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# Joint Ventures 2023

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## **Japan: Trends & Developments**

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## Trends and Developments

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**Nagashima Ohno & Tsunematsu**

**Nagashima Ohno & Tsunematsu** is based in Tokyo, Japan, and is widely recognised as a leading full-service business law firm and as one of the foremost providers of international legal services. In representing its leading domestic and international clients, the firm has successfully structured and negotiated many of the largest and most significant corporate, finance and real estate transactions related to Japan. In addition to its capabilities spanning key commercial areas, the firm is known for path-breaking domestic and cross-border risk management/cor-

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**Axel Kuhlmann** is a foreign law partner at Nagashima Ohno & Tsunematsu and focuses on corporate and M&A. He is qualified in Germany and is co-head of the firm's European practice. Axel has wide-ranging experience in the European and Japanese markets, advising Japanese and global companies on their business activities in Europe as well as European and other foreign clients on their projects in Japan, in particular regarding joint ventures and business co-operations with Japanese partners. Foreign clients praise him for his deep understanding of the Japanese business culture and his ability to facilitate negotiations with Japanese business partners.



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# JAPAN TRENDS AND DEVELOPMENTS

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## General Joint Ventures Overview

Forming a joint venture with a local partner has been and continues to be a popular market entry strategy for foreign companies to establish their presence in Japan. With Japan's unique business landscape and cultural nuances being a contributing factor, many foreign companies have chosen to form a joint venture with a local company to enter the Japanese market in order to leverage their partner's local knowledge and expertise and to overcome market barriers. While there are no official statistics on the number of joint ventures that have been established between foreign and Japanese companies, Toyo Keizai estimates that, as of 2020, there were around 600 to 900 joint ventures incorporated in Japan with both Japanese and foreign capital. Furthermore, according to statistics of the Japanese Ministry of Economy, Trade and Industry (METI), between 2015 and 2019, joint ventures had been gaining popularity as a way of entering into the Japanese market.

According to METI's "Survey of Trends in Business Activities of Foreign Affiliates", out of all companies whose foreign capital ratio newly surpassed 33% (including newly established companies with foreign capital of over 33%) in 2015, only 8.1% were newly established joint ventures (conversely, 74.3% were newly established subsidiaries under a single foreign company). In 2019, the percentage of newly established joint ventures had increased to 17% as opposed to the percentage of subsidiaries established under a single foreign company, which decreased to 36.2%. While comparable statistical data is not (yet) available for the time after 2019, it seems conceivable that the number of newly established joint ventures dropped during the years of the COVID-19 pandemic due to economic uncertainties and travel restrictions which made the arrangement of new business

collaborations more difficult. Following the general business trend, however, the authors are optimistic that the number will start increasing again, and as of 2022 more joint venture activities have been seen. Recent examples are:

- joint venture between Octopus Energy Ltd (United Kingdom) and Tokyo Gas Co, Ltd established in 2021 to provide electricity from renewable sources in Japan;
- joint venture between Abcontek Inc (Korea) and AI Bio established in 2021 to operate contract development and manufacturing organisation focused on pharmaceuticals and diagnostic reagents for infectious diseases including COVID-19;
- joint venture between Sunseap Group Pte Ltd (Singapore), Sumitomo Corporation and Shikoku Electric Power Company, established in 2022 to jointly operate a solar power generation business;
- joint venture between BP plc (United Kingdom) and Marubeni Corporation established in 2022 to jointly operate offshore wind development;
- joint venture between CJ ENM (Korea), Studio Dragon (CJ ENM's subsidiary) (Korea) and LINE Digital Frontier established in 2022 to operate a production studio focusing on drama series for the Japanese content market;
- joint venture between Mirakl (France) and Japan Cloud established in 2022 to operate an online marketplace platform in Japan;
- joint venture between AKQA Corp (United States), ITOCHU Corporation and ITOCHU Techno Solutions Corporation established in 2022 to operate a consulting business specialising in focusing on customer experiences;
- joint venture between Digital Asset Holdings, LLC (United States) and SBI Holdings, Inc

