⁶⁷ The fee for provisional registration of a trade name is 30,000 yen.⁶⁸

5. Articles of Incorporation⁶⁹

At this point in the incorporation process, the articles of incorporation can be drafted. The Commercial Code requires that the promoter draw up and sign⁷⁰ the articles of incorporation.⁷¹ Items included in the articles of incorporation fall into three categories: mandatory items, whose inclusion is required by statute; special items, which are legally effective only if included; and optional items, which may be given effect either by inclusion in the

⁶⁵ The pre-1990 Code required that incorporation expenses that the corporation would bear after establishment be included in the articles of incorporation and subjected to review by a court-appointed inspector. Under the revised Code, the allocation of incorporation costs may instead be stipulated in the Minutes of the Promoter Meeting, thus avoiding the inspection requirement. See *Kaisei shōhō no jitsumu to taisaku* at 88; see also Comm Code art 168(8).

⁶⁶ *Shōgyō tōki hō* (Commercial Registration Law), Law No. 125 of 1963, article 35-2. Corporations whose business derives largely from the use of a trade name usually pre-register their trade names under this statute. The most salient examples in Japan would be those in the fashion industry. In U.S. law, the MBCA provides for the reservation of a corporate name. See MBCA §4.02.

⁶⁷ Commercial Registration Law art 17.

⁶⁸ *Tōroku menkyo zei hō* (Registration Tax Law), Law No. 35 of 1967, as amended, Table 1, item 19(*ka*).

⁶⁹ *Teikan*.

⁷⁰ In the usual case where the promoter is a Japanese national, "signing" entails recording the promoter's name and affixing the promoter's seal. See JETRO at 128, and the 1992 *Mōhan Roppō* (The Complete Model Laws) 871, article 166 and notes.

⁷¹ Comm Code art 166.

articles of incorporation or via other means. Each of these will be treated separately below.

Mandatory Items

The articles of incorporation must include the following items:⁷²

- 1) Trade name. The trade name must include the Japanese-language style, *kabushiki kaisha* (rendered variously in English as "K.K.," "Co., Ltd.," or simply, "Ltd.").⁷³ The trade name may include foreign script, but any portion of a trade name rendered in non-Japanese script may not be registered.⁷⁴
- 2) Business purposes.⁷⁵ The business purposes listed should enumerate specifically the intended commercial activities of the corporation. Drafters usually append a clause to the enumeration stating that the corporation's business purposes include "any and all business activities related or ancillary to the foregoing items."⁷⁶ While the courts will not necessarily hold the corporation strictly to its stated purposes,⁷⁷ the Legal Affairs Bureau may reject the articles of incorporation if the business purposes are not enumerated with sufficient specificity.

⁷² Comm Code art 166(1). The requirements of most states in the U.S. for articles of incorporation are minimal. The MBCA, for example, stipulates only four mandatory items: the corporate name, number of shares authorized to issue, address of the initial registered office and the name of the initial registered agent, and the name and address of each incorporator. MBCA §2.02(a).

⁷³ Comm Code art 17. Under the MBCA §4.01, a corporate name must be distinguishable in the records of the Secretary of State. No local (county, etc.) filing is required.

⁷⁴ JETRO at 129.

⁷⁵ The MBCA §3.01 provides that every corporation has the purpose of engaging in any lawful business unless limited in the articles of incorporation.

⁷⁶ Way, et al. note that "Japanese corporations have broad power to perform acts incidental to their stated business purposes, and the courts have held that activities of a corporation which are not actively harmful to its stated business purposes will not be considered *ultra vires* acts. On the other hand, the corporate registry offices have generally refused to allow the registration of business purposes which they consider too vague or general." Way, et al. at A-5 (cited in note 13). For a thorough discussion of the *ultra vires* doctrine in Japanese law, see Takeuchi, *Kaishahō ni okeru ultra vires no gensoku wa dono yō ni shite haiki subeki ka* (How Should We Abolish the *Ultra Vires* Doctrine in Corporation Law?), 1 *kaishahō no riron* (Theories of Corporation Law) 135 (1984), translation by Dan Fenno Henderson in 2 *Law In Japan* 140 (1968).

⁷⁷ For a list of 27 cases finding various transactions to be within the corporation's purposes, see Henderson translation of Takeuchi cited in note 76. A more recent case in which a political contribution made from corporate funds by two representative directors of the corporation was deemed to be within the corporation's business purposes is *Arita v Kojima, et al*, 24 *Minshū* 625 (S Ct, G B (Grand Bench), June 24, 1970).

- 3) Location of the head office, including the city ward.
- 4) Method of giving public notice. Notice must be published either in the official gazette⁷⁸ or in a daily newspaper.⁷⁹
- 5) Total number of shares authorized to be issued by the corporation (authorized capital). The total number of shares authorized to be issued may not exceed four times the number of shares issued at the time of incorporation.⁸⁰
- 6) Total number of shares to be issued at the time of incorporation, identified as par value and non-par value. Shares may be par value, non-par value, or both.⁸¹
- 7) Price of one par value share, if par value shares are to be issued. The value of one par value share issued at the time of incorporation must be at least 50,000 yen.⁸² The issuing price of par value shares may not be less than par value,⁸³ and all par value shares must be of equal value.⁸⁴
- 8) Name and address of each promoter.⁸⁵

Special Items

The following items have legal effect only if included in the articles of incorporation.⁸⁶ A court-appointed inspector must review any transactions enumerated in Article 168-1 (including items 1-5, *infra*) that are provided in

⁷⁸ Kanpō.

⁷⁹ Comm Code art 166(4). There is no analog in U.S. law for this requirement. See MBCA §1.41 for rules governing notice.

⁸⁰ Comm Code arts 166(3), 347. A detailed discussion of the current rules governing shares (Comm Code arts 199-230) is beyond the scope of this paper. Good discussions can be found in the following Japanese publications: Tsugi Ibayashi, *Shōhō kaisei no subete: kinkyū kaisetsu (kaiteihan)* (The Complete Revisions of the Commercial Code: Initial Interpretation), (Zeimu keiri kyōkai (Association of Tax Accountants), revised ed, November 15, 1990)); *Kaisei shōhō no jitsumu to taisaku* (cited in note 37); and Ōtani, *Gaiyō*, cited in note 14.

⁸¹ Comm Code art 199. At least one quarter of the total authorized shares must be issued upon incorporation.

⁸² Comm Code art 166(2). Similarly, the issuing price of non-par value shares issued at the time of incorporation must be at least 50,000 yen. Comm Code art 168-3.

⁸³ Comm Code art 202(2).

⁸⁴ Comm Code art 202(1).

⁸⁵ This information need not be included in the main body of the articles of incorporation; the promoter's address appended to his or her signature at the end of the articles suffices. *Yoshida v Hashimoto*, 12 Minshū 1091, (Gr Ct Cass, May 9, 1933).

⁸⁶ Comm Code art 168(1).

the articles of incorporation, unless specifically exempted by the Code.⁸⁷ Items 6-11, *infra*, do not require review by a court-appointed inspector.

- 1) Name of any promoter to receive special benefits from the corporation and a description of the benefits to be received (e.g., remuneration).
- 2) Name of any promoter making contributions in kind.⁸⁸ This provision must also include a description of the contributed property, including its value, and the number and classes of shares allotted in exchange, identified as par value or non-par value.⁸⁹ After the 1990 revisions, review by a court-appointed inspector is no longer required for contributions in kind that meet the following requirements:
 - a) The value of property contributed does not exceed one fifth of the capital of the corporation or five million yen; or
 - b) The property consists of publicly-traded securities whose value as stipulated in the articles of incorporation does not exceed its price on the exchange.⁹⁰

Contributed real estate requires appraisal by a real estate appraiser and an attorney's affidavit certifying that the property and its value correspond to the description in the articles of incorporation.⁹¹ The directors and auditors of the newly-formed corporation will in turn examine the attorney's affidavit when they review the incorporation particulars at the Founding General Meeting.⁹²
- 3) A description of any property to be purchased within two years after incorporation, its value, and the name of the transferor.⁹³ The

⁸⁷ Comm Code art 173.

