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Establishing a Joint Venture Company in Japan: Legal Considerations

James L. Hildebrand*

THE REMARKABLE industrial growth of Japan has made it the third greatest industrial power, after the United States and the Soviet Union. It is not surprising that increasing numbers of American and European businesses are considering ways to do business in Japan. One of the most important forms of direct foreign investment in Japan continues to be equity joint ventures.1 A joint venture is not a separate type of legal entity in Japan. It is usually a limited corporation in which two or more parties share ownership in agreed percentages. There are probably as many specific reasons for establishing a joint venture as there are joint ventures. To generalise, however, a joint venture is often formed as part of a technological licensing arrangement because the foreign licensor desires more control over the use of the technology than is possible with a simple licensing arrangement alone, and wishes to obtain an equitable share of the profit earned with the technology.

This article attempts to briefly outline (1) the structure and documentation of a typical joint venture company in Japan established by a non-Japanese corporation and a Japanese corporation, (2) some of the more important Japanese Government controls, and (3) the normal legal steps which must be taken in connection with

* The author wishes to express his sincere gratitude to Richard W. Rabinowitz and Arthur K. Mori for their encouragement and instruction which has been instrumental in developing an appreciation for the Japanese legal system.

1 See generally BUSINESS STRATEGIES FOR JAPAN 97-115 (J. Abegglen ed. 1970); DOING BUSINESS IN JAPAN 142-44 (2d. ed. R. Ballon 1970); FOREIGN INVESTMENT AND JAPAN (R. Ballon and E. Lee eds. 1972); H. GLAZER, THE INTERNATIONAL BUSINESSMAN IN JAPAN 91-107 (1968); D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN: LAWS AND POLICIES (1973); JOINT VENTURES AND JAPAN 21-36 (R. Ballon ed. 1967); E. KAPLAN, JAPAN: THE GOVERNMENT-BUSINESS RELATIONSHIP (1972); SETTING UP ENTERPRISES IN JAPAN (Bank of Tokyo Ltd. ed. 1973).

the establishment of an equity joint venture in Japan. This article should not be viewed as a definitive statement in the subject area; rather, it should be viewed as a general introduction to certain legal considerations relating to the establishment of a joint venture company in Japan based on the conventional arrangements entered into between non-Japanese and Japanese corporations.

Of necessity, the focus in this article is broad and accordingly not all of the factors noted would be relevant to every joint venture project. Conversely, no outline can be all inclusive, and there doubtless will be material omissions in reference to particular investment situations. In this regard, the importance of competent local legal counsel cannot be overstressed. Nevertheless, the following introductory outline may provide a generally useful checklist of factors to consider in formulating detailed proposals for the establishment of an equity joint venture in Japan.

I. STRUCTURE AND DOCUMENTATION OF THE JOINT VENTURE

The typical joint venture project contemplated in this article involves the establishment of a new juridical entity under Japanese law and the acquisition of its equity by two or more investors, one of whom is a Japanese national or juridical entity and the other of whom is a foreign national or juridical entity. Also assumed will be the intent of the joint venture company and one of its shareholders to conclude one or more related agreements concerning licensing or assignment of technology and trademarks, purchase or lease of land and/or plant facilities, provision for personnel and technical services, distribution and sale of products, etc.

A. Choice of Corporate Form

Joint ventures in Japan are usually formed by the establishment of a limited stock company or kabushiki kaisha, which is the general corporate form for major companies in Japan. Due to potential problems concerning presence of limited liability, management participation, and regulations under the Japanese foreign exchange control legislation, business forms other than the kabushiki kaisha usually are not considered suitable for joint ventures. However, in addition to the limited stock company, Article 53 of the Commercial

2 Occasionally joint ventures are formed in Japan by the sale of a block of stock in an existing company by one or more shareholders, but to-date this has not been a common approach.
Code of Japan also provides for the establishment of a commercial partnership or *gomei kaisha* and a limited partnership or *goshi kaisha*. A fourth kind of business organization is the private stock company or *yūgen kaisha*, the establishment of which is controlled under the Private Company Law.

1. *Kabushiki Kaisha.*—The most commonly utilized form of business organization for foreign investors in Japan is the limited stock company or *kabushiki kaisha* whose principal characteristics are similar to those of a United States corporation and publicly held stock companies under many other jurisdictions. The *kabushiki kaisha* is normally the only form of business organization considered appropriate for the organization of a joint venture involving Japanese and non-Japanese interests. The incorporation, administration, accounting, and dissolution of a *kabushiki kaisha* are governed by the Commercial Code of Japan. The formation of a *kabushiki kaisha* is discussed at length in another section of this article below.

2. *Gomei Kaisha.*—The partners of an unlimited liability commercial partnership or *gomei kaisha* have joint and several unlimited liability for all partnership obligations. No partner of a *gomei kaisha* can undertake limited liability. Only natural persons may be partners since the Commercial Code prohibits any entity with limited liability from assuming unlimited liability in another entity. Unless otherwise expressly provided, each partner in a *gomei kaisha* has implied authority to represent the partnership and the right and duty of administering the affairs of the partnership business.

The *gomei kaisha* is generally considered unsuitable for a joint venture with a foreign investor because, firstly, each partner must undertake the direct, joint and several, and unlimited liability, and secondly, the inclusion of an exchange non-resident as one of the partners may involve the necessity of obtaining a license under the foreign exchange control legislation of Japan each time he executes administrative acts relating to the company’s affairs.

3. *Goshi Kaisha.*—The *goshi kaisha* or limited partnership is similar to the *gomei kaisha* except that it includes one or more limited partners whose liability for partnership obligations is limited to the capital contributed as well as partners whose liability is unlimited. A limited partner in a *goshi kaisha* cannot participate in

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3 Law No. 48 of 1899, as amended [hereinafter the Commercial Code].
4 Law No. 74 of 1936, as amended.
the management of the partnership, and if his actions cause other persons to consider him a general partner, he will have unlimited liability with respect to such persons. A limited partner’s capital contribution must be in the form of cash or property. A juridical person can be a partner with limited liability.

The incorporation of a joint venture in the form of a goshi kaisha has the same drawbacks as the gomei kaisha insofar as the partner with unlimited liability is concerned. However, if the non-Japanese investor makes the sole contribution of funds as a partner with limited liability, the goshi kaisha form may prove convenient for the Japanese partner.

4. Yūgen Kaisha.—The private company or yūgen kaisha is basically a simplified limited stock company and it compares generally with the “private company” form in England and also the Gesellschaft mit beschränkter Haftung (GmbH) under German law. The yūgen kaisha is regulated by the Private Company Law which incorporates by reference most of the provisions of the Commercial Code that apply to the kabushiki kaisha. The yūgen kaisha has characteristics of both partnership and corporate entities. The owners of a yūgen kaisha are called members (shain) rather than shareholders, but the same principle of liability limited to contributed capital applies.

Some of the more important differences under Japanese law between the kabushiki kaisha and the yūgen kaisha as corporate forms for the establishment of a joint venture can be listed as follows:

(a) The procedure for incorporation of a yūgen kaisha is relatively simple and there is no system of governmental examinations as is the case with incorporation of a kabushiki kaisha.

(b) The persons incorporating a yūgen kaisha are not required to file a report with the Minister of Finance in accordance with the provisions of the Securities and Exchange Law and Ministerial Ordinance No. 74 of 1953, as these reporting requirements pertain only to the issuance of “securities.” The “ownership certificates” which are issued by private companies do not constitute “securities.”

(c) The total number of members of a yūgen kaisha is

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5 Law No. 25 of 1948, as amended.

6 Even with “securities” when their aggregate value does not exceed one hundred million yen (approximately $33,300 at ¥300/$1) no report is legally required. Id. art. 4.
limited to 50 persons. There is no similar limitation on the number of shareholders of a *kabushiki kaisha*.

(d) For a *yūgen kaisha* the use of no-par instruments of ownership is prohibited and debentures may not be issued.

(e) A member cannot transfer his capital interests in a *yūgen kaisha* to persons other than the members, but the internal transfer of capital interests is not regulated.

(f) The procedures for valuation of contributions in kind to the capital of a *yūgen kaisha* are substantially less complex than those pertaining to a *kabushiki kaisha*. Of course, this may not be of substantial importance depending on the specific joint venture project.