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established in 2022 to provide blockchain service in Japan and East Asia;

- joint venture between Arcturus Therapeutics Holdings, Inc (United States) and Axcelead, Inc established in 2022 to operate a contract development and manufacturing organisation focused on mRNA vaccines and therapeutics;
- joint venture between Dear U Co, Ltd (Korea) and m-up holdings, Inc announced in 2023 to operate “Dear U bubble”, a private messaging service allowing artists and fans to chat;
- joint venture between Zodia Custody Limited (United Kingdom) and SBI Digital Asset Holdings Co, Ltd announced in 2023 to operate a crypto-asset custodian; and
- joint venture between Global Thermostat (United States) and ICMG announced in 2023 to leverage advanced technology to directly capture carbon dioxide (CO<sub>2</sub>) from the atmosphere.

This list is certainly not exhaustive, but it shows that joint ventures are particularly popular where foreign investors seek a strong local partner to overcome regulatory barriers and streamline regulatory procedures. By partnering with Japanese companies, foreign companies may:

- gain access to the Japanese partner’s knowledge of regulatory frameworks;
- use their relationships with governmental authorities; and
- at times, utilise the existing governmental permits, licences or approvals held by the Japanese partner which are required to operate their business in Japan.

Consequently, joint ventures between foreign and Japanese companies are commonly seen in sectors with heavy industrial regulations, such as the financial, medical, technology, entertainment and energy sectors.

Start-ups are another area in which more joint venture activities can be seen. While statistical data about investments of Japanese companies into foreign start-ups is not available, the number of investments by Japanese companies into Japanese start-ups has increased more than ten times in the last decade. Investments into foreign start-ups likely follow the same trend since Japan is an attractive market, in particular in the field of new technologies. This makes Japan highly relevant for more mature start-ups pursuing a growth and market-expansion strategy. The business collaboration between the US autonomous driving company MayMobility and Japan’s telecommunications giant Softbank is a good example of this. Other examples are the joint ventures between Yahoo and OYO (India), Softbank and Mapbox (United States) as well as Softbank and Cyberreason (Israel). All of these start-ups are tech-oriented and seeking entry into, or expansion in, the Japanese market with support from a local partner.

In teaming up with a distributor for the Japanese market, foreign start-ups can benefit from the exchange and mutual use of technologies as well as logistical, production and operational support and financing, depending on how the joint venture is structured and where parties see promising synergies. In addition, setting up a joint venture shows the start-up company’s significant commitment to the Japanese market. This, and the Japanese partner’s obvious commitment to the start-up as a reliable and attractive business partner as well as the product or service manufactured/provided by the start-up through the joint venture can help to raise more third-party financing from Japanese financial and strategic investors, noting that their appetite for start-up investments is still strong in Japan. In addition, teaming up with a well-established Japanese partner can make the undertaking

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more attractive for local employees since it adds trust and a certain reputational heft.

## Challenges for Foreign Investors and How to Overcome Them

Forming a joint venture with another company always comes with certain challenges, since the joint venture partners may pursue different goals regarding the joint venture and may have different company cultures. This applies even more in the case of a joint venture with a Japanese partner, since Japan has a somewhat unique business culture. A classic example is the corporate decision-making process, which usually takes (much) more time in Japanese companies since decisions usually follow a consensual approach among all departments involved. This has to be taken into account not only during the formation process of a joint venture but also when drafting the deadlock resolution provisions of the joint venture agreement. In this context, it should also be noted that management personnel dispatched to the joint venture by the Japanese joint venture partner are usually very dependent on instructions from the Japanese joint venture partner's headquarters, and can be less flexible.