⁸⁸ Property eligible for in-kind contribution includes movable and real property, securities, industrial property rights, mining concessions, goodwill, know-how, and other items that can be shown in the balance sheet of a company. Labor or credit is not eligible, and a company name may be transferred only with the transfer of the underlying business or upon its closure. See JETRO at 131.

⁸⁹ Contributions in kind may be made by promoters only. Comm Code art 168(2). A contribution in kind need not be recorded in the share subscription application to be effective. 8-11 Minshū 2098 (S Ct, November 26, 1954).

⁹⁰ Comm Code arts 168(5), 173(2), 181(2). A foreign parent corporation can transfer equipment or property whose value exceeds these limitations by means of a license agreement executed with the subsidiary in Japan. Such agreement is subject to notification of the Fair Trade Commission. See "Notifications," *infra*.

⁹¹ Comm Code art 173(3).

⁹² Comm Code art 184(1).

⁹³ Comm Code art 246(2-3).

inspection requirements for contributions in kind have been extended to post-formation purchases of assets under the revised formation rules.⁹⁴ Thus, review by a court-appointed inspector is no longer required for property authorized to be acquired subsequent to formation, provided the transaction meets the requirements listed in paragraph 2, *supra*, for contributions in kind.⁹⁵

- 4) Amount of remuneration, if any, to be received by the promoter.
- 5) Incorporation expenses to be borne by the corporation, with the exception of the notary's fees for attestation of the articles of incorporation (currently established by statute as 40,000 yen)⁹⁶ and the bank's or trust company's fees for the handling of share payments.⁹⁷ The 1990 revisions permit these items to be charged to the corporation without so providing in the articles of incorporation.⁹⁸

The following items do not require review by a court-appointed inspector:

- 6) Description of each class of shares to be issued and the number of each.⁹⁹
- 7) Any restrictions on the transfer of shares. Shares may be transferred freely unless restricted by provision in the articles of incorporation.¹⁰⁰

⁹⁴ *Id.*

⁹⁵ Comm Code art 246(2-3). See also Comm Code arts 168(6), 173(2-3), 181(2).

⁹⁶ *Kōshōnin tesūryō kisoku* (Notary Fee Regulations), article 21-2.

⁹⁷ However, as in the past, the scrivener's fee for the registration application and the attorney's and real estate appraiser's fees when required for an in-kind contribution of real estate qualifying under Comm Code art 173(3) must be noted in the articles of incorporation if they are to be borne by the corporation. *Kaisei shōhō no jitsumu to taisaku* at 14 (cited in note 37). The Registration and License Tax levied at the time of registration is not deemed to be an incorporation expense and thus may be borne by the corporation without a provision to that effect in the articles of incorporation. Expenses for setting up business operations, such as delivery or rental fees for office or factory space, or expenses incurred after formation such as for the installation of equipment or importation of raw materials, are not deemed incorporation expenses and are not automatically borne by the corporation unless the transaction is to be treated as a transfer of assets and the requirements of articles 168(1, 6) and 173 have been met.

⁹⁸ The rationale for this is apparently that these expenses are indispensable for incorporation, and payment of the amounts concerned will not significantly reduce the new corporation's capital. *Kaisei shōhō no jitsumu to taisaku* at 13.

⁹⁹ Comm Code art 222(1). In the event preferred stock is to be issued, it will suffice to stipulate the maximum amount to be distributed in respect of preferred shares. Comm Code art 222(2).

¹⁰⁰ Comm Code art 204(1). Japanese corporations invariably include such provisions.

- 8) Appointment of a share transfer agent and registrar, in the event shares are to be transferred.¹⁰¹
- 9) Alternative method for adopting ordinary shareholders' meeting resolutions. Unless otherwise stipulated in the articles of incorporation or the Commercial Code, a shareholders' meeting resolution is adopted by a majority vote of a quorum comprising more than half the total number of outstanding shares.¹⁰²
- 10) Shorter period of notice for shareholders' meetings. The required period, unless provided otherwise in the articles of incorporation, is one week prior to the date of the meeting.¹⁰³
- 11) Stricter method for adopting board of directors meeting resolutions. Unless stricter requirements are provided in the articles of incorporation, a board of directors meeting resolution is adopted by a majority vote of a quorum comprising more than half the directors. The requirements may not be reduced.¹⁰⁴

Optional Items

The articles of incorporation may, but need not, contain other provisions such as the term of existence of the company, the time and location of shareholder meetings, members' qualifications, the tenure and authority of directors, accounting periods, and rules on dividends and reserves.¹⁰⁵ The foreign investor contemplating including such provisions must bear in mind, however, that amending the articles of incorporation requires a special resolution of a general shareholders' meeting (two-thirds vote of a quorum comprising a majority of all outstanding shares).¹⁰⁶ The foreign investor can avoid this inflexibility in some cases by writing the optional items into the

¹⁰¹ Comm Code art 206(2-3).

¹⁰² Comm Code art 239(1).

¹⁰³ Comm Code art 259(2).

¹⁰⁴ Comm Code art 260-2(1).

¹⁰⁵ JETRO at 131 (cited in note 2).

¹⁰⁶ Comm Code art 343. Such a special resolution is commonly referred to as an "Article 343 resolution." Many Code provisions pertaining to shareholders' and directors' meetings and corporate management procedures apply unless altered in the articles of incorporation. Way, et al, at A-6 (cited in note 13). Modifying corporate procedures is thus somewhat problematic for a subsidiary in Japan. A U.S. corporation would ordinarily include these provisions in its bylaws, easily amended by either the directors or the shareholders. MBCA §10.20. See Henderson at 77 (cited in note 35). The bylaws of a U.S. corporation may include "any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation." MBCA §2.06. Bylaws, required under U.S. law, are not required in Japan.

Rules for the Board of Directors (*Torishimariyaku kisoku*) and the Regulations for Handling Shares (*Kabushiki toriazukai kisoku*).¹⁰⁷

6. *Attestation of Articles of Incorporation*

In contrast to the U.S. incorporation process, the notary's attestation of the articles of incorporation is a critical step in the Japanese incorporation process. The articles of incorporation must be attested by a notary in order to have legal effect.¹⁰⁸ The promoter is required to present his or her seal certificate¹⁰⁹ to the notary and sign (i.e., affix the seal¹¹⁰ to) the articles in the presence of the notary, who inspects them and attests to their compliance with the Commercial Code.¹¹¹ The Legal Affairs Bureau will not accept the articles of incorporation without a notary's attestation.¹¹²

Once the articles of incorporation have been attested, the promoter must notify the pertinent government agencies of certain transactions contemplated as part of the incorporation.

7. *Notifications*

The notification requirements derive from statutory and administrative law outside the Commercial Code and were unaffected by the Code's revision. The general scope of notification requirements under the Foreign Exchange and Foreign Trade Control Law, the Anti-Monopoly Law, and the Securities Exchange Law is as follows:

¹⁰⁷ Henderson at 77.

¹⁰⁸ Comm Code art 167. See the 1992 Mohan Roppō, article 166, for cases determining the legal effects of, and procedures for, "signing" the articles of incorporation.

¹⁰⁹ *Inkan shōmeisho*, or *inkan tōroku shōmeisho*.

¹¹⁰ *Inkan*.

¹¹¹ JETRO at 126.

¹¹² That the notary, an important legal officer in Japan, is usually a retired judge or retired public prosecutor, is evidence of the seriousness with which the attestation of articles of incorporation is taken. It is important to point out, however, that the notary does not *approve* the articles of incorporation, but attests to their compliance with the Commercial Code. Under U.S. law, the articles of incorporation need not be notarized. MBCA §1.20(g).

