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Japan

ACQUISITION FINANCE

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This country-specific Q&A provides an overview of acquisition finance laws and regulations applicable in Japan.

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JAPAN
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1. What are the trends impacting acquisition finance in your jurisdiction and what have been the effects of those trends? Please consider the impact of recent economic cycles, Covid-19, developments relating to sanctions, and any environmental, social, and governance ("ESG") issues.

In recent years, major global private equity funds have been actively investing in Japan. Along with their expanded presence, there has been the need for transactions in Japan to adopt features of global acquisition finance, such as the 'certain funds' concept that was rarely seen under traditional finance practice in Japan.

Other notable recent trends in the M&A market in Japan include the increasing number of growth investments using leveraged finance sponsored by private equity funds, including investments in pre-IPO target companies.

Since 2020, the global Covid-19 pandemic has led to a temporary downturn in M&A transactions, as well as a significant impact on existing completed acquisition financings where many portfolio companies required financial covenant waivers or emergency credit facilities. Among them, one of the largest scale leveraged financings in Japan has been forced into civil rehabilitation proceedings. While M&A transactions have been rebooted and remain active, financial terms (including the minimum equity requirement, interest margins, upfront fees and financial covenants) offered by lenders have become more stringent compared to pre-Covid years due to ongoing economic uncertainty and lenders' limited risk tolerance. As a forecast towards 2024, it is expected that the monetary policy of the Bank of Japan will shift to allow increase of interest rates, which may lead to higher interest rates in acquisition finance.

2. Please advise of any recent legal, tax, regulatory or other developments (including any reforms) that will impact foreign or domestic lenders (both bank and non-bank lenders) in the acquisition finance market in your jurisdiction.

The parallel debt structure has been a debated topic in Japan, and we do not see this structure used in the Japanese market except for parallel debt structures governed by non-Japanese law (such as English law or NY law) involving a Japanese-law governed security interest. One positive move towards utilizing the parallel debt structure in Japan is the amendment of the Civil Code (Act No. 89 of 1896, as amended) which came into effect in April 2020 and explicitly provides a concept of joint and several claims among multiple creditors created by a contract. It is anticipated that this amendment could facilitate the adoption of the parallel debt structure governed by Japanese law in the future.

3. Please highlight any specific high level issues or concerns in your jurisdiction that should be considered in respect of structuring or documenting a typical acquisition financing.

In the Japanese market, the three "mega banks" (MUFG Bank, Sumitomo Mitsui Banking Corporation and Mizuho Bank) play a dominant role in deals with larger exposures. This often leads to a situation where the capacity to retain the mega banks as arrangers is a key issue in order to successfully arrange acquisition finance of large-cap deals for amounts more than one billion US dollars.

In the Japanese market, a substantial part of acquisition finance transactions is documented based on a standard form unique to Japanese traditional banking practice, while documentation for acquisition finance transactions involving global private equity funds is usually made based on a model form of the Loan Market Association

(LMA).

4. In your jurisdiction, due to current market conditions, are there any emerging documentary features or practices or existing documentary provisions/features which borrowers or lenders are adjusting or innovating their interpretation of, or documentary approach to?

ESG finance has been getting more attention from participants in the Japanese finance market.

For example, according to the Ministry of the Environment Government of Japan (MOE), the number of green loan deals has increased from one in 2017 to 180 in 2022. The Japanese government encourages expansion of ESG finance transactions by, for instance, issuing MOE guidelines for green loans, green bonds, sustainability-linked loans and sustainability-linked bonds. So far, the impact of ESG-related issues on the terms and conditions of acquisition finance documentation in Japan has been limited, but this is expected to change as ESG concerns grow in significance.

5. What are the legal and regulatory requirements for banks and non-banks to be authorised to provide financing to, and to benefit from security provided by, entities established in your jurisdiction?

A foreign investor (whether a bank or non-bank) who intends to engage in a money lending business in Japan must be either licensed as a foreign bank branch under the Banking Act of Japan or registered with the relevant authorities under the Money Lending Business Act of Japan (MLBA), unless the money lending in question satisfies an exemption from the MLBA (such as loans to certain affiliates). Both a licensed foreign bank branch under the Banking Act and a registered money lender under the MLBA are required to maintain a place of business in Japan.