(g) The financial statements of a *yūgen kaisha* do not have to be disclosed by public notice, whereas the balance sheet of a *kabushiki kaisha* must be so disclosed in accordance with Article 283 of the Commercial Code.\(^7\)

(h) Generally, the administration of a *yūgen kaisha* is substantially less complex than that of a *kabushiki kaisha*. It is possible under the Private Company Law to dispense with the usual requirements for general meetings of members (for example, that such meetings must actually be convened and that quorums must be present). Article 42 of the Private Company Law permits, in effect, "paper meetings" at which members may pass, validly and effectively, resolutions in writing provided there is unanimous consent. There is no comparable provision for directors' meetings, but legal commentators in Japan generally agree that directors of private companies may enact resolutions in writing upon unanimous consent as well. In effect, this means that the affairs of a *yūgen kaisha* can be carried on entirely through written correspondence. In contrast, the Commercial Code makes no comparable provision for general meetings of shareholders of a *kabushiki kaisha*, and neither custom nor juristic opinion suggests that it would be possible to dispense with the formalities of directors' meetings or shareholders' meetings of a limited stock corporation.

(i) There are interesting possibilities whereby provision can be made for disproportionate voting rights and participation in

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\(^7\) Commercial Code, *supra* note 3, art. 283, para. 2. Of course, financial statements must be disclosed by both private companies and stock corporations to the competent government officials in connection with taxes, but this is quite different from the requirement of public notice.
distribution of profits (and liquidation surplus) of a *yūgen kaisha* irrespective of contributions to capital.

(j) There is no impediment to the reorganization of a *yūgen kaisha* into a *kabushiki kaisha* if and when it might become desirable to do so. Additionally, a private company can be merged either with another private company or with a stock corporation.

From an organizational and operational viewpoint, the *yūgen kaisha* corporate form would be more suitable generally for a joint undertaking than the *kabushiki kaisha* form. However, major Japanese business circles do not conventionally use the private company form and its use by small family-owned businesses has stigmatized it in Japanese eyes as unsuitable for large companies. Therefore, the *kabushiki kaisha* or limited stock corporation form continues to be utilized in most joint venture projects.

B. *Capital Contributions and Technological Assistance*

Regardless of whether the *kabushiki kaisha* or the *yūgen kaisha* form is utilized, upon completion of the share acquisition involved, two (or more) corporations, usually one non-Japanese and one Japanese, will own all the outstanding equity of the joint venture company. Stock in the joint venture company is usually acquired in exchange for cash contributions, but one or more of the shareholders may wish to transfer or otherwise make available property or technical know-how to the joint company in exchange for cash, which will partially or wholly offset the sum expended by the transferor for its share in the equity of the joint venture. Direct contributions in kind can be employed in some cases.

Typically (but not necessarily), if the joint venture company is to be a manufacturing enterprise, the Japanese investor will acquire its shares in exchange for a cash contribution without an accompanying sale of property, while the foreign party might assign or license patents, trade secrets, or other industrial property rights to the joint venture company in exchange for cash corresponding to all or part of its cash contribution to the capital of the new company.

The foregoing contributions of technology may be compensated in various ways. Under usual arrangements, the foreign party will receive from the new company a substantial initial cash payment, frequently large enough to offset its investment in shares of the new company, a running royalty for a period of years pegged at a specified percentage of the new company's sales, and specific fees and
reimbursements of expenses in connection with engineering and technical services. (Of course, in the lease complex situation, the non-Japanese investor, too, will simply contribute cash to the joint venture company.)

Often the Japanese party will agree to lend money to the new company or to arrange funding for the joint venture from banks or third parties. If necessary, the Japanese partner may even guarantee the joint venture’s obligations. In some cases the non-Japanese investor may undertake to lend money or arrange financing for the new company.

The Japanese partner may furnish other property or services to the joint venture company, such as land, buildings, equipment, technology, or personnel. Depending on the extent to which the joint venture company is meant to operate as a self-sufficient entity, various services may be performed for the new company by the Japanese partner. In some cases, the joint venture company is little more than a conduit for technology, and all manufacturing and selling is done by the Japanese partner through its own facilities for a fee or on a commission basis. Not infrequently the new company’s sales are handled by the Japanese partner or an affiliated trading company on an agency or resale basis. If the joint venture is simply for trading purposes the documentation can be substantially less complex.

The new company may be licensed to use the trademarks of either or both of its shareholders. Some arrangement may be made for the exchange of information and rights relating to technology newly developed by the parties or by the joint venture company. Typically, the new company, if a manufacturing enterprise, will grant licenses to the non-Japanese investor for areas outside the new company’s territory, and often the Japanese partner as well will be committed to the exchange of related technical information and industrial property rights through the new company.

C. Typical Joint Venture Documentation

There are several somewhat standard documents which are usually employed to define and regulate the various transactions involved in the establishment of a typical joint venture project.

1. Formation or Joint Venture Agreement.— The Formation or Joint Venture Agreement is executed by the parties which are to become shareholders in the new company. This agreement is executed prior to the filing of an application for any approvals by gov-
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Civil Procedure in the U.S.S.R.

Introduction

Contrary to the popularly held notion that the U.S.S.R. has no procedures for dispensing anything which could remotely be called justice, Soviet civil procedure in many ways resembles that of civil law countries. Because the Soviet Union follows the Marxist ideology in which the State dominates all phases of life, civil procedure has evolved differently from that of other civil law countries and has been described as "a new building erected of old bricks."

In order to understand why this is so, a brief look at the reception and function of law in Soviet society is helpful. The traditional Marxist view of legal institutions was that they were a mere superstructure erected upon the economic base of society and as a result were the ideological reflection of economic relations. The law was merely a tool of the economically powerful class, designed to provide maximum benefits and maximum control for the ruling class. Under this view, it was believed that once class domination was eliminated and the economy publicly owned, it would no longer be necessary to submit disputes to the judicial process — spontaneous and unofficial social pressures from the community would lead to their resolution. However, when the Soviets were faced with the realities of governing such a large nation, they restored many traditional institutions.

Their law was also affected for it attained new respectability under the name of "socialist law" in 1936 when Stalin proclaimed the completion of the socialist construction of the U.S.S.R. Since Stalin's death there have been significant legal reforms, reflecting the decline of one-man rule and political terror with a corresponding increase in emphasis on legal norms and legality.

When the Soviets came to power in 1917, Russian civil proce-

1 V. Gsovski, Soviet Civil Law 856 (1948) [hereinafter cited as Gsovski].
3 Id. at 280.
4 Id. at 47.
5 Id. at 66-67.

There are three factors which have shaped the Soviet legal system and made their influence felt in the R.S.F.S.R. Code of Civil Procedure. First, there is the Marxist view of the role of law, touched upon earlier, which is manifested in a distaste for legal formalities. Second, there is the total pervasiveness of the State, a dictatorship which dominates the social, economic, and political life of the U.S.S.R. Third, there is the educational role of Soviet law, often referred to as the parental function of Soviet law. The parental function of law lies in its duty to help create the "Soviet man," who will make Communism a success by working hard for the State while not expecting large monetary rewards. In this sense, legal man in the U.S.S.R. is not an independent possessor of rights and duties, but instead is a dependent member of a collective group, whom the law protects but also trains and disciplines.

Recognition of these factors is important to understand the nature and function of civil procedure since:

procedure reflects important and often basic cultural, ideological and political values, attitudes and convictions separating one legal system from another and mirrors the type of the political system, particularly the relationship prevailing in a given society between those in power and those governed by them.

Court System and Jurisdiction

The lowest general courts or courts of first instance for civil cases in the U.S.S.R. are known as the "people's courts." Several of these courts may be found in each district or rayon, a political subdivision in the U.S.S.R. corresponding roughly to a county. A court bench consists of a professional judge, popularly elected for a five year term, and two lay assessors, elected to a two year term

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6 Gsovski at 856.
7 Berman, supra note 2, at part III.
8 Id. at 283.
10 Gsovski at 838.
at general meetings of workers or peasants. The judge is considered professional because he or she serves full time and is salaried in contrast to the lay assessors, but he or she is not required to have legal training of any sort. The distinction between judge and lay assessor does not correspond to that between judge and jury since all of the bench decides by majority vote questions of both fact and law.