*Foreign Exchange and Foreign Trade Control Law (FECL)*¹¹³

The FECL was amended in 1991, effective January 1992, as a result of foreign pressure on the Japanese government (primarily in General Agreement on Tariffs and Trade (GATT) negotiations and through the Strategic Impediments Initiative (SII)) to make its regulatory regime more hospitable to foreign investment.¹¹⁴ Until amended in 1991, foreign investors had to notify the Bank of Japan of *any* agreement¹¹⁵ involving a "direct inward investment"¹¹⁶ or a technology transfer¹¹⁷ within three months prior to its execution. The Bank of Japan would then review the transaction informally and advise the notifying party whether the transaction met the competent ministry's guidelines.¹¹⁸ This prior-notification and review system—still applicable to certain transactions—permitted the Japanese government to exercise considerable *de facto* control over transactions

¹¹³ Gaikoku kawase oyobi gaikoku bōeki kanri hō, Law No. 228 of 1949, as amended in 1991 (hereinafter "FECL" refers to the 1991 amended version).

¹¹⁴ For a thorough English-language discussion of notification requirements under the revised FECL, see CCH at ¶70-100, *et seq.* and ¶75-000, *et seq.* (cited in note 2). For a treatment of the old notification requirements existing prior to the 1991 amendment of the FECL, including notification forms, see JETRO at 95-114.

¹¹⁵ FECL arts 26(3) (for direct inward investments) and 29 (for technology transfers) stipulate that the notification must be submitted to the Minister of Finance and the Minister having jurisdiction over the relevant industry; however, article 69(1) of the FECL and the Cabinet Order Relating to Direct Inward Investments, etc. ("Investment Cabinet Order"), Cabinet Order No. 261 of October 11, 1980, as amended, provide that the handling of such notifications may be delegated to the Bank of Japan. Investment Cabinet Order No. 261 sets forth provisions governing investment in Japan by foreign entities. There is an English translation of Cabinet Orders Nos. 260 and 261 of October 11, 1980 in 1-2 *The Japan Business Law Journal* 105 (1981) (the translation does not include the 1991 amendment).

¹¹⁶ The rubric "direct inward investments" subsumes foreign acquisitions of shares in Japanese companies, including capital investments in connection with the incorporation of a subsidiary. FECL art 26(2).

¹¹⁷ This statutory category includes agreements for the transfer or license of industrial property rights from a foreign to a Japanese party. FECL arts 29 and 30.

¹¹⁸ Advice by the Bank of Japan takes the form of "administrative guidance" (*gyōsei shido*) proffered in informal discussion with the party. Administrative guidance has no binding legal effect. The Bank of Japan and government ministries which employ administrative guidance have recourse to compel compliance, however: if a foreign investor chooses to ignore the Bank of Japan's advice (regarding an incorporation transaction, for example) the Bank may refuse to stamp the documents as received until the recommended changes in the transaction have been made. The stamped documents are required in order to register the new company at the Legal Affairs Bureau. CCH at ¶70-170. For English-language discussions of administrative guidance, see Paul C. Davis, *Administrative Guidance in Japan*, Sophia University Socio-Economic Institute Bulletin No. 41 (Sophia University, 1972); Yoriaki Narita, *Administrative Guidance in the Role of Law* (translation), 7 *Law in Japan* 45-79 (1974); Kazuo Yamanouchi, *Administrative Guidance and the Rule of Law* (translation), 7 *Law in Japan* 22-23 (1974); and John O. Haley, *Administrative Guidance Versus Formal Regulation: Resolving the Paradox of Industrial Policy*, in Saxonhouse and Yamamura, eds, *Law and Trade Issues of the Japanese Economy* 107-128 (1986).

involving foreign investment in Japan. The system provoked foreign criticism, however, that the long delays incurred in obtaining government approval effectively inhibited foreign entry into the Japanese market.¹¹⁹

The amended FECL specifies the types of direct inward investments that are still subject to prior notification and review.¹²⁰ All other direct inward investments, including capitalization share acquisitions by foreign investors, simply require filing a report with the Bank of Japan within fifteen days after performance of the transaction.¹²¹ A resident of Japan must submit the report on behalf of the foreign investor.¹²²

Despite measures such as the relaxation of the notification requirements taken to facilitate foreign investment, Japan continues effectively to prohibit any foreign investment in the following restricted industries: agriculture, forestry and fisheries, mining, oil and leather products manufacturing.¹²³

The old FECL also required prior notification and review of any agreement to transfer or license industrial property rights executed between a non-resident (foreign parent) and a resident (Japanese subsidiary) and of any

¹¹⁹ See CCH at ¶70-255.

¹²⁰ FECL arts 26(3), 27(1); Investment Cabinet Order arts 2(10), 3(1-2). Most direct inward investments are now subject to the new "subsequent reporting" rule. Transactions still subject to prior notification and review are those which 1) affect national security, 2) fall under Japan's reservations to the applicability of the Organization of Economic Cooperation and Development's Code of the Liberalization of Capital Movements, or 3) involve nationals of a country which is not a party to a reciprocity agreement with Japan in respect of the type of investment in question. FECL art 27(3). In addition, some transactions are completely exempt from any reporting requirement (e.g., direct inward investments in connection with acquisitions of stock 1) through inheritance, 2) by a juridical person surviving or newly incorporated in a merger with the juridical person which owned the stock and the stock is not traded on the exchange, 3) by shareholders where new shares are issued as a result of a transfer of reserve funds to capital, 4) by shareholders as a result of a share split, 5) in a listed company in a subscription offer abroad, 6) through conversion of convertible debentures in connection with an offer for subscription abroad, 7) through the exercise of subscription rights in connection with debentures or securities in an offering abroad, and 8) other circumstances as provided by Ministerial Ordinance of the competent minister. FECL art 26(3) and Investment Cabinet Order art 2(12). See CCH ¶75-000, ¶75-400, ¶75-450.

¹²¹ FECL art 26(3); Investment Cabinet Order art 2(10). CCH notes that the ministries have as yet no established policy as to when "performance" occurs. CCH thus recommends submission of the report within fifteen days of the execution of the agreement. CCH at ¶75-420.

¹²² Investment Cabinet Order art 2(11). This requirement ensures that a representative who speaks Japanese will be available to the Bank of Japan or ministry officials in conducting informal discussions (administrative guidance). See CCH at ¶75-440.

¹²³ The restrictions are set forth in Japan's Annex B to the Organization for Economic Cooperation and Development, "Reservations to the Code of Liberalization of Capital Movements and Notes Concerning Payment Channels," June 1978, pp. 74-75, which supersede the notification requirements of FECL arts 26 and 27.

changes and renewals of such agreements.¹²⁴ The revised provisions governing notification of such transfer agreements parallel those mentioned above for direct inward investments: under the revised FECL, a report must be filed with the Bank of Japan within fifteen days after execution of a technology transfer agreement, unless FECL Art 29 specifies prior notification.¹²⁵ The resident party to the agreement has the responsibility to submit the report, not the foreign investor as is the case with direct inward investments.¹²⁶

*Anti-Monopoly Law*¹²⁷

Article 6 of the Japanese anti-monopoly law stipulates that certain agreements between foreign and Japanese parties (including subsidiaries of foreign corporations)¹²⁸ with terms of one year or more must be reported to the Fair Trade Commission¹²⁹ within 30 days after concluding the agreement.¹³⁰

¹²⁴ FECL art 29. Industrial property rights transfers include transfers of patented and copyrighted information (including software), utility model rights, design rights, trademarks, know-how, and trade secrets. See discussion in CCH at ¶75-800.