6. Are there any laws or regulations which govern the advance of loan proceeds into, or the repayment of principal, interest or fees from, your jurisdiction in a foreign currency?

There is no specific law in Japan that prohibits or restricts the advance of loan proceeds into, or the repayment of principal, interest or other amount from, Japan in a foreign currency.

7. Are there any laws or regulations which limit the ability of foreign entities to acquire assets in your jurisdiction or for lenders to finance the acquisition of assets in your jurisdiction? Please include any restrictions on the use of proceeds.

Under the Foreign Exchange and Foreign Trading Act of Japan (“FEFTA”), when a foreign investor acquires shares in a Japanese company conducting business activities in certain types of designated business listed in the FEFTA (such as businesses related national defense and nuclear power), a notification is required to be filed with the Japanese government via the Bank of Japan.

8. What does the security package typically consist of in acquisition financing transactions in your jurisdiction and are there any additional security assets available to lenders?

A typical security package for Japanese acquisition financings include: (1) a pledge over shares in the borrower and the target (as well as its material subsidiaries); (2) a pledge over receivables of bank accounts of the borrower and the target (as well as its material subsidiaries) held with the lenders to the acquisition financings; and (3) security interests over other material assets of the target (as well as its material subsidiaries) that include, among others, intra-group loans, trade receivables, real estate, movable fixed assets and inventory, intellectual property rights, investment securities, insurance receivables and lease deposit receivables. The scope of the security package is in principle ‘all assets’, but the security package is usually negotiated between the parties based on a cost-benefit analysis.

9. Does the law of your jurisdiction permit (i) floating charges or any other universal security interest and (ii) security over future assets or for future obligations?

Under the current Japanese law, there is no concept of a blanket security interest over all assets of a person or entity such as a floating charge. Accordingly, a security interest needs to be created individually over each type of asset.

In this connection, discussions on the establishment of a new regime of "business growth charge" (*jigyou seichou tampo ken*) to create a floating charge over all assets, including intangible assets (such as goodwill), have been ongoing within the Financial System Council (a working group within the Financial Services Agency of Japan) since 2022. The main purpose of the business growth charge is to facilitate smooth fundraising for small and medium-sized enterprises and start-ups that do not possess substantial tangible assets. However, it also presents the possibility of a new security regime for acquisition finance. According to the latest report by the Financial System Council, the chargee in a business growth charge is contemplated to be a security trustee whch has a special trust licence. Needless to say, industry players are closely monitoring these developments.

It is legally possible to create a security interest over (a) collective movable assets that are identifiable by location and types of asset or (b) collective receivables, including current and future claims that are identifiable by types of claim, timing (or a period of time) of occurrence and underlying contracts.

10. Do security documents have to (by law) include a cap on liabilities? If so, how is this usually calculated/agreed?

In order to validly create a revolving mortgage (*ne-teito-ken*) over real estate (being a type of mortgage created to secure unspecified claims of a certain scope, typically a revolving facility), it is required by law to set a maximum claim amount (*kyokudo-gaku*) on the secured obligations. There is no explicit rule by law on how the maximum claim amount is calculated, and in practice it is up to commercial negotiations, while the total facility amount is usually referred to. For other types of security interests, there is no statutory requirement of including a cap on liabilities.

11. What are the formalities for taking and perfecting security in your jurisdiction and the associated costs and timing? If these requirements are different for different asset classes, please outline the main points to note for each of these briefly.

For a pledge over shares, other than book-entry shares (such as shares in a listed company), a commonly used method for creating and perfecting the pledge is by delivery of the share certificates to the pledgee. If the issuer of the pledged shares is not a company that issues share certificates pursuant to its articles of incorporation, a pledge may be created by a security agreement between the pledger and the pledgee, and perfected against the issuer and any third party by registration of the pledge on the issuer's shareholders registry which is maintained by the issuer or, if applicable, a shareholder registry administrator.

For a pledge over, or security assignment of, monetary claims, the security interest that has been created is perfected by either obtaining the consent of debtors of the pledged or assigned claims, or registration of the security interest with the competent authorities. Registration of the pledge or security assignment requires payment of a nominal registration tax.