The civil jurisdiction of these courts of first instance includes:

- disputes arising from relations of civil, family, labour and collective farm law where any one of the parties to the dispute is a citizen or collective farm

unless such a dispute is assigned by law to an administrative tribunal or some other tribunal. Civil disputes assigned to administrative tribunals include those concerning quasi-criminal sanctions such as disputes involving membership or expulsion from a collective farm, dismissals of executives in certain categories and application of disciplinary codes enacted for employees in certain industries. Commercial disputes involving state enterprises are heard by the state arbitration tribunals. Other disputes which may be heard in the people's courts include: disputes over contracts involving the international carriage of freight by rail or air; certain cases involving administrative-legal relations; cases of special procedure, such as to declare a citizen dead or missing; and cases in which foreign citizens or foreign enterprises and organizations take part. Some civil cases may be tried by “Comrades Courts,” informally elected tribunals consisting of a defendant's peers which impose minor sanctions if the regulations of

12 Gsovski at 838.
13 Id.
15 Id.
16 Gsovski at 837.
17 Berman, supra note 2, at 124-29.
19 Id. § 25(3).
20 Id. § 25(4).
21 Id.
22 Berman, supra note 2, at 288-91.
these courts provide for the hearing of such cases. There is a presumption in favor of the jurisdiction of civil courts over disputes involving different claims, since it is provided that:

In the event of a combination of several inter-connected claims, some of which are subject to the jurisdiction of a court and others to that of arbitration organs, all of the claims are to be tried in court.

The intermediate appellate court system in the U.S.S.R. is not uniform because the various union republics which make up the U.S.S.R. are administratively subdivided in different manners. The R.S.F.S.R. is subdivided into autonomous republics and such lesser entities as provinces, autonomous provinces, and national districts. To each subdivision corresponds a court having jurisdiction over the subdivision, and to this list of courts must be added the city courts, which have jurisdiction over the larger urban areas. Each of these intermediate courts may function as a court of first instance or as an appellate court for cases heard in a people’s court located in the administrative subdivision with which the court corresponds. If the intermediate court exercises its power to remove a case from a people’s court and hear the case as a court of first instance, the bench will consist of a judge and two lay assessors elected by the highest government organ of the corresponding administrative subdivision. If the intermediate court sits as an appellate court, the bench consists of three judges and its decision is final. The R.S.F.S.R. Supreme Court generally sits as an appellate court reviewing the decisions of intermediate courts sitting as courts of first instance, but it has the power to remove a case from any court in the R.S.F.S.R. and sit as a court of first instance.

Above all courts sits the U.S.S.R. Supreme Court, the only federal court in the U.S.S.R. It is composed of judges and lay assessors elected by the Supreme Soviet of the U.S.S.R. Its civil panel sits as an appellate court for cases from the supreme

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24 Id. § 28.
25 Id. §§ 114-15.
26 Gsovski at 840.
27 Id.
28 Id. at 840-41.
30 Gsovski at 836.
courts of all the union republics. The Supreme Court of the U.S.S.R. is a special appellate court, however, only in the sense that a private party may not bring an appeal before it. Only the Procurator General of the U.S.S.R. and the President of the U.S.S.R. Supreme Court may bring such appeals.

Generally a plaintiff may bring his or her action at the defendant’s place of residence, or if the defendant is a juridical person the plaintiff may bring the action where the main office or property of the juridical person is situated. Other options are also available to a plaintiff. If a defendant’s place of residence is unknown or if he or she has none, an action may be brought where the defendant’s property is located or in his or her last place of residence. A personal injury action may also be brought at plaintiff’s place of residence or where the harm occurred. Property damage actions may be brought where the harm occurred. In actions on a contract in which a place of performance is stipulated an action may be brought there or wherever else the parties to a contract stipulate.

No matter where the action is brought a court has the power to transfer the case to another court if the following occurs: a defendant whose address was previously unknown becomes known; a judge has been challenged and cannot be replaced in that court; or the court does not appear to have jurisdiction. The doctrine of forum non conveniens appears to have a place in Soviet civil procedure. This doctrine allows a court to transfer a case if it “would be more properly and expeditiously tried in another court, particularly at the place where most of the evidence is situated.” An even more interesting provision, emphasizing the parental function of Soviet law, provides that an intermediate court may transfer a case from one people’s court to another if this would result in a more proper and expeditious trial in keeping

31 Id. at 844.
32 Id.
34 Id. § 118.
35 Id.
36 Id.
37 Id.
38 Id. § 120.
39 Id. § 122.
40 Id.
“with the object of better ensuring the educational effect of a judicial hearing.”

Parties and Persons Taking Part in a Suit

Civil litigation in the U.S.S.R. reflects the concept that an individual is not the independent possessor of personal rights and duties but is a member of a collective society with collective rights and duties. Consequently, in addition to the parties to a dispute corresponding to a plaintiff and defendant, a lawsuit concerns others who may be called persons taking part in a suit, including the procurator, third persons, and various organizations to be described later. The fact that so many persons have been given civil procedural capacity is due in part to the extreme nature of the State’s control of Soviet life so that distinction between public and private law is practically absent from Soviet law. Additionally, legal sanctions in the U.S.S.R. serve to do more than merely compensate a plaintiff. In accordance with the parental function of law they also provide for deterrence, rehabilitation, and prevention in regard to future disputes of the same kind. As a result, increased attention has been given to procedural forms which facilitate correction of the defendant and education of others, such as the participation in the case of persons other than the parties.

The individuals whose legal rights and duties are directly affected by a lawsuit are parties and third persons. A party is either a plaintiff or defendant. A party plaintiff may either bring the suit “for the defence of his right or legally protected interest,” or may have suit brought on his or her behalf by the procurator or some other organization. A third party cannot initiate suit and he or she is in one of two categories. First, a third party who makes an independent claim to the subject matter of a dispute may intervene before the court pronounces judgment and enjoys all the rights and duties of a plaintiff. Second, a third party who does not make an independent claim to the subject matter of the dispute but whose rights and duties in relation to one of the parties may be

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41 Id. § 123.
43 Id. at 64.
44 Id. at 65.
46 Id. § 33.
47 Id. § 37.
affected may intervene as either plaintiff or defendant, or be joined in the case upon the application of the parties or procurator or on initiative of the court. In this situation, the third party enjoys all the procedural rights and duties of a party except the right to alter the basis or subject matter of the action, to increase or reduce the claim, to withdraw the action (if a plaintiff), to concede the action (if a defendant), or to settle out of court.

The procurator is also permitted to institute suit on behalf of another and take part in any civil suit, an institution unique to the Soviet legal system. Procurators are government attorneys found in the various administrative subdivisions of the U.S.S.R. who make up a federal apparatus since they are appointed by the Procurator General of the U.S.S.R. The function of the procuracy has been described as two-fold. First, it consists of a supervisory power over the administration of justice by which a procurator can commence or participate in any civil suit “if ... required to protect State or public interests or the rights or legally protected interests of citizens.” Second, it includes a general supervisory power by which the procurators make sure that the law as promulgated by the central authorities is followed by local government. It is the first function with which civil procedure is concerned, another manifestation of the supreme power and control of the Soviet State having an interest in civil litigation of any sort.

Participation by a procurator in a civil action is mandatory if provided for by law or if the court requests his or her opinion of law. The procurator possesses all the procedural rights of the party on whose behalf he intervened or instigated the suit, but the party may continue the suit even if the procurator later abandons it. Rather than being considered a party to the action, the procurator only “calls the procedure in a given case to life, . . . .” Suits are brought by a procurator when a wronged party does not wish to do so, perhaps because he or she is dependent upon the wrongdoer in some way, and when a suit is needed to protect the legal rights and interests of Soviet citizens. Common examples of suits instigated by the procurator include: suits to protect labor

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48 Id. § 38.
49 Id.
50 Gsovski at 846.
51 Id. at 846-47.
53 Id.
rights of citizens which officials of economic enterprises may violate; suits to protect housing rights, such as declaring invalid an order for the provision of living space or a suit to evict a tenant; or suits to protect rights arising from family relationships. Through the participation of the procurator in these civil suits the State is able to exert more control over its citizens and ensure that the law is applied in a manner consistent with the State interest.