¹²⁵ Investment Cabinet Order art 4. article 29 refers to article 30 for general explication of the prior notice system, and Investment Cabinet Order 5(1) lists the types of technology transfer agreements that require prior notice. Broadly stated, technology transfer agreements requiring prior notice are 1) those with a risk of coming within certain designated technologies (viz., aircraft, weapons, gunpowder, nuclear power, and spacecraft) (Investment Cabinet Order art 5(1), Investment Ministerial Ordinance art 5(1), schedule 2.) or the restricted industries listed in the preceding paragraph of the text; and 2) those whose purchase price either exceeds 100 million yen or cannot be determined. Investment Cabinet Order 5(1).

¹²⁶ FECL art 29.

¹²⁷ *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kan suru hōritsu* (Act Concerning the Prohibition of Private Monopolies and the Maintenance of Fair Trade), Law No. 54 of 1947, as amended in 1982 ("Anti-Monopoly Law").

¹²⁸ See CCH at ¶37-600 for a discussion of what constitutes an "international contract" for purposes of the Anti-Monopoly Law.

¹²⁹ *Kōsei torihiki iinkai*.

¹³⁰ Anti-Monopoly Law art 6(2); see also article 2 of the *Kokusaiteki kyōtei matawa kokusaiteki keiyaku no todokede ni kan suru kisoku* (Regulations Concerning Reporting of International Agreements and Contracts), *Kōsei torihiki iinkai kisoku* No. 1. April 12, 1991. The following types of agreements are designated by the Fair Trade Commission as requiring notification if the term of the agreement exceeds one year:

1) International agreements between domestic and foreign enterprises assigning a patent, utility model or other technology rights; granting a license under such rights; or providing for the transfer of technical assistance

2) Continuing international purchase and sale agreements between domestic and foreign enterprises

3) International joint venture agreements which entail the acquisition of stocks or shares of a company

4) International agreements between domestic and foreign enterprises assigning a trademark right or copyright, or licensing such rights

Securities Exchange Law

Finally, the Securities Exchange Law requires the filing of a prior notification with the Securities Bureau of the Ministry of Finance at least twenty five days prior to the subscription date if the total sale price of subscribed shares is 500 million yen or more.¹³¹

8. *Share Subscription*

The foreign investor must subscribe as an outside subscriber for all the shares to be issued upon incorporation which are not taken by the promoter. The Commercial Code regulations governing share subscriptions as they pertain to incorporations by foreign investors remain unchanged by the 1990 revision of the Commercial Code. A brief outline of the regulations governing share subscription follows.

The promoter and any outside subscribers must subscribe for all shares stipulated in the articles of incorporation to be issued upon incorporation (at least one-fourth the total authorized shares).¹³² The promoter is responsible for preparing a share subscription application signed by the applicants and stating their names and addresses and the number of shares of each subscriber.¹³³ If the share subscription application does not designate a bank or trust company to handle share payments, the promoter must submit an affidavit, together with the application, designating a financial institution to perform that function.¹³⁴ The designation cannot be changed without a court's permission.¹³⁵

When all shares to be issued at the time of incorporation have been subscribed, the promoter is responsible for ensuring that all subscribers remit their respective payments¹³⁶ to the designated financial institution.¹³⁷ The

5) Agreements in which domestic competitors jointly engage in sales to or purchases from a foreign enterprise, and agreements in which domestic and foreign competitors agree to restrict the price, quantity, or territory of exports or imports on a continuing basis

The Fair Trade Commission has designated the foregoing categories as those likely to require some restriction of business activities and thus subject to the notification requirement. Only international agreements need be reported.

¹³¹ Shōken torihiki hō (Securities and Exchange Law), Law No. 25 of 1948, art 4(1-2).

¹³² Comm Code arts 166(3), 174.

¹³³ Comm Code arts 169, 175. See Comm Code art 175(2-3) (Appendix) for a list of the items to be included in the share subscription application.

¹³⁴ Comm Code art 175(4).

¹³⁵ Comm Code art 178.

¹³⁶ Comm Code art 176. A non-promoting shareholder's liability extends only to the value of his or her shares as subscribed. Comm Code art 200.

foreign investor pays in by remitting an appropriate amount into a separate yen account in the investor's name at the designated bank.¹³⁸ On the payment date, stipulated in advance by the promoter, the bank transfers the funds into a subscription account upon presentation of the share acquisition notification cleared by the Bank of Japan.¹³⁹ Any promoter making a contribution in kind must also deliver the property on the date of payment for shares.¹⁴⁰

The designated bank then issues, at the promoter's request, a document certifying the amounts held in payment for the shares.¹⁴¹ The registration application must include this certification when the incorporation is registered.¹⁴²

The following provisions governing share issues may be stipulated in the articles of incorporation or, alternatively, in a separate document with the unanimous consent of the promoters:¹⁴³

- 1) Number and class of shares authorized to be issued at the time of incorporation,
- 2) Issuing price of the shares, and
- 3) Amount of the issuing price not credited to stated capital.

The promoter must submit such documentation with the application for registration.¹⁴⁴

9. *Founding General Meeting*¹⁴⁵

When all payments for shares have been remitted to the subscription account and contributions in kind have been delivered, the promoter must

¹³⁷ Comm Code art 177(2).

¹³⁸ See the section on notifications, *supra*. See also Way, et al, at A-5; JETRO at 135.

¹³⁹ *Id.* Some banks may also require submission of the Minutes of the Promoter Meeting. See the section on the promoter meeting, *supra*.

¹⁴⁰ Comm Code art 172.

¹⁴¹ Comm Code art 189(1).

¹⁴² Commercial Registration Law, art 80(10); see also *Kaisei shōhō no jitsumu to taisaku* at 90 (cited in note 37).

¹⁴³ Comm Code art 168-2.

¹⁴⁴ Commercial Registration Law art 80(3); See also JETRO at 146, 148.

¹⁴⁵ There is no analog for the founding meeting in U.S. law. After the articles of incorporation are filed with the secretary of state and the corporation has come into existence, however, the initial directors, if named in the articles of incorporation, hold an organizational meeting to elect the corporation's officers, adopt the bylaws, and conclude any other pending business. If the initial directors are not specified in the articles of incorporation, they will be elected at this meeting. MBCA §2.05.

then convene a founding general meeting.¹⁴⁶ The meeting accomplishes the following tasks:

- 1) The promoter reports the details of the incorporation process;¹⁴⁷
- 2) The articles of incorporation are approved or amended;¹⁴⁸
- 3) The promoter appoints at least three directors and at least one auditor;¹⁴⁹
- 4) The directors and auditors review the incorporation procedures, including the requirements for contributions in kind which fall within the purview of Article 173-2(1);¹⁵⁰
- 5) Remuneration for the directors and auditors and the location of the head office (if not provided in the articles of incorporation)¹⁵¹ are established;¹⁵² and
- 6) If any items have been included in the articles of incorporation which require review by a court-appointed inspector under Article 181, the directors and auditors examine the inspector's report.¹⁵³

Minutes of the founding general meeting must be prepared and later submitted with the application for registration.¹⁵⁴

10. *Board of Directors Meeting*

Promptly following the founding general meeting, the appointed directors must meet to elect a representative director.¹⁵⁵ The representative director is authorized to perform acts on behalf of the corporation,¹⁵⁶ and his

¹⁴⁶ Comm Code art 180(1). The statutory requirements for the founding general meeting were not affected by the 1990 revision of the Code.

¹⁴⁷ Comm Code art 182.

¹⁴⁸ Comm Code art 187(1). The articles of incorporation may be amended at the founding general meeting even if the convocation notice omits a statement of intent to amend. Comm Code art 187(2). A resolution may also be adopted rescinding the incorporation. Comm Code art 187(1). A resolution of the founding general meeting is adopted by a vote of at least two thirds of the voting shares held by a quorum comprising a majority of the total outstanding shares. Comm Code art 180(2).

¹⁴⁹ Comm Code arts 183, 255, 280. The statutory auditor may be supplied by the law office performing the incorporation.

¹⁵⁰ Comm Code art 184(1).

¹⁵¹ Comm Code arts 269, 279.

¹⁵² See *Kaisei shōhō no jitsumu to taisaku* at 97-98, and JETRO at 136.