Another challenge involves communication issues. This is not limited to language barriers but includes the way things are communicated in Japan in general. While foreign investors, in particular those from the USA and Europe, tend to be quite frank and explicit in their communication, the Japanese usually go for more indirect and implicit communication. This can easily lead to misunderstandings, and the parties are well advised to ensure that they are on the same page regarding the outline and goals of the joint venture and regarding each party's role before the joint venture is established. For the foreign investor, this includes scrutinising not only its

own rationale for entering a joint venture but also that of its Japanese partner.

In general, parties should take time to carefully assess what type of joint venture (incorporated joint venture or simple business collaboration) makes the most sense for them and how their collaboration should be structured. Particular attention should be paid to the business collaboration or venture agreement, which should not leave any gaps. This is not only to avoid controversies down the road but also to make the parties aware of and sort out potential differences in expectations. For the reasons mentioned above, this is even more important when entering a joint venture with a Japanese partner.

In the case of an incorporated joint venture, particular care should be taken when drafting the following provisions.

- Governance of the joint venture, including composition of the board of directors and shareholder-reserved matters. Depending on the situation, optional additional bodies such as a strategic or steering committee with representatives of both joint venture partners can be helpful to ensure that the partners stay aligned in terms of how the joint venture is operated and its business strategy. It is also recommendable to agree on the language used in meetings and for the minutes, since English is still not as common for business communication in Japan as it is in other countries.
- Contributions of both partners, not only in terms of economic contributions but also each partner's role in the operation of the joint venture. Also, regulatory aspects such as responsibility for obtaining necessary licences and permits should be clarified.



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- Resolution of deadlocks – as mentioned above, the generally slower decision-making process of Japanese joint venture partners should be taken into account here and deadlines for the individual steps of the resolution process should be set realistically. At the same time, the mechanism should not provide for too many steps to avoid unnecessary postponement of the resolution. A provision on the language of documents to be exchanged during the resolution process and who should bear the costs of translation is also recommendable.
- To facilitate collaboration and exchange of knowledge, secondments from the joint venture partners to the joint venture are often a good option. If possible, the major terms of such secondments should be agreed and attached to the joint venture agreement as term sheets.
- Dispute resolution – Japanese joint venture partners tend to opt for jurisdiction of Japanese courts, which seems an obvious choice since the joint venture is established and likely operates in Japan. For foreign investors, however, this can be cumbersome not just because the court language is Japanese and all relevant documents have to be submitted in Japanese, but also because Japanese law may give courts more room to apply a certain amount of discretion than in their home jurisdiction. An arbitration clause could be a good and more practical alternative as well, since arbitral proceedings are usually confidential, as opposed to state court proceedings.
- Termination provisions, including put and call options as well as drag-along and tag-along rights (where appropriate), in each case, with clearly defined triggers.

Once the joint venture is set up, foreign investors often face the challenge of “getting a grip” on the

joint venture. If both joint venture partners are dispatching management personnel to operate the company, it is key for the foreign investor to send persons who are familiar with the Japanese business and work culture. Not only does this facilitate collaboration with their Japanese counterparts, but it also encourages acceptance by and respect of the employees of the joint venture, who will likely be mostly Japanese. Gaining trust and respect from the Japanese employees can be a challenge for dispatched personnel from the foreign joint venture partner, since the Japanese joint venture partner will likely appoint Japanese management personnel who speak Japanese and, as such, has much easier access to the staff. This point should be addressed openly in the discussions between the joint venture partners, and an obligation for either party to ensure that their dispatched management personnel co-operate and support the other party’s personnel should be added to the joint venture agreement.

## Foreign Investment Control

When setting up a joint venture as a corporation in Japan, foreign investors must follow the foreign direct investment control regime, which is mainly governed by the Foreign Exchange and Foreign Trade Act (FEFTA). In many cases, FEFTA will only require a post-closing notification to the Ministry of Economy, Trade and Infrastructure (METI) through the Bank of Japan. If the joint venture will be active in certain sensitive business sectors, however, FEFTA can require a notification prior to the incorporation or acquisition of the shares in the joint venture. Upon notification, and unless certain exceptions apply, foreign investors must wait 30 days before completing the transaction. Moreover, if the authorities identify any substantial national risk associated with the investment, they may impose covenants on the parties (eg, limiting

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access of the foreign investor to the joint venture company's information).