An even more unique aspect of civil procedure in the U.S.S.R. is that in certain instances the right to bring civil action on behalf of another and to intervene or be joined by the court to state conclusions regarding the action lies with:

organs of State administration, trade unions, State institutions, enterprises, collective farms and other cooperative and public organizations or private citizens . . . in protection of the rights and legally protected interests of other persons.

This procedural innovation is important because of its relation to recent Soviet ideology as well as being yet another device to enable the State to exert control over civil lawsuits through its various organizations. A modern Soviet corollary to the Marxist doctrine of the eventual withering away of the state as a communist society is that social organizations will play a greater role in the governing of society and enforcement of legal norms. Having the procedural capacity to participate in civil suits in which they have no direct interest, social organizations can begin to exert more of an influence in the governing of the U.S.S.R. by determining when and how the legal rights of others are to be exercised. The Soviet courts have gone even further in allowing social participation. Sometimes even spectators are allowed to give conclusions or opinions on a case rather than testify to facts in question in the case, although this is not provided for in the Code of Civil Procedure. One also cannot ignore the paternal nature of Soviet law with reference to the participation of social organiza-

54 Id.
57 Id.
59 Berman, supra note 2, at 285-86.
60 O'Connor, supra note 42, at 80.
tions in civil actions, since for the most part cases in which their representatives participate are those in which reform in conduct is sought.\footnote{Id. at 78.}

In addition to being able to bring suit and enjoy all the procedural rights of a party, organizations commonly intervene or are joined by the court to give their conclusions regarding the merits of a case and what action should be taken by the court. As a result their procedural status is difficult to define. The organization may in some instances act as a party, but it also may participate in a case in which it has no material interest in the outcome, but rather an interest in reforming conduct through the law.\footnote{Id. at 126.} It does not act in the capacity of a witness since the organization through its representative gives its conclusions of fact and law and not testimony as to facts within its knowledge.\footnote{Id. § 128.} In fact, an organization may abandon a lawsuit entirely and the case may still continue until there is an adjudication on the merits if the party on behalf of whom the action is brought so desires. It is perhaps less important to classify the procedural status of social organizations in civil actions than it is to be aware of their procedural rights and duties.

\textit{Pre-trial Procedure}

A legal action is commenced by filing a written pleading which must state the circumstances upon which the plaintiff bases his claim, the evidence proving the circumstances described by the plaintiff, a list of any evidentiary documents attached to the pleading, and the plaintiff’s prayer for relief.\footnote{1964 R.S.F.S.R. Code of Civil Procedure § 126.} Upon examining the pleadings, the judge has the right to conduct a separate trial as to certain claims or parties if he feels that this would be more appropriate.\footnote{Id. § 128.} The judge conducts an examination of both plaintiff and defendant to find out more about their respective claims and defenses and to decide who may be joined or who can intervene, including the procurator or any organizations. The judge may even notify another person whom he finds to be an interested party that there is a case in progress. He also decides which witnesses shall be summoned and either procures documentary and other evidence
for the parties or issues a search warrant to obtain evidence.\textsuperscript{66} After the case has been prepared for trial the judge announces the place and date of trial.\textsuperscript{67}

The right of voluntary dismissal exists in the U.S.S.R., but it is significantly circumscribed because of the State's desire to control civil litigation. A plaintiff may alter the basis of his or her action or the amount of his or her claim and technically he or she is given the right to withdraw his or her action completely and settle out of court.\textsuperscript{68} A court, however, is not obligated to accept such a withdrawal and settlement if this will "violate the law or the rights or legally protected interests of any person."\textsuperscript{69} The Soviets view this power of the court as:

one of the guarantees of legality and protection of the interests of the state and of the citizens, which are harmoniously fused in socialist society. . . .\textsuperscript{70}

In reality, it reflects the subordination of the right of the individual to pursue his or her remedy as he or she sees fit to the will of the State. Gsovski has observed:

All this shows what a hazard a litigant runs in the soviet [sic] civil court. As soon as he sets the proceedings in motion, they are no longer under his control.\textsuperscript{71}

\textit{Trial}

In general a trial in the U.S.S.R. will be held in public unless a State secret will be endangered.\textsuperscript{72} \textit{In camera} trials are permitted if intimate facts concerning the lives of persons taking part will be disclosed.\textsuperscript{73} A party has the right to challenge the participation in the case of a judge, a lay assessor and even a procurator "if he is personally interested, directly or indirectly, in the result of the case or other circumstances exist which cast doubt on his impartiality."\textsuperscript{74} A judge or lay assessor can be challenged if he took part in a pre-

\textsuperscript{66} Id. \S 141.
\textsuperscript{67} Id. \S 143.
\textsuperscript{68} Id. \S 34.
\textsuperscript{69} Id.
\textsuperscript{70} Kleinman, \textit{Comments on the Fundamentals of Civil Procedure}, in J. Hazard \& I. Shapiro, \textsc{The Soviet Legal System} 117 (1962).
\textsuperscript{71} Gsovski at 860.
\textsuperscript{72} 1964 R.S.F.S.R. \textsc{Code of Civil Procedure} \S 9.
\textsuperscript{73} Id.
\textsuperscript{74} Id. \S 18.
vious trial of the same case, or if he is a relative of a party or person taking part in the case, or if he is personally interested in the case and might not be impartial. The challenge is made either by a party, or by a judge or lay assessor, in which case it is a self-challenge.

The presiding judge conducts the court session and keeps order, but it requires the majority vote of the full membership of the court to decide any objection to an aspect of the proceedings raised by a party. The hearing begins with a report on the claims and evidence from the presiding judge or a lay assessor. The presiding judge then asks the plaintiff if he or she persists in the demands, and the defendant if he or she admits the claims of the plaintiff. The judge also inquires whether the parties wish to settle out of court. Next the plaintiff, defendant, third persons, the procurator and representatives of organizations, in that order, present their explanations. The testimony of witnesses is then heard, and the presiding judge must warn each witness of his or her responsibility for testifying and for knowingly giving false testimony. In fact the witness must sign an acknowledgment that the duties and responsibilities have been explained to him or her. Final agreements, referred to as court pleadings, are presented by each participant in the same order as their opening arguments; each also having a right to reply, with the defendant having the final word. When a procurator participates in a case, he or she is entitled to present conclusions as to the substance of a case after the court pleadings. The arguments of all should be confined to matters and evidence brought out in the trial. Finally, the judges retire to compose a judgment and upon their return either the presiding judge or a people’s assessor pronounces the judgment, which includes the method of appeal and the term for appealing.

Evidence

As in other civil law countries, there are no exclusionary rules

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75 Id.
76 Id. § 145.
77 Id. § 164.
78 Id. § 166.
79 Id. § 169.
80 Id. §§ 185-86.
81 Id. § 187.
82 Id. §§ 189-90.
of evidence in the U.S.S.R., evidence being characterized as:

only factual data on the basis of which the court, following the procedure prescribed by law, established the presence or absence of circumstances supporting the claims or defenses of the parties and other circumstances material to a correct decision of the case.\textsuperscript{83}

If the court feels that the evidence is insufficient, it may order the parties to produce more. Another example of State control of civil litigation through the courts is that in addition to appointing its own expert witness, a Soviet court may itself gather evidence pertinent to the case.\textsuperscript{84} While the admissibility of evidence is left to the discretion of the court, the verdict should be based on relevant evidence only.\textsuperscript{85} At an earlier point in the history of the U.S.S.R., when the transformation to socialism was incomplete and so-called "hostile" classes, such as merchants and landowning peasants still existed, a court was to consider the class status of a witness in evaluating his or her testimony and pay less heed to testimony from members of these "hostile" classes.\textsuperscript{86} Now, however, with the socialization of the nation and the elimination of "hostile" classes, a court must evaluate evidence:

according to its own inner conviction based on all-round, full, and objective consideration at the trial of all the circumstances of the case, looked at as a whole, being guided by the law and its socialist legal conscience (emphasis added).\textsuperscript{87}

Evidence is divided into five categories in the Soviet legal system. Explanations by parties and third parties are acceptable as evidence unlike other civil law countries. However, the court is not bound by admissions of fact, not even an admission by one party of a fact upon which the other party bases his or her claim. A court only has to consider an admitted fact as established if it is convinced that the admission is factual and that the party had no ulterior motive for making the admission.\textsuperscript{88} Testimony of witnesses and documentary evidence are the next two categories of evidence\textsuperscript{89} and the court can levy fines against individuals who re-
fuse to testify or produce documentary evidence. The fourth category is real evidence, consisting of objects which may serve as a means of establishing facts material to a case. Finally there is expert testimony, including those experts appointed by the court. It should be noted that the power of a Soviet court is such that the bench is not bound by the report of any expert, and the court may disagree with an expert's opinion if it states the grounds of its disagreement in its opinion.