¹⁵³ Comm Code art 184(2).

¹⁵⁴ Commercial Registration Law art 80(7). See also *Kaisei shōhō no jitsumu to taisaku* at 89, 102.

¹⁵⁵ Comm Code art 261(1).

¹⁵⁶ Comm Code arts 261(3), 78.

or her acts in respect of third parties are binding upon the corporation.¹⁵⁷ More than one representative director may be elected,¹⁵⁸ multiple representative directors exercise authority jointly.¹⁵⁹ In either case, corporations may limit a representative director's powers by means of explicit provisions in the articles of incorporation or by a resolution of a shareholders' or board of directors meeting.¹⁶⁰ The Bank of Japan's published guidelines for operating a business in Japan stress that any restrictions on the "nature and extent" of the representative director's authority beyond those provided by statute should be formally defined by a resolution of the board of directors.¹⁶¹

11. *Application for Registration*

The registration of the corporate name and other details regarding the new corporation brings it into legal existence. The representative director must, within two weeks after the founding general meeting, submit an application for registration and supporting documentation to the Legal Affairs Bureau with jurisdiction where the principal office of the corporation is located.¹⁶² The application must include the following information, which will be registered:¹⁶³

- 1) Business objectives, company name, total number of shares authorized, par value of one share, method of making public announcements;
- 2) Location of head and branch offices;

¹⁵⁷ Comm Code arts 261(3), 39(2).

¹⁵⁸ Comm Code art 261(2).

¹⁵⁹ Comm Code art 261(2). Commentators are divided as to whether a foreign corporation should elect multiple representative directors. Some practitioners advise that a corporation have more than one representative director to prevent unilateral usurpation of the office. Other commentators take the view that requiring the approval of all joint representative directors to conclude a given transaction imposes unnecessary logistical constraints on the day-to-day operations of the corporation. See Way, et al. at A-9.

¹⁶⁰ See Way, et al. at A-9; JETRO at 141.

¹⁶¹ See JETRO at 141. While the Commercial Code does not explicitly define the limits of the representative directors' authority, it does specify certain major acts that require the approval of the board of directors (disposal or acquisition of important assets; borrowing substantial sums of money; appointment and dismissal of a manager or other key employee of the corporation; and the creation, alteration or closing of a branch or other office vital to the corporation), and thus prevents the representative directors from acting unilaterally on such matters. Comm Code art 260(2).

¹⁶² Comm Code art 188(1). See *Kaisei shōhō no jitsumu to taisaku* at 90, 102; see also JETRO at 144, 146.

¹⁶³ Comm Code art 188(2).

- 3) Term of existence of the company, if fixed; classes of shares and number of each; restrictions on share transfers, if any; whether shares may be redeemed with profits; name, address and business address of transfer agent (if one has been appointed);
- 4) Details regarding conversion of convertible shares, if any are to be issued;
- 5) Total number of shares issued, categorized by class;
- 6) Total value of capital stock;
- 7) Name and address of each representative director; and
- 8) Whether the corporation will be represented jointly by two or more representative directors.

The following documentation must accompany the application:¹⁶⁴

- 1) Articles of incorporation,
- 2) Certificates of subscription and receipt of shares, signed by subscribers,
- 3) Promoters' letters of consent regarding items under Commercial Code Article 168-2, if any,
- 4) Minutes of the founding general meeting,
- 5) Consent to shorten period of notice for the founding general meeting, if applicable,
- 6) Acceptance letters signed by appointed directors and auditors, unless recorded in the signed minutes of the founding general meeting,
- 7) Reports of the review of incorporation procedures by directors and auditors (attach certificate of receipt of payments for shares issued by the financial institution handling such payments),
- 8) Report of the court-appointed inspector pursuant to Comm. Code Arts 173-1, 181(1), if applicable,
- 9) Minutes of the meeting of the board of directors (attach seal certificate of each representative director),
- 10) Acceptance letters signed by each elected representative director, unless recorded in the signed minutes of the board of directors meeting,

¹⁶⁴ Commercial Registration Law art 80. See also *Kaisei shōhō no jitsumu to taisaku* at 90, 102; see also JETRO at 144, 146.

- 11) Any licenses or approval certificates issued by government agencies, if required,
- 12) Power of Attorney signed by the appropriate official of the foreign investing corporation, authorizing the Japanese attorney to carry out the incorporation procedures, and
- 13) Proxy for the founding general meeting, executed by the foreign investor.

The representative director or a designated proxy submits the completed registration application to the Legal Affairs Bureau and pays the registration tax;¹⁶⁵ the corporation is then deemed to have come into existence.¹⁶⁶ After registration, the corporation must file reports of incorporation with the appropriate government agencies, including the National Tax Agency and the local tax authorities.

CONCLUSION

The introduction to the "Explanation of the Reasons Underlying the Recommendations" (*Tean riyū setsumei*), submitted by the Ministry of Justice to the Diet in connection with its proposed Commercial Code amendments, states,

In view of the diminishing effectiveness of the current provisions of the Commercial Code which govern the small-scale, closed companies which comprise the great majority of our stock corporations (*kabushiki kaisha*) and limited liability corporations (*yūgen kaisha*), we implement these revisions for the purposes of devising a legal framework which better suits these companies, adopting measures necessary to protect creditors, and rationalizing capitalization methods.¹⁶⁷

An important aim of the 1990 "Law Revising the Commercial Code and Other Statutes" was thus to distinguish large and small corporations. The revision accomplished this by 1) instituting a statutory minimum capitalization

¹⁶⁵ *Kaisei shōhō no jitsumu to taisaku* at 90. The tax is currently the greater of 0.7 per cent of the value of the subscribed shares, or 150,000 yen. *Tōroku menkyo zei hō*, (Registration Tax Law), Law No. 35 of 1967, as amended, Table 1, item 19(ro).

¹⁶⁶ Comm Code art 57.

¹⁶⁷ Cited in Tatsuta at 8 (cited in note 1).

maintenance system for *kabushiki kaisha* and 2) increasing required capitalization levels for both *kabushiki kaisha* and *yūgen kaisha*.¹⁶⁸ In making these changes, the Commission sought to increase creditor protection by ensuring that corporations would have sufficient assets to pay their debts.¹⁶⁹ This rationalization¹⁷⁰ of the formation section of the Code was the centerpiece of a constellation of statutory revisions intended to remove the *kabushiki kaisha* and *yūgen kaisha* corporate forms from the reach of very small enterprises which tend to be undercapitalized.¹⁷¹

Commentators have noted that the failure rate of *kabushiki kaisha* and *yūgen kaisha* under the old statutory regime (which had a lower effective capitalization requirement and no provisions for the maintenance of minimum capital) engendered an overwhelming number of lawsuits.¹⁷² Creditors had no recourse but costly and time-consuming suits against the directors of failed, undercapitalized corporations, relying on the statutory bases of negligence or bad faith,¹⁷³ or on the judicial doctrine of disregard of the corporate entity.¹⁷⁴ Neither recourse was certain of success. Academics and the members of the Commission felt that a statutory regime which made it more difficult for undercapitalized enterprises to incorporate as *kabushiki kaisha* or *yūgen kaisha* would reduce the failure rate and resulting litigation.¹⁷⁵

Many changes contemplated in the Commission's draft amendment were postponed for later consideration. Most do not concern the incorporation process directly. Commentators consider it likely, however, that the Diet will further increase minimum capitalization requirements in

¹⁶⁸ *Id.* Japanese statutory law in this regard differs significantly from that of the U.S., which has no capitalization requirement and expects the creditor to take the responsibility of investigating the financial health of the other party before entering into a transaction: *caveat venditor*.

¹⁶⁹ Yōhei Muramatsu, *Saitei shihonkin seido e no taiō* (Coping With the Minimum Capitalization System), 120 Bessatsu shōji hōmu 57 (1991). Mr. Muramatsu is the head of the Management Inquiry Section of the Yamaichi Securities Economic Research Institute.