For a security transfer of movable assets that has been created, the security transfer is perfected by the transfer of possession (typically by way of constructive transfer with retention of possession by the security grantor) or registration with the competent authorities. Registration requires payment of a nominal registration tax.

For the creation of a mortgage over real estate, the mortgage is perfected by registration with the competent authorities. Registration requires payment of a registration tax in the amount of 0.4 per cent of the registered secured obligations. In practice, it is sometimes agreed that the registered secured obligations are limited to a lower amount than the actual secured obligations to avoid a large amount of registration tax. A provisional registration (for which the registration tax is a nominal amount) is also available for a real estate mortgage to ensure the ranking of the security interest, provided that subsequent registration is necessary for perfection.

For a pledge over intellectual property rights, the pledge over registered patent rights or trademarks is created and perfected by registration with the competent authorities. Registration requires payment of a registration tax in the amount of 0.4 per cent of the registered secured obligations. In practice, it is sometimes agreed that the registered secured obligations are limited to a lower amount than the actual secured obligations to avoid a large amount of registration tax.

12. Are there any limitations, restrictions or prohibitions on downstream, upstream and cross-stream guarantees in your jurisdiction? Please also provide a brief description of any potential mitigants or solutions to these limitations, restrictions

or prohibitions.

Under Japanese law, there are no explicit statutory restrictions on providing financial assistance or corporate benefits that would apply to the upstream guarantee. There are also no statutory limitations on downstream and cross-stream guarantees. However, if there is any minority shareholder of the guarantor company, it is commonly understood that the guarantor company providing the upstream guarantee may constitute a breach by the directors of the guarantor company of their fiduciary duties. A solution commonly adopted in practice is to obtain consent from all minority shareholders for the upstream guarantee. In a transaction where it is difficult to obtain such consent from all minority shareholders (e.g., if the guarantor company is a listed company), it is common practice to withhold providing an upstream guarantee until a squeeze-out of minority shareholders is completed.

13. Are there any other notable costs, consents or restrictions associated with providing security for, or guaranteeing, acquisition financing in your jurisdiction?

Please see our responses to Q29.

14. Is it possible for a company to give financial assistance (by entering into a guarantee, providing security in respect of acquisition debt or providing any other form of financial assistance) to another company within the group for the purpose of acquiring shares in (i) itself, (ii) a sister company and/or (iii) a parent company? If there are restrictions on granting financial assistance, please specify the extent to which such restrictions will affect the amount that can be guaranteed and/or secured.

There are no explicit financial assistance issues. However, please see our responses to Q12.

15. If there are any financial assistance issues in your jurisdiction, is there a procedure available that will have the effect of making the proposed financial assistance possible (and if so, please briefly describe the procedure and how long it will take)?

There are no explicit financial assistance issues. However, please see our responses to Q12.

16. If there are financial assistance issues in your jurisdiction, is it possible to give guarantees and/or security for debt that is not pure acquisition debt (e.g. refinancing debt) and if so it is necessary or strongly desirable that the different types of debt be clearly identifiable and/or segregated (e.g. by tranching)?

There are no explicit financial assistance issues. However, please see our responses to Q12.

17. Does your jurisdiction recognise the concept of a security trustee or security agent for the purposes of holding security, enforcing the rights of the lenders and applying the proceeds of enforcement? If not, is there any other way in which the lenders can claim and share security without each lender individually enforcing its rights (e.g. the concept of parallel debt)?

A security agent is commonly appointed for secured syndicated loan transactions in Japan, but its role is usually limited to clerical or administrative work. Under Japanese law, it has been a commonly accepted doctrine that the holder of the security interest must be the same as the creditor of the claims that are secured by the security interest, except where a security trust is in place. Accordingly, the practice is for each lender to be a secured party because a security agent is not permitted to hold a security interest securing claims owed to these lenders on their behalf.

A security trustee is also recognised. The security trustee must be a trust company licensed under the Trust Business Act of Japan that can hold a security interest securing claims owed to lenders without being the creditor of the secured claim. Having said that, in the Japanese market, the security trust is much less commonly utilised than the security agent.

For the concept of parallel debt, please see our responses to Q2.

18. Does your jurisdiction have significant restrictions on the role of a security agent (e.g. if the security agent in respect of local security or assets is a foreign entity)?