Judgment and Costs

There is no such thing as a default judgment in the U.S.S.R. If a party fails to appear without just cause a court may hear the case in his or her absence. A judgment must be signed by all the judges, including a dissenter, and is divided into four parts: the introductory part, which names the court, judges, parties and other persons taking part in the trial; the descriptive part, which describes the plaintiff's claim, the defendant's defense, and the explanations of other persons taking part; the reasoned part, which indicates the circumstances established by the court, the evidence upon which its conclusions are based and any controlling law; and the operative part, which provides the decision to grant or deny relief, the allocation of court costs, and the method and time for appeal.

Court costs, as in other civil law countries, are paid by the losing party, include the attorney's fees of the winner, and are measured as a percentage of the amount in controversy. One of the more interesting provisions on the allocation of court costs allow the winning party to recover for any lost working time, if a suit was filed or defended in bad faith by the other party. Another provision, which reflects the privileged position of the laborer in Soviet society, exempts workers from paying costs when they file an "action for wages or on other claims arising out of their employment."

A judgment becomes res judicata upon the expiration of the term for cassationary appeal or protest if it has not been appealed.

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90 Id. § 68.
91 Id. § 78.
92 Id. § 158.
93 Id. § 197.
94 Id. § 92.
95 Id. § 80.
tion. However, certain complications can arise under the Foreign Investment Law\(^\text{30}\) and the Foreign Exchange Law\(^\text{31}\) when non-Japanese nationals or corporations act as promoters. Therefore, it is advisable that all promoters of the new company be Japanese nationals or Japanese corporations in order to avoid such complications. The foreign investor can be a non-promoter subscriber at the time of the incorporation of the new company or if the non-Japanese investor intends to exchange technical know-how and other proprietary information for shares in the new company, then it may be more convenient if the non-Japanese investor is made a shareholder after the new company is incorporated.

At the outset, all of the promoters must execute an Agreement of Promoters' Association, which includes a short statement to the effect that the promoters intend to establish a corporation and that one or more of the promoters have been selected as the promoters' representative(s) to perform the various acts necessary to establish the new corporation. The Agreement of Promoters' Association must also set forth matters concerning issuing of shares and designate the bank (or banks) which will act as depository for receipt of subscription payments.

The promoters must prepare and execute the Articles of Incorporation, which must be authenticated (attestation) by a notary public in Japan. By executing the Articles of Incorporation (on which are indicated the name and address of each promoter and usually the number of shares to which he subscribes) each promoter commits himself to subscribe to the shares so stipulated in the Articles of Incorporation or determined at the aforesaid meeting of promoters. The promoters' representative then submits to the bank designated in the Agreement of Promoters' Association a written request that it act as depository for receipt of subscription payments.

A ministerial ordinance promulgated under the Securities and Exchange Law\(^\text{32}\) requires that a Notification of Issuance of Shares be prepared and submitted to the Ministry of Finance before shares may be taken by promoters or subscribed to by non-promoter subscribers.\(^\text{33}\) This requirement applies to all corporations having an initial capital of more than ¥ 50,000,000 (approximately U.S.

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\(^{30}\) Foreign Investment Law, \textit{supra} note 13.

\(^{31}\) Foreign Exchange Law, \textit{supra} note 14.

\(^{32}\) Law No. 25 of 1948, \textit{as amended}.

\(^{33}\) Ministerial Ordinance Concerning Notice, etc., of Subscription of Sales of Securities, Ministry of Finance Ordinance No. 74 of 1953, \textit{as amended}.
$166,600 at ¥3000/$1) even if the shares are not offered to the general public (i.e. not offered to more than 50 subscriptions). However, this is a pro forma matter which the Japanese investor normally will handle.

The promoters may then invite subscriptions for the remaining shares. Each subscriber who is not a promoter, or each promoter who is to subscribe to shares other than as a promoter, must execute a subscription form for subscription by non-promoter subscribers.\(^4\) Subscription forms must describe, inter alia, the date of payment for subscription and the depository bank. The promoters and non-promoter subscribers are required to make full payment to the depository bank for the shares for which they have subscribed not later than the final date of payment for subscriptions as designated in the subscription form. The depository bank in turn issues a receipt to the promoters and subscribers for the payments made. Upon completion of payment for subscriptions by all subscribers, including the promoters, the depository bank must issue a certificate of deposits, which will be submitted to the Local Legal Affairs Bureau for entry in the Commercial Registry in connection with the registration of the incorporation of the new company.

3. Constituent General Meeting of Subscribers and Promoters.

—A constituent general meeting of subscribers and promoters of the new company should be held after all payments for shares to be issued as of the time of incorporation of the company have been made. All promoters and non-promoter subscribers should attend this meeting or should authorise by power of attorney some other person to attend the meeting and vote on their behalf. A two-week notice of the convening of the constituent general meeting of subscribers must be given to both promoters and non-promoter subscribers, unless a waiver of notice of the convening thereof is prepared and executed by all the promoters and non-promoter subscribers.

During the constituent general meeting of subscribers a report should be made by the promoters on matters relating to the incorporation of the new company, reciting the steps taken in connection with the incorporation.\(^5\) Election of the directors and auditors of the new company should be made,\(^6\) and the directors and auditors should then submit to the constituent general meeting an

\(^4\) Commercial Code, supra note 3, art. 175.

\(^5\) Id., art. 182.

\(^6\) Id., art. 183.
investigation report indicating that they have ascertained that the initial shares of the new company have been taken and that the purchase price has been fully paid and properly deposited.  

The minutes of the constituent general meeting should be prepared and signed by all the promoters and subscribers as well as by the directors and auditors in attendance at the meeting.

4. First Meeting of Board of Directors. —The first meeting of the Board of Directors of the joint venture can be convened immediately after the close of the constituent general meeting. Proper notice of the convening of the first meeting of the Board of Directors should be given to each director unless a waiver of notice has been prepared and executed by each. Proxies cannot be used for meetings of the Board of Directors.

At the first Board of Directors' meeting, one or more Representative Directors (daihyo torishimariyaku) should be elected. They may be authorised to represent the company either jointly or severally and they may hold other titles such as President or Vice-President, etc. The Board of Directors of the new company should also determine by resolution the location of the head office of the corporation.

Minutes of the first meeting of the Board of Directors should be prepared and signed by all directors present.

5. Registration of Incorporation.—The Representative Directors of the new company must file an application for corporate registration within two weeks of the date upon which the constituent general meeting of subscribers was held. At the same time they must pay a registration fee equivalent to 0.7 percent of the paid-in capital, in accordance with the provisions of the Registration and License Tax Law. Since the capital funds of the new company will still be in special accounts maintained at the depository bank, the registration fee is usually advanced by the Japanese investor.

The following items must be submitted with the application for corporate registration: (a) authenticated copy of Articles of Incorporation; (b) certification of the share subscriptions; (c) brief investigation report by the directors and auditors (discussed above);

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37 Id., art. 184.
38 Id., art. 261.
39 Id., art. 188.
40 Law No. 35 of 1967, as amended.
41 See Commercial Registration Law, Law No. 125 of 1963, as amended, art. 80.
(d) minutes of the constituent general meeting of subscribers; (e) certification that the directors, Representative Directors, and auditors have consented to assume their respective offices; (f) certificate of deposit for funds paid to the depository bank; and (g) minutes of the first Board of Directors meeting.