¹⁷⁰ *Gōrika*.

¹⁷¹ See generally Ōtani and other sources cited in note 14.

¹⁷² Tatsuta at 9-10.

¹⁷³ Comm Code art 266(3).

¹⁷⁴ Tatsuta at 10.

¹⁷⁵ *Id.* at 9. A less salubrious result of the increased capitalization requirement is the possible increase in illicit capitalization schemes on the part of Japanese investors lacking the necessary capital. Two such schemes resorted to in the past are dubbed "borrow-and-deposit" (*azukeai*) and "pretense-money" (*misegane*). For a discussion of these schemes and their legal consequences, see Henderson at 85-88 (cited in note 35). A recent Supreme Court case touching upon the issue of *misegane* in a criminal law context is 1379 Hanrei jihō 141 (S Ct, February 28, 1991). It is unlikely that such concerns will affect the typical foreign investor, however.

future legislation.¹⁷⁶ At any rate, the 1990 revisions have made it easier to incorporate in Japan by reducing the required number of promoters from seven to one and relaxing the inspection rules for promotive incorporations. Since foreign investors are still confined to the subscription method of incorporation, they cannot take full advantage of all the changes. Nonetheless, they have benefited from the reduced promoter requirement and the relaxed inspection rules, and no longer need to satisfy burdensome prior notification requirements for incorporation share purchases and technology transfers.

Both German and U.S. trends in commercial law have influenced by turns the development of Japanese commercial statutes since the late nineteenth century.¹⁷⁷ While both civil and common law concepts thus have a place in Japanese commercial law, the Japanese Commercial Code has by now attained *sui generis* status.¹⁷⁸ Evidence of this is seen in the 1990 revision's divergence from U.S. thinking regarding the problem of creditor protection, most notably in the reliance on a capitalization system to protect creditor interests. Therefore, U.S. observers watching for signs of simplification of incorporation procedures along the lines of U.S. developments (minimal registration requirements, virtually no capitalization requirements) are likely to be disappointed. While Japan continues to rationalize its commercial statutes in response to internal and foreign pressures, it appears that Japan will increasingly chart its own course of development in the area of commercial law.

¹⁷⁶ Tatsuta at 10.

¹⁷⁷ See generally Ueyanagi (cited in note 4), and Blakemore and Yazawa (cited in note 8).

¹⁷⁸ Henderson, *Rethinking the Close Corporation in Japan* at 2 (cited in note 10).

APPENDIX

THE REVISED FORMATION PROVISIONS

The following is a translation of the Commercial Code provisions pertaining to formation as revised by the Law to Partially Amend the Commercial Code, Etc., 1990 Law number 64, promulgated on June 29, 1990 and taking effect on April 1, 1991.¹⁷⁹

CHAPTER 4. JOINT STOCK CORPORATION¹⁸⁰

SECTION 1. FORMATION

ARTICLE 165. PROMOTERS

One or more promoters shall prepare articles of incorporation in order to establish a joint stock corporation.

ARTICLE 166. PREPARATION AND PUBLIC NOTICE OF THE ARTICLES OF INCORPORATION

1. The articles of incorporation shall be signed¹⁸¹ by each promoter and shall include the following items:

- 1) Business purposes
- 2) Trade name
- 3) Total number of shares to be issued by the corporation
- 4) The price of one par value share if par value shares are to be issued

¹⁷⁹ Shōhōtō no ichibu o kaisei suru hōritsu, Heisei ni nen hōritsu dai roku jū yon gō (translation by the author). The "etc." is included in the title of the law itself to indicate that the bill encompassed amendments to other statutes in addition to the Commercial Code, notably the Limited Liability Company Law (Yūgen kaisha hō).

¹⁸⁰ This translation is of the text of the current Corporation Law, chapter 4 (Joint Stock Corporations), section 1 (Formation), as published in Roppō Zensho (Compendium of the Six Codes) (Yūhikaku, 1991). Note that the 1990 revisions do not appear in the 1990 Roppō Zensho, published on March 15, 1990, before 1990 Law Number 64 was promulgated (June 29, 1990). Translations of the formation provisions of the Corporation Law as they existed prior to the 1990 amendments are based on *Shōhō tō no ichibu o kaisei suru hōritsuan shinkyū taishō jōbun* (Textual Comparison of the Old Commercial Code Provisions with the Draft Law to Partially Amend the Commercial Code, Etc.). 1214 Shōji hōmu 4 (April 25, 1990). Shōji hōmu publishes only the revised portions of laws; for comparison of the old and new versions in the context of the complete law, see a current copy of the Mohan Roppō (The Complete Model Laws).

¹⁸¹ *Shomei*.

- 5) [Deleted]¹⁸²
- 6) The total number of shares to be issued at the time of incorporation, identified as par value and non par value
- 7) [Deleted]
- 8) Location of the main office
- 9) The corporation's method of giving public notice
- 10) Names and addresses of the promoters

2. The price of each par value share issued at the time of incorporation of the corporation shall not be less than 50,000 yen.
3. The total number of shares issued by the corporation at the time of incorporation shall not be fewer than one quarter of the total number of shares to be issued by the corporation.
4. The corporation's public notices shall be posted in the official gazette (Kanpō) or in a daily newspaper which covers current affairs.

ARTICLE 167. ATTESTATION OF ARTICLES OF INCORPORATION

The articles of incorporation shall not be valid unless attested by a notary.

ARTICLE 168. SPECIAL INCORPORATION ITEMS

1. The following items shall have no effect unless stated in the articles of incorporation:
 - 1) [Deleted]
 - 2) [Deleted]
 - 3) [Deleted]
 - 4) Special benefits to be received by a promoter and the name of the promoter receiving same
 - 5) Contributions in kind: the name of any person making a contribution in kind, the property contributed and its value, in addition to the number and class of shares allotted in return, identified as par value or non-par value
 - 6) Post-formation acquisitions: any property which the corporation has agreed to acquire after formation, its value and the name of the transferor

¹⁸² "[Deleted]" indicates that the provision was removed by legislative amendment.

- 7) Amount of any remuneration [to be paid] to a promoter
- 8) Any incorporation expenses to be borne by the corporation; provided, however, that this limitation shall not apply to fees for attestation of the articles of incorporation nor to fees paid to a bank or trust company for handling payment of shares

2. Contributions in kind may only be made by a promoter.

ARTICLE 168-2. ISSUANCE OF SHARES AT THE TIME OF INCORPORATION

Any of the following details relating to the issuance of shares at the time of formation which is not included in the articles of incorporation shall be determined by the unanimous consent of the promoters:

- 1) Number and class of the shares
- 2) Issuing price of the shares
- 3) [Portion of] issuing price not to be credited to the stated capital

ARTICLE 168-3. ISSUING PRICE OF NON-PAR VALUE SHARES

The issuing price of non-par value shares issued at the time of incorporation shall not be less than 50,000 yen per share.

ARTICLE 168-4. MINIMUM CAPITAL

The amount of capital shall not be less than 10 million yen.

ARTICLE 169. SHARE SUBSCRIPTION BY PROMOTER

Each promoter shall subscribe for [one or more] shares in writing.

ARTICLE 170. PAYING-IN AND APPOINTMENT OF THE DIRECTORS AND STATUTORY AUDITORS (INCORPORATION BY THE PROMOTERS ONLY)¹⁸³

1. If all the shares to be issued at the time of incorporation are subscribed by the promoters alone, the promoters shall without delay pay the full issuing

¹⁸³ *Hokki setsuritsu.*

price for each of the shares and shall appoint the directors and statutory auditors.

2. Payment pursuant to the preceding paragraph shall be remitted to a bank or trust company designated by the promoters to handle such payments.

3. The appointments of the foregoing paragraph 1 of this Article shall be decided by a majority of the votes of the promoters; in such case, the provisions of Article 241 paragraph 1 shall apply *mutatis mutandis*.