As mentioned in our responses to Q17, the role of a security agent is in practice quite limited in the Japanese syndicated loan market and a security agent cannot hold a security interest securing claims owed to the lenders on their behalf. Other than these limitations, there are no specific restrictions by law on the role of the security agent.

19. Describe the loan transfer mechanisms that exist in your jurisdiction and how the benefit of the associated security package can be transferred.

If the loan transfer is not prohibited by the terms of the loan documents, the loan can be transferred by agreement from a lender to a third party, and the guarantee is automatically transferred to the assignee. In general, a security interest securing the transferred loan is automatically transferred to the assignee as well, except that (i) a revolving security interest (such as revolving mortgage and revolving pledge) cannot be transferred to the assignee without the consent of the security grantor unless such security interest has crystallised, and (ii) a single security interest jointly held by multiple creditors (e.g., a security assignment of monetary claims and a security transfer of movable assets) cannot be transferred to the assignee without the consent of those secured creditors.

20. What are the rules governing the priority of competing security interests in your jurisdiction? What methods of subordination are used in your jurisdiction and can the priority be contractually varied? Will contractual subordination provisions survive the insolvency of a borrower incorporated in your jurisdiction?

Priority of competing security interests is typically determined by the order of perfection. If a security interest has not been validly perfected, the security holder will be treated as an unsecured creditor and will be subordinated to a holder of security interests which are subsequently created but perfected in advance.

There are two possible ways for establishing subordination of claims in practice. The first approach is by the subordinated lender (typically a shareholder of the borrower) agreeing in the subordinated loan agreement between the borrower and the subordinated lender that the subordinated lender will not be entitled to equitable distribution among the creditors in insolvency proceedings until all other unsubordinated claims (including the senior loan) have been repaid in full. The other approach, often used in a mezzanine subordinated loan, is by the mezzanine lender entering into an intercreditor agreement with the senior lender (typically the borrower is also a party to the intercreditor agreement), stipulating that the mezzanine lender will be subordinated to the senior lender in the order of application of any recovered proceeds among creditors. It is commonly understood that the first method is recognised by the courts in insolvency proceedings, while the second method would not be binding in insolvency proceedings. Accordingly, when using mezzanine subordinated loans, it is common for the intercreditor agreement to further provide for a turnover provision by which the mezzanine lender is required to turn over any recovered proceeds, including distributions received in insolvency proceedings, to the senior lender so that the priority of the senior lender is subsequently achieved contractually. When using the second method, the credibility of the mezzanine lender is one of the key issues that the senior lender should bear in mind and accordingly the assignability of the mezzanine loans is often negotiated.

21. Is there a concept of “equitable subordination” in your jurisdiction whereby loans provided by a shareholder (as a creditor) to a company incorporated in your jurisdiction are subordinated by law upon insolvency of that company in your jurisdiction?

In summary, equitable subordination is exceptional and not automatic. However, in the proceedings of corporate reorganisation and civil rehabilitation, it is permitted in practice to differentiate the priority of payment of the same kind of claims on the basis of equity, and there have been some court precedents where intercompany claims have actually been subordinated. There is no similar provision in the Bankruptcy Act, and therefore most of the court precedents do not support the argument of equitable subordination in the bankruptcy proceedings.

22. Does your jurisdiction generally (i) recognise and enforce clauses regarding choice of a foreign law as the governing

law of the contract, the submission to a foreign jurisdiction and a waiver of immunity and (ii) enforce foreign judgments?

Choice of Law

Clauses regarding choice of a foreign law as the governing law are generally recognised and enforced in Japan. However, it should be noted that there are mandatory statutes applicable to certain types of contracts (such as consumer protection law and usury law) regardless of choice of foreign law in the contract.

Jurisdiction

Clauses regarding choice of foreign jurisdiction are generally recognised and enforced in Japan unless a court in that country cannot exercise jurisdiction by law or in fact.

Waiver of Immunity

Under the Act on the Civil Jurisdiction of Japan with respect to Foreign States (Act No. 24 of 2009, as amended), a waiver of immunity made in a written contract by a foreign jurisdiction's government will be recognised and enforceable in Japan.