The process of incorporation and registration usually requires about two weeks from the date upon which the Agreement of Promoters’ Association is executed. All steps prior to the filing of the application for registration can be completed in approximately one week from the date instructions are given to proceed, and registration can be obtained, if unusual problems do not arise, within one week from the date that the application for corporate registration is filed. The corporation is considered to be incorporated as of the date that the registration is obtained.

As soon as the registration has been completed, the Representative Directors of the new company must obtain a certified extract copy thereof and deliver it to the bank(s) in which the share subscription payments have been deposited, together with a letter of instruction from the promoters’ representatives authorizing the bank(s) to place the subscription deposits at the disposal of the Representative Directors of the new corporation.

B. Contributions in Kind Under Japanese Law

Japanese law concerning contributions in kind made to a corporation in exchange for shares does not lend itself to precise explanation. The Commercial Code speaks in terms of "contributions in the form of property other than money," which is generally interpreted to mean de facto assets of such nature as can be listed on the asset side of the balance sheet. Such property must have a monetary value which can be estimated on an objective basis, it must be transferable or assignable, and it must be of such nature as can be legally protected against invasion. If the property has these characteristics, it can be contributed, whether it is tangible property, such as real estate, movables, immovables, securities, corporate bonds, or intangible property, such as industrial property

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42 Commercial Code, supra note 3, art. 18, para. 2.

rights (patents, design rights, utility models, trademarks), technological know-how, mining rights, good will or the like.

There is no question that patents and trademarks can be contributed to a Japanese corporation by transferring outright title thereto. Moreover, it seems well accepted that property can be contributed not only by means of an outright transfer, but also in the form of granting a right to use or exploit the property. There appears to be no clear distinction between the grant of an exclusive right and the grant of a non-exclusive right in considering the permissibility of contributions in kind in Japan. The Patent Law provides that when a non-exclusive right to work (tsujo-jisshi-ken) is registered, it can be set up against third parties, including the patent holder and an exclusive work right holder who later acquires such right. The Patent Law also provides that a tsujo-jisshi-ken is transferrable (subject to the consent of the patent holder and, in some cases, the consent of an exclusive work right holder) and can be an object of a pledge. The same can be said about trademarks since the Trademark Law renders the cited provisions of the Patent Law substantially applicable, mutatis mutandis, to trademarks.

Therefore, it would appear arguable that a license of patents or trademarks can be legally contributed to a Japanese corporation, regardless of whether it is an exclusive license or non-exclusive license. It must be noted, however, that registration of the license is crucially important in order for the contribution to be valid. The establishment of an exclusive license has no effect unless it is registered, and as already noted, a non-exclusive license cannot be set up against parties without registration.

With respect to technological know-how, a majority of the legal commentators affirm the permissibility of a contribution of know-how to a Japanese corporation in payment for shares, although some scholars have questioned the legality of contributions of know-
how on the ground that the actual supply of know-how usually takes place after the formation of a company.\textsuperscript{49} As a matter of practice, the courts have accepted the contribution of know-how to a \textit{kabushiki kaisha} in numerous situations. Given the well-accepted proposition that property can be contributed not only by means of a transfer thereof but also in the form of granting a right of use, there seems to be no cogent reason why license of know-how cannot be contributed and indeed it has been so held by the courts if the know-how itself qualifies as a proper subject matter of a contribution in kind.\textsuperscript{50}

At the time of incorporation, contributions in kind (including payments by way of transfer of industrial property rights) to a \textit{kabushiki kaisha} are dealt with under Japanese law as follows: (1) Only promoters can make "contributions in the form of property other than money." (2) The full name of each promoter who is to make a contribution in kind, a description of the property forming the contribution, the value assigned and a statement concerning the number and kinds of shares being given therefore must be set forth in the Articles of Incorporation.\textsuperscript{51} (3) The promoters making a contribution in kind must effect delivery on the date specified by the promoters for payment of contributions.\textsuperscript{52} (4) When all shares are to be taken by promoters so that there are to be no subscriptions from outsiders, the promoters appoint the first directors and auditors\textsuperscript{53} and, promptly after their appointment, the directors must apply to the court of competent jurisdiction (the district court) in the area in which the head office of the new company is located.


\textsuperscript{50} The Japanese approach to contributions in kind is quite similar to that evidenced in United States Internal Revenue Service's Revenue Ruling 64-56 of 1964. Rev. Rul. 64-56 (1964), 1964-1 CUM. BULL. 133. \textit{Cf. Comment, The Application of Section 482 to the Transfer or Use of Intangible Property, 17 U.C.L.A. L. REV. 202} (1969). For example, if both industrial property and services (such as translations, explanations as to the use of the property and training employees in its use) are furnished in exchange for stock, then to the extent that said services are considered "ancillary and subsidiary" to the transfer of property they will be treated as know-how qualifying as a proper subject matter of a contribution in kind to a Japanese corporation. However, as discussed above, to the extent that such "property" does not exist at the time of the date of payment for shares, it cannot qualify as the subject matter of contribution in kind. Commercial Code, \textit{supra} note 3, art. 172.

\textsuperscript{51} \textit{Id.}, art. 168, para. 1, item 5.

\textsuperscript{52} \textit{Id.}, art. 172.

\textsuperscript{53} \textit{Id.}, art. 170, para. 1.
to be located, for the appointment of an inspector to determine whether the contributions, both cash and in kind, called for by the Articles of Incorporation have been made. While there are no established procedures for inspection proceedings, it can be anticipated that they will be largely documentary in nature so that affidavits of foreign experts, translated into Japanese, or of prominent Japanese specialists could be submitted. (5) The report of the inspector is submitted to the court, which thereafter may leave the Articles of Incorporation in the form drafted or order their alteration to reflect a lower value for the property contributed. (6) A promoter who does not agree with the alterations ordered by the court may rescind his acceptance of shares, but incorporation procedures may then continue provided the Articles of Incorporation are altered in accordance with the court order.

The above procedures apply when the promoters take all of the shares to be issued at the time of incorporation ("promotive incorporation"). When a corporation is organized by inviting subscriptions from non-promoter subscribers in addition to the promoters' shares ("subscriptive incorporation"), it would still be necessary to submit the matter of valuation of contributions in kind to a court appointed inspector, but the inspector would submit his report to the constituent general meeting of shareholders rather than to the appointing court, and the constituent general meeting has the power to either alter or leave unchanged the value assigned in the Articles of Incorporation to the contributed property. Schematically diagramed, the necessity of applying to the court for inspection and review is as follows:

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54 *Id.*, art. 173. See Chart I and Chart II on pp. 218-219 above. In the case of a private company (*yūgen kaisha*), the value assigned to contributions in kind must be specifically stated in the Articles of Incorporation, but the value so assigned is not subject to review by a court-appointed inspector. Private Company Law, Law No. 74 of 1936, *as amended*, art. 7, item 2. Members at the time of incorporation remain jointly and severally liable for the deficiency when the value has been "substantially" overstated. *Id.*, art. 14.

55 *Commercial Code*, *supra* note 3, art. 173, para. 2.

56 *Id.*, art. 173, para. 3.

57 Of course, even when there is no contribution in kind, if the promoters take all the shares, then the promoters would still be required to apply to the court for the appointment of an inspector whose duty will be to inquire as to whether cash payment for the shares has been made. *Id.*, art. 173, para. 1.

58 *Id.*, art. 181, para. 2.

59 *Id.*, art. 185, para. 1.
There are two methods which obviate the potential problems of making contributions in kind in exchange for shares at the time of incorporation. With both methods the making of any contributions in kind is delayed until after incorporation. The first method is based on Article 280-8 of the Commercial Code which provides for contributions in kind to occur after the incorporation of a company in exchange for the issuance of new shares of the corporation not in excess of five percent of the total issued shares. Article 280-8 states:

In case there is any person who makes contributions in the form of property other than money, the directors of a corporation shall apply to the court for the appointment of an inspector whose duty shall be to make investigations regarding [the full names of the persons whose contributions are in the form of property other than money, the property forming the subject-matter of such contributions, the value of such property, a statement as to whether the shares to be given therefore are those having par value, the class and the number]. However, this shall not apply in case the number of shares to be given to such person does not exceed one-twentieth of the total number of the issued shares.