ARTICLE 171. [DELETED]

ARTICLE 172. DELIVERY OF CONTRIBUTED PROPERTY

Any person making an in-kind contribution shall deliver the property to be contributed on the payment date; provided, however, that registrations or other acts necessary to oppose a third party by the creation of or transfer of a right may be effected after the formation of the corporation.

ARTICLE 173. REVIEW BY INSPECTOR AND DISPOSITION BY COURT

1. Immediately following their appointment, the directors shall apply to the court for the appointment of an inspector to review the items specified in Article 168 paragraph 1.

2. The provisions of the preceding paragraph shall not apply to the property described in Article 168 paragraph 1 sub-paragraphs 5 and 6 where—

a) the total value of such property as stipulated in the articles of incorporation does not exceed one fifth of the capital of the corporation or 5 million yen, or

b) such property consists of marketable securities listed on the stock exchange whose value as stipulated in the articles of incorporation does not exceed its price as quoted on the exchange.

3. The provisions of paragraph 1 of this Article shall also not apply to the property described in Article 168 paragraph 1 sub-paragraphs 5 and 6 where the property is real estate and an attorney attests that the description [of the property in the articles of incorporation] pursuant to sub-paragraphs 5 and 6 of paragraph 1 of the same Article is accurate in all details. The property must be appraised by a real estate appraiser.

4. In the event that the court, upon hearing the report of the inspector, determines that any detail [of a transaction under] Article 168 paragraph 1

does not comport [with the description in the articles of incorporation], the court may amend [the articles of incorporation] and notify each promoter of the alteration.

5. A promoter rejecting an amendment made pursuant to the preceding paragraph may rescind his or her share subscription. The articles of incorporation may be amended and the incorporation process may proceed, the foregoing notwithstanding.

6. If no promoter has rescinded a share subscription within two weeks following notification by the court, the articles of incorporation shall be deemed amended as indicated by the court.

ARTICLE 173-2. REVIEW AND NOTIFICATION BY THE DIRECTORS AND STATUTORY AUDITORS (INCORPORATION BY THE PROMOTERS ONLY)

1. The directors and statutory auditors shall examine the certificate of the attorney provided in the first part of paragraph 3 of the preceding Article, and shall also determine the following matters:

- 1) In cases such as that stipulated in paragraph 2 of the preceding Article, whether the price stated in the articles of incorporation is commensurate with the value of the property described in the same paragraph
- 2) Whether the total shares to be issued at the time of incorporation have been subscribed for
- 3) Whether payment has been made and in-kind contributions delivered for the shares mentioned in the foregoing sub-paragraph

2. If, as a result of the review in the preceding paragraph, the directors or statutory auditors determine that there is a contravention of any law, ordinance or the articles of incorporation, or that any of the details is inaccurate, the promoters shall be notified of the inaccuracy.

ARTICLE 174. SOLICITATION OF SHAREHOLDERS (SUBSCRIPTIVE INCORPORATION)

In the event that all of the shares to be issued at the time of incorporation are not subscribed for by the promoters, shareholders shall be solicited.

ARTICLE 175. APPLICATION FOR SHARE SUBSCRIPTION

1. Any person applying for share subscription shall include in an application signed by the applicant the number of shares to be subscribed and the applicant's address.
2. The share application form shall be prepared by the promoters and shall include the following:
 - 1) Date of attestation of the articles of incorporation and the name of the attesting notary
 - 2) The items listed in Article 166 paragraph 1
 - 3) Provisions, if any, pertaining to the duration of the corporation or grounds for its dissolution
 - 4.1) If more than one class of shares is to be issued, the number and description of each class of shares
 - 4.2) Provisions, if any, stipulating that the approval of a meeting of the board of directors is required for a transfer of shares
 - 5) Provisions, if any, for interest distributions prior to the commencement of business
 - 6) Provisions, if any, for retirement of shares with profits being distributed to shareholders
 - 7) The items stipulated in Article 168 paragraph 1
 - 8) The items stipulated in Article 168-2
 - 9) Classes, number and subscription price of the shares subscribed by each promoter, identified as par value or non-par value
 - 10) [Name of the] bank or trust company handling the payments for shares
 - 11) Provision to the effect that the share subscription application may be canceled in the event the founding general meeting is not concluded within the designated period
 - 12) Name, address and business office of each transfer agent or registry assigned, if any
3. The applicant for share subscription shall include the following items in the application, in addition to the items mentioned in paragraph 1:
 - 1) Identification of the shares to be subscribed for as par value or non-par value, if both par value and non-par value shares are to be issued
 - 2) Classes of the shares to be subscribed where shares of more than one class are to be issued

- 3) Subscription price of the shares to be subscribed, if non-par value shares are to be issued or par value shares are to be issued at a price above their par value
4. When submitting the share subscription application form, the promoters shall also submit a document stating the location where the bank or trust company stipulated in paragraph 2 sub-paragraph 10 shall handle the payments for the shares; provided, however, that this shall not apply if the location is stated on the share subscription application form.
5. The proviso to Article 93 of the Civil Code shall not apply to share subscription applications.

ARTICLE 176. ALLOTMENT OF SHARES

An applicant for share subscriptions shall be obliged to make payment corresponding the number of shares allotted to the applicant by the promoters.

ARTICLE 177. PAYMENT FOR SHARES

1. When all of the shares to be issued at the time of incorporation have been subscribed, the promoters shall without delay effect payment of the full price of the shares to be issued.
2. The payment in the preceding paragraph shall be remitted at the location for the handling of payments for shares as provided in the document stipulated in Article 175 paragraph 4 or in the share subscription application.
3. The provisions of Article 172 shall apply *mutatis mutandis* in the case stipulated under paragraph 1.

ARTICLE 178. CHANGE OF SHARE PAYMENT HANDLING AGENT

Permission of the court shall be required to change the bank or trust company charged with handling the payments for shares under paragraph 1 of the preceding Article, or to transfer the money paid in.

ARTICLE 179. PROCEDURE FOR FORFEITURE OF RIGHTS OF SHARE SUBSCRIBERS

1. In the event a share subscriber does not make the payment required under Article 177, the promoters may set a date and notify the share subscriber that if payment is not made by that date the subscriber will forfeit the right [to

subscribe]; provided, however, that such notice must be made at least two weeks prior to the date set.

2. In the event a share subscriber is notified by the promoters pursuant to the preceding paragraph yet forfeits the right [to subscribe] for failure to make the payment, the promoters may solicit new subscribers for the former subscriber's shares.

3. The provisions of the preceding paragraph 2 shall not bar claims for damages against the share subscriber.

ARTICLE 180. FOUNDING GENERAL MEETING

1. When the payments for shares have been made and the in-kind contributions have been delivered, the promoters shall convene the founding general meeting without delay.

2. Resolutions of the founding general meeting shall be adopted by a vote of at least two thirds of the voting rights held by the share subscribers in attendance, whose shares shall comprise a majority of the total number of outstanding shares.

3. The provisions of Article 232 paragraphs 1 and 2, Articles 233, 237-3, 237-4, Article 239 paragraphs 2, 4 - 6, Article 239-2, Article 241 paragraph 1, Articles 243, 244, 247-252 and Article 345 shall apply *mutatis mutandis* to the founding general meeting.

ARTICLE 181. REVIEW BY INSPECTOR

1. If any of the items stated in Article 168 paragraph 1 are provided in the articles of incorporation, the promoters shall petition the court for the appointment of an inspector to review such provisions.

2. The provisions of Article 173 paragraphs 2 and 3 shall apply *mutatis mutandis* in the case described in the preceding paragraph.

3. The written report of the inspector in the preceding paragraph and the attorney's certificate stipulated in Article 173 paragraph 3 applicable to the preceding paragraph shall be submitted to the founding general meeting.