Foreign Court Judgment

A final and binding judgement rendered by a foreign court will be valid if the requirements under the Code of Civil Procedure (Act No. 109 of 1996, as amended) are satisfied. The requirements include the assurance of reciprocity between the jurisdiction of the relevant judgment and Japan, and the litigation proceedings not being contrary to public policy in Japan.

23. What are the requirements, procedures, methods and restrictions relating to the enforcement of collateral by secured lenders in your jurisdiction?

In general, secured creditors are entitled to enforce security interests upon non-performance of payment obligations of the borrower on the maturity date, or an acceleration of loan receivables in accordance with the facility agreement.

The enforcement procedure varies depending on the type of security interests and collateral assets.

The enforcement of security interests over receivables is achieved by way of disposal (through auction procedures) of such receivables or collection of such receivables by the secured creditors from the obligor. For real estate properties, the secured creditor can enforce the security interests by a sale of the properties through a real estate auction process, or application of revenues from the properties under the management of an administrator appointed by the court. In practice, however, it would be rather common for secured creditors to realize the value of collateral assets out-of-court by way of a voluntary sale to achieve higher sale proceeds.

24. What are the insolvency or other rescue/reorganisation procedures in your jurisdiction?

Insolvency and restructuring proceedings in Japan can be largely categorized into (a) judicial insolvency proceedings, which are supervised by the court and (b) voluntary restructuring proceedings, which are based on settlements among the debtor and certain creditors (usually banks) without the involvement of the court.

The judicial insolvency proceedings consist of (i) bankruptcy proceedings, (ii) special liquidation proceedings, (iii) civil rehabilitation proceedings and (iv) corporate reorganisation proceedings.

Bankruptcy and special liquidation are proceedings aimed at the liquidation and winding up of the debtor, while civil rehabilitation and corporate reorganisation are proceedings aimed at the revitalisation of the debtor's business. These judicial insolvency proceedings do not commence unless they are petitioned to the competent district courts.

The voluntary restructuring proceedings are held through statutory frameworks for out-of-court workouts in which unanimous consent of all the affected creditors is required. Among the out-of-court workouts above, Turnaround ADR (alternative dispute resolution) proceeding is the most important because it is often used by large companies, including listed companies.

25. Does entry into any insolvency or other process in your jurisdiction prevent or delay secured lenders from accelerating their loans or enforcing their security in your jurisdiction?

Generally, once bankruptcy, civil rehabilitation or corporate reorganisation proceedings have commenced, unsecured ordinary creditors are precluded from collecting their claims, including attachment or injunctions, no matter whether or not they are

provisional.

In the event of bankruptcy proceedings and civil rehabilitation proceedings, secured creditors can generally enforce security interests outside the proceedings. In turn, in corporate reorganisation proceedings, secured creditors cannot enforce their security interests without the approval of the court and the claims of secured creditors will be paid pursuant to the reorganisation plan.

26. In what order are creditors paid on an insolvency in your jurisdiction and are there any creditors that will take priority to secured creditors?

Under bankruptcy proceedings, administrative claims (*zaidan-saiken*) (e.g. fees for bankruptcy trustee, expenses for administration of the bankruptcy estate and court proceedings performed for the common interest of bankruptcy creditors) will be paid when they become due to the extent that the assets of the bankruptcy estate are sufficient to satisfy such claims.

Other claims will be distributed in the following order:

- preferred bankruptcy claims (*yusenteki-hasan-saiken*) (e.g. pre-commencement tax claims and pre-commencement labour claims which satisfy certain conditions);
- ordinary bankruptcy claims (*ippan-hasan-saiken*) (e.g. ordinary unsecured claims);
- subordinated bankruptcy claims (*retsugoteki-hasan-saiken*) (e.g. claims of interest or overdue tax accruing after the commencement of bankruptcy proceedings, and default charges due to a failure to perform obligations after the commencement of bankruptcy proceedings); and
- contractual subordinated bankruptcy claims (*yakujo-retsugo-hasan-saiken*) (e.g. claims subject to a contractual subordination arrangement using the first method referred to in our responses to Q20).

The categorisation and priority of claims are similar in civil rehabilitation proceedings. Under bankruptcy proceedings and civil rehabilitation proceedings, secured creditors enjoy the out-of-court enforcement as mentioned in our response to Q25. Under corporate reorganisation proceedings, although enforcement of security interests is restricted after the commencement of proceedings, claims of secured creditors are generally entitled to priority over unsecured general claims.