A series of recent amendments of FEFTA expanded the scope of relevant business sectors that require prior notification. Among others, relevant business sectors now also include software and data processing and certain internet-related services. Foreign investors should keep this in mind, and a foreign investment control analysis should be carried out at an early stage of the process.

## Dissolution of Joint Ventures

Similar to joint ventures formed in other countries, joint ventures formed in Japan may come to an end for various reasons, such as:

- a change in the joint venture partner's business strategy, or in the market or economic environment;
- poor business performance of the joint venture; or
- the expiry of an originally anticipated joint venture period.

Although there are no notable trends in recent joint venture dissolutions in Japan, there are relatively more cases where joint ventures are dissolved by one partner acquiring all shares in the joint venture from the other partner(s), thus making the joint venture company a wholly owned subsidiary. A recent example of this is the Heineken-Kirin joint venture for sales and marketing of Heineken beer in Japan, which existed for over 30 years. In 2022, Heineken, already holding 51% of the joint venture, decided to take over the shares of Kirin to make the joint venture its wholly owned subsidiary. Apparently, after such a long time, Heineken had gained enough experience in the Japanese market to run the former joint venture on its own.

Obviously, it is desirable to dissolve a joint venture on an amicable basis. Otherwise, many issues can arise, particularly if the joint venture agreement was not drafted with a view to potentially (controversial) dissolution. Those issues include the question of whether to dissolve the joint venture completely or transfer all shares to one of the partners to continue the business. If shares are transferred, how to calculate the purchase price and how to handle jointly developed intellectual property rights that the selling partner needs to use for its own business must be considered, as must how to allocate the assets if the joint venture is dissolved.

Even if, at the moment it is set up, the parties have no intention of terminating the joint venture, the joint venture partners are well-advised to anticipate the end of the joint venture and to properly address all those points in the joint venture agreement. Furthermore, potential trigger events for the end of the collaboration should be considered, such as put or call options and drag-along and tag-along rights that can be exercised when certain criteria are met. Particularly for technology-heavy joint ventures, appropriate provisions on how to handle intellectual property rights at the end of the joint venture (but of course also during its active phase) are equally important.

Although it is not possible to anticipate all issues that may arise when a joint venture heads towards dissolution, foreign investors should consider this point. Japanese companies tend to prefer amicable solutions reached through sometimes lengthy and cumbersome good-faith discussions rather than provide for a concrete dissolution process in the joint venture agreement. Also, Japanese companies are particularly reluctant to discuss potential dissolution scenarios and problems or disagreements that may



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occur in this context at a time when the parties are just planning to set up the joint venture. This may be rooted in Japanese culture, but can lead to a lack of detailed arrangements for the dissolution of the joint venture with the expectation that the issues will finally be resolved through amicable consultations between the joint venture partners.

The dissolution of a joint venture with a foreign joint venture partner can also become relevant from a regulatory perspective if the joint venture is active in a relevant industry sector that is subject to foreign direct investment control under the FEFTA. Depending on the situation, a prior filing may be required for the dissolution of the joint venture, discontinuation of the business, or acquisition of shares in the joint venture by the foreign party. If the foreign party is a minority shareholder, a notification under the antitrust law of Japan may also be required if the foreign party is supposed to take over the shares from its Japanese partner.

## Conclusion

Japan is a very joint venture-friendly jurisdiction and remains an interesting market for various industry sectors. This is reflected in a continuously growing number of joint ventures with foreign ownership in Japan. While the Japanese business culture may come with some unique features, foreign investors regularly praise the reliability and trustworthiness of their Japanese partners. If set up properly and with experienced legal advice, cross-border joint ventures in Japan can be an attractive method for entering the Japanese market, pooling know-how and other capacities, and creating attractive synergies.

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