Due to the express limitation that court inspection can be avoided only if the new shares to be issued in exchange for the contribution in kind do not exceed five percent of the total number of issued shares, the joint venture investors may not want to utilize this option.

The other procedure, whereby the necessity of an application to the court is effectively (and legally) circumvented involves a two-step transaction whereby the "property other than money" is sold at the Closing to the new company at a stated price and thereafter, the party who receives the monetary benefit of this sale pays the same amount of cash for the agreed amount of newly issued stock resulting from a pre-planned capital increase. There is no requirement for court application, inspection and valuation when this procedure is combined with a subscription for newly issued stock pursuant to a capital increase of the new company. The next section of this article will assume that this capital increase approach is to be utilized.
C. Subsequent Capital Increase of the Joint Venture Company

If the non-Japanese investor subscribed to shares of the new company as a non-promoter subscriber, then it will be in the same position as the Japanese investor after incorporation of the joint venture company. However, if the non-Japanese investor intends to (in effect) exchange technical know-how and other proprietary information for shares in the new company, as discussed above, it will be more expedient for it not to act as a non-promoter subscriber at the time of the incorporation of the new company but rather to wait until the company has been incorporated and then receive a lump-sum payment from the company for the technological contribution and at the same time subscribe to new shares in the joint venture company resulting from a pre-planned capital increase.

Once the incorporation of the new company has been completed, certain preliminary steps looking toward the investment in the new company by the non-Japanese investor at the time of the capital increase must be completed.

1. Meeting of Board of Directors.—As soon as possible after the corporate registration of the new company has been completed, another meeting of the Board of Directors should be convened. At this meeting, the following items of business should be approved: (a) resolution to issue new shares of the company to be allocated to the foreign investor subject to the approval of a general meeting of the shareholders of the new company, if such approval is required by the Articles of Incorporation; (b) resolution to approve execution by the company of related agreements, including, for example, the patent license and technological assistance agreement, distribution and sales agreement, land and/or building purchase or lease agreements, etc., and to seek approval of such execution of such agreements at a general meeting of the shareholders; (c) resolution to convene an extraordinary general meeting of the shareholders of the company; and (d) resolutions to determine the deadline date for new subscriptions, the depository banks and other matters relating to the manner in which the shares are to be subscribed, subject to the shareholders' approval of the allocation of such shares to the non-Japanese investor.

2. General Meeting of Shareholders.—Pursuant to the resolution of the Board of Directors, an extraordinary general meeting of the shareholders should be convened with the directors of the new company also in attendance. Proper notice of this meeting
should be given, unless a waiver of notice is executed by all shareholders. At this meeting, the shareholders should approve the issuance of new shares of the company in the manner as proposed by the Board of Director's resolutions (specifically waiving any preemptive rights which they may have under the Articles of Incorporation) and approve the execution by the company of the related agreements, as mentioned above.

Article 246 of the Commercial Code requires the assent of shareholders where "within two years after its coming into existence, a company makes an agreement to acquire, for value equivalent to not less than one-twentieth of the capital, property existing prior to its incorporation and intended to be continuously used for purposes of the business." Compliance with Article 246 turns on the time of the making of an agreement rather than on the time that payment is to be made. The foreign investor should require copies of the resolutions of the shareholders approving the new company's conclusion of related agreements falling under Article 246.

3. Notification of Issuance of Shares.—A Notification of Issuance of Shares relating to the capital increase of the new company must be prepared in the manner described above and filed with the Ministry of Finance.

4. Remittance of Sum Equivalent to Withholding Tax.—In anticipation of the fact that payment by the joint venture company of any lump-sum consideration under a related patent license and technological assistance agreement will be subject to withholding tax under the Japanese Income Tax Law, 60 usually the non-Japanese investor (assuming it intends to use the entire lump-sum payment to offset its payment for shares in the new company) will remit into Japan the sum equivalent to the withholding taxes due. Such remittance should be made through a non-resident exchange "free yen" account established with an authorized foreign exchange bank in Japan.

5. Filing of International Tax Convention Report.—If the foreign investor is domiciled in a country which has entered into an international tax convention with Japan, then a representative of the non-Japanese investor must prepare and file the prescribed Tax Convention Report. This Report can be handled by representatives of the joint venture company, if the Report is delivered to them and if they are properly empowered by power-of-attorney. The new company must, in turn, affix its receipt stamp and deliver

60 Law No. 33 of 1965, as amended [hereinafter the Income Tax Law].
the same to the tax office having jurisdiction, on or before the Closing date. Failure to follow this procedure may result in a 20 percent withholding tax, instead of the current treaty rate of 10 percent.\(^{61}\)

6. **Subscription Form for the Foreign Investor.**—The Representative Directors of the company must prepare a share subscription form similar to the one which was (or would have been) used by the non-promoter subscribers at the time of incorporation of the new company, as discussed above. The final day of subscription payment should be the day of the Closing, in which event the foreign investor will officially become a shareholder on the day following the date of the Closing.\(^{62}\)

7. **Steps to Be Taken at the Closing.**—The first order of business at the Closing should be for the representatives of the foreign investor, the Japanese investor, and the joint venture company to confirm that all actions required to be taken as previously discussed have been taken in a manner satisfactory to all parties. Normally, the parties will then execute the related agreements. Frequently, the joint venture company will deliver to the non-Japanese investor a check for a lump-sum royalty payment (pursuant to the provisions of the patent license and technological assistance agreement), a receipt for which should be issued by the non-Japanese investor. The check should be promptly deposited in the exchange non-resident free yen account in the name of the non-Japanese investor previously established with an authorized foreign exchange bank in Japan.

The non-Japanese investor should execute the subscription form previously prepared by the Representative Directors of the new company and then issue an instruction to the bank with which its free yen account is established to release a stipulated amount of the free yen funds held there for payment into the special account of the new company as the non-Japanese investor’s payment for the new shares of the company. The Representative Directors of the company should then issue a receipt of subscription payment to the foreign investor.

D. **Post-Closing Procedures**

1. **Meeting of Board of Directors.**—A meeting of the Board


\(^{62}\)See Commercial Code, supra note 3, art. 280-9, para. 1.
of Directors should be convened on the day following the Closing. At this meeting, a resolution should be adopted to convene another extraordinary general meeting of the shareholders and to approve the items of business to be placed before it, which may include the appointment of new directors nominated by the non-Japanese investor, and the appointment of an additional statutory auditor also nominated by the non-Japanese investor. If necessary, pursuant to the requirements of the Articles of Incorporation of the new company, the Board of Directors should accept the resignations of the appropriate number of directors and auditors to be nominated by the non-Japanese investor.

2. General Meeting of Shareholders.—The non-Japanese investor will become a shareholder of the joint venture company from the day after the deadline date for subscription payment (i.e., the day immediately following the date of the Closing). Pursuant to the resolution of the Board of Directors, discussed above, an extraordinary general meeting of the shareholders of the new company should be convened, preferably on the day following the date of the Closing, through utilization of waiver of notice. The directors and statutory auditor nominated by the non-Japanese investor should be elected at this meeting, and minutes of the meeting should be prepared and executed by all the directors present. Each new director and auditor should sign a written acceptance of his position.

3. Meeting of Board of Directors.—A meeting of the Board of Directors should be held subsequent to the close of the extraordinary general meeting of the shareholders described above. As with all Board of Directors’ meetings, proper notice must be given beforehand, unless waivers of notice are executed by all directors, including those newly appointed. The agenda for this meeting may include the following items of business: appointment of one or more Representative Directors to be designated by the non-Japanese investor; approval of the transfer from each non-Japanese promoter and non-promoter subscriber to the Japanese investor of the shares which such person or juridical entity subscribed to at the time of incorporation of the new company, and determination of denomination of share certificates to be issued by the new company, which is necessary in order to effect the issuance of share certificates.