27. Are there any hardening periods or transactions voidable upon insolvency in your jurisdiction?

Major kind of voidable transactions include, among others, fraudulent conveyance, preferential payment and grant of security (including perfection of security). In general, those transactions are voidable if they took place after the debtor became unable to pay its debts as they became due or a petition had been made for the commencement of the insolvency proceedings; provided that it is required that the beneficiary of the transaction acknowledges such transaction would prejudice other creditors at the time of transactions.

The above is only a brief description of typical cases and general principles. The power of insolvency trustees and supervisors is more complex in reality and differ depending on the type of insolvency laws involved.

28. Are there any other notable risks or concerns for secured lenders in enforcing their rights under a loan or collateral agreement (whether in an insolvency or restructuring context or otherwise)?

Not applicable.

29. Please detail any taxes, duties, charges or related considerations which are relevant for lenders making loans to (or taking security and guarantees from) entities in your jurisdiction in the context of acquisition finance, including if any withholding tax is applicable on payments (interest and fees) to lenders and at what rate.

Each original copy of a loan agreement executed in Japan is subject to stamp duty under the Stamp Duty Act of Japan. The amount of stamp duty is determined by the facility amount of the loan agreement, and the maximum amount of stamp duty for a loan agreement is ¥600,000 per original copy where the facility amount is more than ¥5 billion. Stamp duty is also imposed for guarantee agreements and certain types of security documents, but it is relatively low or nominal.

Registration taxes are imposed on (i) mortgage registration (0.4% of the registered secured obligations (or, in the case of revolving mortgage, 0.4% of the registered maximum claim amount)), (ii) movable assignment registration (¥7,500 per filing (up to 1,000

movables)), and (iii) claim assignment registration (¥7,500 per filing (up to 5,000 claims)).

Any interest on loans payable to a non-Japanese-resident lender is subject to withholding tax of 20.42 per cent. This withholding tax may be exempted or reduced to a lower rate pursuant to any applicable tax treaty between Japan and the country in which the lender receiving interest is a tax resident.

30. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?

As mentioned in our responses to Q29, any interest payment to a non-Japanese-resident lender is subject to withholding tax. A loan agreement utilised in the Japanese loan market usually contains a tax gross-up provision to compensate the lender for any loss caused by deduction of the withholding tax. In the Japanese acquisition finance market, however, the major issues that are subject to negotiation at the stage of structuring the financing often include whether to permit an offshore lender to be part of the syndication or to be eligible for other permitted assignments under the loan agreement.

31. What is the regulatory framework by which an acquisition of a public company in your jurisdiction is effected?

In Japan, where a purchase of shares of a public company is made outside a Japanese stock market or the organised over-the-counter market, that purchase must be made, in certain situations including (but not limited to) those illustrated below, by means of a tender offer bid ("TOB").

(a) "Exceeding 5% Rule" (off-market purchases)

The total shareholding ratio (*kabuken-tou-shoyu-wariai*) of the purchaser in the target company following the off-market purchase will exceed 5% (except where the shares are purchased from not more than 10 persons within 60 days, including the number of counterparties to the contemplated sale and purchase; and shares are purchased thorough the Private Trade System (PTS) which are required to meet certain conditions);

(b) "Exceeding 1/3 Rule" (off-market purchases)

The number of counterparties to any off-market purchases effected by the purchaser within 60 days is not more than 10, but the total shareholding ratio of the purchaser in the target company following the purchase will exceed 1/3.

Since the Financial Instruments and Exchange Act of Japan ("FIEA") has strict regulatory requirements on TOB processes such as the disclosure of certain documents to the public within certain time limits and the prohibition of withdrawal, the parties should be prepared well in advance if they seek to proceed with TOB.

32. What are the key milestones in the timetable (e.g. announcement, posting of documentation, meetings, court hearings, effective dates, provision of consideration, withdrawal conditions)?