ARTICLE 182. REPORT ON MATTERS RELATING TO THE FOUNDING OF THE CORPORATION

The promoters shall report to the founding general meeting on matters regarding the founding of the corporation.

ARTICLE 183. APPOINTMENT OF THE DIRECTORS AND STATUTORY AUDITORS

The directors and [one or more] statutory auditors shall be appointed at the founding general meeting.

ARTICLE 184. REVIEW OF INCORPORATION PROCEDURES

1. The directors and statutory auditors shall review each of the items stipulated in Article 173-2 paragraph 1 and shall report on same to the founding general meeting.
2. The directors and statutory auditors shall review the documents listed in Article 181 paragraph 3 and shall report their opinion regarding same to the founding general meeting.
3. If any of the directors or statutory auditors was appointed from among the promoters, the founding general meeting may specially appoint an inspector to conduct the review and make the report stipulated in the preceding two paragraphs.

ARTICLE 185. AMENDMENT OF SPECIAL INCORPORATION ITEMS

1. Any of the items stipulated in [the articles of incorporation pursuant to] Article 168 paragraph 1 which are deemed improper by the founding general meeting may be amended.
2. The provisions of Article 173 paragraphs 5 and 6 shall apply *mutatis mutandis* to the case described in the preceding paragraph.

ARTICLE 186. CLAIMS FOR DAMAGES AGAINST PROMOTERS

The provisions of the preceding Article shall not bar any claim for damages against the promoters.

ARTICLE 187. RESOLUTION TO AMEND THE ARTICLES OF INCORPORATION OR RESCIND THE INCORPORATION

1. A resolution to amend the articles of incorporation or rescind the incorporation may be adopted at the founding general meeting.
2. A resolution pursuant to the preceding paragraph shall not be barred notwithstanding its omission from the notice of convocation.

3. The provisions of Article 348 paragraph 1 shall apply *mutatis mutandis* in the event that the articles of incorporation are amended to require the approval of the board of directors for a transfer of shares.

4. Any subscriber opposed to the implementation by the founding general meeting of the clause in the preceding Article may cancel his or her share subscription within two weeks of the adoption of the resolution. In such case, the articles of incorporation may be amended and the incorporation procedures continued.

ARTICLE 188. REGISTRATION OF INCORPORATION

1. The registration of incorporation of a stock corporation shall be effected within two weeks of the day on which the procedure under Article 173 or Article 173-2 is completed, provided that the promoters have subscribed for all the shares issued at the time of formation. If the promoters have not subscribed for all the shares issued at the time of formation, registration shall be effected within two weeks of the day on which the founding general meeting is concluded, or the day on which the procedure under Article 185 or paragraph 4 of the preceding Article is completed.

2. The items to be registered in a registration [of incorporation] as stipulated in the preceding paragraph are as follows:

- 1) Items 1 - 4, 9 under Article 166 paragraph 1
- 2) Head and branch offices
- 3) Items 3 - 6, 12 under Article 175 paragraph 2
- 4) The items stipulated in Article 222-4 if convertible shares are to be issued
- 5) Total number of outstanding shares, their classes and the number of shares of each class
- 6) Amount of stated capital
- 7) Name of each director and statutory auditor
- 8) Name and address of each representative director
- 9) Provisions, if any, stipulating that two or more representative directors shall jointly represent the corporation

3. The provisions of Article 64 paragraph 2 and Articles 65 - 67 shall apply *mutatis mutandis* to a stock corporation, and the provisions of Article 67-2 to the directors and statutory auditors thereof.

ARTICLE 189. CERTIFICATION BY AGENT HANDLING PAYMENTS FOR SHARES

1. The bank or trust company handling the payments for shares shall, upon request by the promoters or the directors, furnish certification regarding its custody of the money paid in.
2. The bank or trust company of the preceding paragraph may not assert [a claim] against the company that the paid-in amount thus certified has not been paid in or that its withdrawal is restricted.

ARTICLE 190. TRANSFER OF SUBSCRIPTION RIGHT

A transfer of rights arising from a subscription for shares shall not be effective as against the corporation.

ARTICLE 191. RESTRICTIONS ON DECLARATION OF INVALIDITY OR RESCISSION OF SUBSCRIPTION

A subscriber for shares may not, after the corporation has come into existence, assert the invalidity of a share subscription due to mistake or the omission of a material fact on the subscription application, nor may a share subscription be rescinded on grounds of fraud or duress. The same shall apply to a share subscriber who has exercised his or her right at the founding general meeting.

ARTICLE 192. PROMOTERS' DUTY TO GUARANTY THE SUBSCRIPTION AND PAYMENT FOR SHARES

1. If any shares to be issued at the time of incorporation remain unsubscribed after the corporation has come into existence, the promoters and directors at the time the corporation comes into existence shall be deemed jointly to have subscribed for such shares. The same shall apply in the event that an application for share subscription is rescinded.
2. If after the corporation comes into existence there remain shares for which payment has not been made or for which in-kind contributions have not been delivered, the promoters and directors at the time the corporation comes into existence shall bear the burden of paying-in for the shares and of making a payment equivalent to the value of any undelivered property.
3. Within 6 months of the paying-in or equivalent payment under the provisions of the preceding Article, the promoters or directors effecting the

paying-in or equivalent payment may request the share subscriber to sell the shares to the promoters or directors. In such case the subscription price of the shares shall be equal to the sale price.

4. The provisions of Article 186 shall apply *mutatis mutandis* to the circumstances described in paragraphs 1 and 2.

ARTICLE 192-2. PROMOTERS' AND DIRECTORS' DUTY TO INDEMNIFY FOR THE PRICE OF THE PROPERTY

1. In the event that the real value of the property in Article 168 paragraph 1 sub-paragraphs 5 and 6 at the time the corporation comes into existence is less than the price stipulated in the articles of incorporation, the promoters and directors at the time the corporation comes into existence shall jointly and severally bear the burden of paying the shortfall to the corporation.

2. If a review by an inspector of the items stipulated in Article 168 paragraph 1 sub-paragraphs 5 and 6 is undertaken, the promoters and directors who are not the contributors or transferors of the property shall not bear liability for the property, notwithstanding the provisions of the preceding paragraph.

3. The provisions of Article 186 shall apply *mutatis mutandis* in the circumstances described in paragraph 1.

ARTICLE 193. PROMOTER LIABILITY FOR DAMAGES

1. Promoters shall be jointly and severally liable to the corporation for damages in the event any promoter neglects a duty in connection with the formation of the corporation.

2. Promoters shall also be jointly and severally liable to third parties for damages in the event of bad faith or gross negligence on the part of any promoter.

ARTICLE 194. PROMOTERS' LIABILITY IN THE EVENT THE CORPORATION DOES NOT COME INTO EXISTENCE

1. In the event that the corporation does not come into existence, the promoters shall be jointly and severally liable for their acts in respect of the formation of the corporation.

2. Promoters shall bear any incorporation expenses arising due to the circumstances described in the preceding paragraph.

ARTICLE 195. JOINT AND SEVERAL LIABILITY OF PROMOTERS, DIRECTORS
AND STATUTORY AUDITORS

In the event that the directors or statutory auditors become liable to the corporation or to third parties due to neglect of their duties under in Article 173-2 or Article 184 paragraphs 1 and 2, and the promoters are also deemed liable, the directors, statutory auditors and promoters shall be jointly and severally liable.

ARTICLE 196. PROMOTER IMMUNITY; REPRESENTATIVE ACTION

The provisions of Article 266 paragraph 5 and Article 267 through 268-3 shall apply *mutatis mutandis* to the promoters.

ARTICLE 197. [DELETED]

ARTICLE 198. LIABILITY OF PSEUDO-PROMOTERS

Any person who is not a promoter yet permits the use of his or her own name in connection with statements in support of the formation of the corporation on a share application form or prospectus, or in an advertisement soliciting share subscribers, or on any other document pertaining to the solicitation of share subscribers, shall incur the same liability as a promoter.