4. Changes to Corporate Registration.—Within two weeks after the Closing, a Representative Director of the joint venture company must file another corporate registration application with the

63 Id., art. 240-2.
Local Legal Affairs Office setting forth the joint venture's increase in capital, the appointment of new or additional directors, Representative Director(s) or auditor. The following documents must be attached to this application: (a) minutes of the Board of Directors meeting appointing the new Representative Director and approving the increase of capital; (b) minutes of the extraordinary general meeting of the shareholders approving the increase of capital and electing the new directors and the auditor; (c) written acceptances of the new directors, Representative Director, and auditor to their respective appointments; (d) written resignations of the directors, Representative Director, and auditor who resigned, if any; (e) subscription form executed by the non-Japanese investor; and (f) a certificate of the depository bank stating that the payment for the newly issued shares was received in full and kept in a special account for that purpose.

Registration tax equivalent to 0.7 percent of the amount of capital increase must be paid at the time of registration. In addition, the sum of ¥ 10,000 (approximately U.S. $30) must be paid as registration tax in respect of the registration of changes in officers of the joint venture company.

5. Issuance of Share Certificates.—The issuance of share certificates is not mandatory under Japanese Law, if not otherwise provided for in the Articles of Incorporation of the joint venture company. Therefore, if the foreign investor or the Japanese investor does not desire to possess share certificates representing their respective shares of the new company they should notify the company, and the company should make an entry in the Shareholders' Register to that effect. Of course, shareholders may at any later date request the issuance of their respective share certificates.

The issuance of share certificates must be registered in the Shareholders' Register of the joint venture company. Non-resident shareholders may be required by the Articles of Incorporation to report an address in Japan where they may be served with notices by the company to its shareholders, and such addresses must also be noted in the Shareholders' Register.

With respect to the shares subscribed to at the time of incorporation of the new company by the Japanese promoters and non-

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64 Id., art. 226-2. Sometimes parties to a joint venture prefer to waive possession of their share certificates as a means to inhibit the transfer of those shares to other parties. In such a situation, before a shareholder can transfer his share certificates he must first request the Board of Directors to issue the shares certificates to him. Thus, the Board of Directors is put on notice before any transfer of shares can occur.
promoter subscribers, other than the Japanese investor, all of such shares can now be transferred from such parties to the Japanese investor. In order to effect the transfer of shares, the actual share certificates must be delivered from the transferor to the transferee. Therefore, it will be necessary for the new company to issue share certificates to represent the shares to which such parties subscribed at the time of incorporation of the company. Upon issuance of the certificates, the promoters should transfer and deliver their shares in the new company to the Japanese investor, and such issuance and transfer should be reflected in the Shareholders' Register of the new company.

Should the non-Japanese investor desire to take its share certificates out of Japan (an alternative being a safe-keeping arrangement with a bank in Japan), confirmation by the Tokyo Customs authorities will be required in accordance with Article 20 of the Foreign Exchange Control Order. Such confirmation is usually not difficult to obtain.

6. Payment of Withholding Tax.—The joint venture company must make payment of withholding taxes by the tenth day of the month following the month in which payment of lump-sum royalties, if any, is made by the joint venture company to the non-Japanese investor. Upon payment of such withholding tax, the joint venture company should obtain a Japanese Tax Payment Certificate from the tax authorities to which the withholding tax was paid, and deliver the certificate to the foreign investor.

7. Registration of Rights to Patents and Trademarks.—Licenses or assignments of industrial property rights should be registered with the Japanese Patent Office. The requisite documents may include a simple confirmation of the license or assignment and a power-of-attorney from the non-Japanese investor authorizing an agent in Japan to effect registration of the license or assignment referred to above with a notarized Corporation Nationality Certificate of the foreign investor stating that it is a duly organized corporation and that the person who has signed the power-of-attorney is duly authorized to act on its behalf.

8. Reports to Be Filed by the non-Japanese Investor.—Several reports must be filed with the Japanese Government in respect of the foreign investor’s acquisition of shares of the joint venture com-

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65 Id., art. 205, para. 1.
66 Cabinet Order No. 203 of 1950, as amended.
67 Income Tax Law, supra note 60, art. 212.
pany and the conclusion of the related agreements. Representatives in Japan can handle these requirements if provided with a proper power-of-attorney.

A report must be filed with the Ministry of Finance and the Ministry of International Trade and Industry concerning the acquisition of shares in the new company by the foreign investor. A copy of the conversion certificate issued by the authorized foreign exchange bank which handled the remittance and deposit in the exchange non-resident free yen account should be attached to this report. The conditions of validation also will usually require a certificate of the joint venture company, as the issuing company, certifying that the number of shares stated in the validation have been duly issued to the foreign investor.

As previously noted, the non-Japanese investor and the joint venture company must also file a report with the Ministry of Finance and the Ministry of International Trade and Industry concerning the conclusion of any related patent license and technological assistance agreement.

9. Reports to Be Filed by the Japanese Investor.—Within thirty days of the execution of the joint venture agreement, the Japanese investor must file a report with the Japanese Fair Trade Commission (FTC) concerning the conclusion of an international agreement.

10. Reports to Be Filed by the Joint Venture Company.—The joint venture company must file a report with the FTC concerning the conclusion of the related international agreements which the company has entered into with the non-Japanese investor (having a term exceeding one year) within thirty days of the execution of such agreements.

As soon as possible after the incorporation of the new company, the following national and local tax reports and applications must be filed by the company: (a) Report Concerning Establishment of Business by the new company; (b) Application for Filing Blue Tax Return; (c) Report Concerning Adoption of Particular Method of Evaluation of Inventory; (d) Report Concerning

68 Foreign Investment Law, supra note 13, art. 24.
69 Id. See discussion accompanying notes 22-23 supra.
70 Antimonopoly Law, supra note 25, art. 6. See discussion accompanying notes 25-27 supra.
71 See Corporation Tax Law, Law No. 34 of 1965, as amended, art. 122. This application is optional, but usually desirable.
72 Id., art. 22.
Adoption of Particular Method for Depreciation of Depreciable Assets; and (e) Report Concerning Establishment of Salary-Paying Office.

As soon as the joint venture company employs five or more persons, it must file the following reports pursuant to Japanese labor and employee welfare laws: (a) a report must be filed with the prefectural Labor Standards Office pursuant to the Workmen’s Accident Compensation Insurance Law; (b) a notification must be filed with the Chief of the competent Public Employment Security Office pursuant to the Unemployment Insurance Law; (c) a report must be filed with the prefectural government pursuant to the Health Insurance Law; and (d) a report must be filed with the prefectural government pursuant to the Welfare Pension Insurance Law.

As soon as the joint venture company employs ten or more persons, it must take the following action pursuant to the Labor Standards Law: (a) submit a report on Form No. 23-2 to the Chief of the competent Labor Standards Inspection Office; (b) establish and submit Rules of Employment for the company’s employees to the Chief of the competent Labor Standards Inspection Office; and (c) if the joint venture company wishes to establish overtime work provisions which differ from those set forth in the Labor Standards Law, it must obtain the agreement of its employees and then notify the Chief of the competent Labor Standards Inspection Office.

IV. CONCLUSION

The trend toward a greater number, larger and more diversified joint ventures in Japan will surely continue. Joint ventures remain the most important and effective means of direct involvement in

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73 Id., art. 310.
74 Income Tax Law, supra note 60, art. 230.
75 Law No. 50 of 1947, as amended. If the joint venture is a manufacturing enterprise (or involved in the transportation, communication, construction, electricity, or gas and water industries), then it must participate in the Workman’s Accident Compensation Insurance program even if it has less than five employees.
76 Law No. 146 of 1947, as amended. Same comment in note 75 supra applies to the Unemployment Insurance program.
77 Law No. 70 of 1922, as amended.
78 Law No. 115 of 1954, as amended.
79 Law No. 49 of 1947, as amended.
Japanese business activities open to foreign companies. Even if foreign investment in Japan were to become completely liberalized, joint ventures will still have many advantages over other methods of participation due to the differences in Japanese business practices in key areas such as personnel and marketing and also due to the relatively limited first hand experience of most foreign companies with Japan.

This article has attempted to briefly outline the structure and documentation of a typical joint venture in Japan, along with the relevant Japanese Government controls and the normal legal steps which must be taken in connection with the establishment of a joint venture company in Japan. While admittedly introductory in nature, it is hoped that this outline will provide a generally useful checklist of factors to consider in formulating detailed proposals for the establishment of an equity joint venture in Japan.