Key milestones of a friendly tender offer would be the following:

- Prior consultation with Kanto Local Finance Bureau in respect of a tender offer registration statement and a financing certificate (with a summary of financing commitment letter) from financiers (by purchaser), which consultation is commenced more than three weeks prior to the launch of the tender offer in general;
- Obtainment of a financing commitment letter and a financing certificate from financiers (by purchaser);
- Disclosure of the tender offer registration statement and the financing certificate, and public notice (by purchaser);
- Press release (by purchaser);
- Announcement of opinion and timely disclosure press release (by target company);
- Tender offer explanation statement (by purchaser); and
- Post-tender offer disclosure (by purchaser).

If the buyer intends to acquire 100% of the target, a squeeze out procedure would follow.

33. What is the technical minimum acceptance condition required by the regulatory framework? Is there a squeeze out procedure for minority hold outs?

The minimum number of shares to be acquired as a result of a TOB can be designated as a minimum acceptance condition in the tender offer registration statement; provided that the bidder cannot set the minimum number at more than two-thirds of the voting shares of the target. If the bidder seeks to acquire two-thirds or more of the voting shares of the target as a result of the TOB, it must acquire all the tendered shares upon the TOB. Where the bidder purports to acquire all

the shares in the target, the minimum acceptance threshold should be two-thirds of the voting shares of the target after the TOB in order for the bidder to ensure that a minority squeeze-out is successfully implemented.

Squeeze out procedures for minority hold-outs are available. If the bidder holds 90% or more of the voting shares of the target, a demand for the sale of the remaining target shares (*kabushikitou uriwatashi seikyu*) may be used. This is essentially a sale of target shares between the shareholders, although the target is involved in the process by passing a resolution of the board of directors. If the bidder holds less than 90% but equal to or greater than two-thirds of the voting shares of the target, consolidation of the target shares (*kabushiki heigou*) may be used, which requires a special resolution (with approval by two-thirds or more of the voting rights) at a shareholders meeting of the target. The consolidation rate will be adjusted so that minority shareholders would only have less than one share, and be cashed-out with a court approval in accordance with procedures set forth in the Companies Act of Japan (Act No. 86 of 2005, as amended).

34. At what level of acceptance can the bidder (i) pass special resolutions, (ii) de-list the target, (iii) effect any squeeze out, and (iv) cause target to grant upstream guarantees and security in respect of the acquisition financing?

The bidder would need to acquire at least two-thirds of the voting shares of the target after the TOB. After the acquisition of no less than two-thirds of the target's voting shares, the bidder can effect the minority squeeze out through the procedures mentioned in our response to Q33 and acquire 100% of the target. After the bidder acquires 100% of the target shares, it can cause the target to grant upstream guarantees and security in respect of the acquisition financing. For upstream guarantees and security, please see our response to Q12 as well.

35. Is there a requirement for a cash confirmation and how is this provided, by who, and when?

Under the current regulations applicable to TOB, a 'financing out' condition is not allowed for the acquirer. Given that the acquirer is not permitted to withdraw a tender offer because of its financing failure, the acquirer usually obtains a financing commitment letter from the lender (or, in some cases, enters into a definitive loan agreement) prior to the tender offer launch.
While the regulations do not explicitly require strict 'cash confirmation' or 'certain funds', the competent authorities practically require certainty of the financing. In this regard, under the TOB regulations, the acquirer is required to disclose a document evidencing the certainty of funds necessary for the settlement of the tender offer together with the disclosure of the tender offer registration statement. For an acquisition finance, it is typical to disclose a financing certificate (with a summary of financing commitment letter) issued by the lender to the acquirer. The terms of the letter are usually based on the major terms and conditions agreed in the long-form commitment letter, but it is not practically required to disclose the economic conditions such as margins and fees.

36. What conditions to completion are permitted?

After the filing of a tender offer registration statement, the purchaser cannot cancel or withdraw a TOB unless the purchaser indicates in the tender offer registration statement in advance the absence of certain (limited) events as conditions to complete the TOB. These events include, among others, (i) determination by the target company of certain types of corporate actions (such as a corporate reorganisation including merger and corporate split, and disposal of certain material assets), (ii) an occurrence of certain material adverse change in the target company (including, among others, suspension of business and a petition for commencement of insolvency proceedings), (iii) a failure to obtain governmental permits necessary for the share acquisition, and (iv) where certain anti-takeover measures (which, for example, purport to dilute the shareholding ratio of the purchaser) have been decided to come into effect. On the other hand, a financing failure is not permitted as a withdrawal event.

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