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# TECHNOLOGY M&A

Japan

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# Technology M&A

Contributing Editors

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White & Case LLP

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# Contents

## Technology M&A

### STRUCTURING AND LEGAL CONSIDERATIONS

- Key laws and regulations
- Government rights
- Legal title

### DUE DILIGENCE

- Typical areas
- Customary searches
- Registrable intellectual property
- Liens
- Employees and contractors
- Transferring licensed intellectual property
- Software due diligence
- Special or emerging technologies

### PURCHASE AGREEMENT

- Representations and warranties
- Customary ancillary agreements
- Conditions and covenants
- Survival period
- Liabilities for breach
- Indemnities
- Walk rights

### UPDATES AND TRENDS

- Key developments of the past year

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## STRUCTURING AND LEGAL CONSIDERATIONS

### Key laws and regulations

What are the key laws and regulations implicated in technology M&A transactions that may not be relevant to other types of M&A transactions? Are there particular government approvals required, and how are those addressed in the definitive documentation?

Intellectual property laws are particularly important for structuring technology M&A transactions as the formalities and processes required for transferring intellectual property assets and related agreements may differ depending on deal structures. For instance, registration with the Japan Patent Office is required to effect the transfer of industrial property rights such as patent rights via asset purchases, while such registration is not required in mergers, company splits, and share purchases. In this regard, key intellectual property laws are [the Patent Act](#), [the Utility Model Act](#), [the Design Act](#), [the Copyright Act](#), and [the Trademark Act](#), as well as [the Unfair Competition Prevention Act](#), which protects, among others, trade secrets, big data (as far as it may qualify as 'data for limited provision'), indications of goods or business (eg, product names, trade names, and packaging for goods), and forms of goods.

In addition, under [the Foreign Exchange and Foreign Trade Act](#) (FEFTA), investments by foreign investors in Japanese companies operating in certain designated industries, including aerospace (including drones), semiconductor manufacturing, semiconductor production equipment manufacturing, industrial robot manufacturing, cybersecurity, software development, data processing, other IT-related services, and infrastructure, are subject to review by Japanese government authorities prior to closing. The transactions subject to review include not only typical M&A transactions (such as share acquisitions and mergers) but also the appointment of officers and the exercise of voting rights at shareholders' meetings of Japanese companies. The waiting period is 30 days after the submission of the filing documents in general but can be extended up to five months in total.

A key data protection law in Japan is [the Act on the Protection of Personal Information](#) (APPI). Some M&A transactions in the technology field are driven by personal data owned by the target company. In such case, buyers should, as part of the due diligence of the target company, identify major activities involving personal data and any compliance issues concerning the APPI and other applicable data protection laws. Since, under the APPI, personal data may only be used for the purposes for which it was acquired, buyers should also verify whether personal data owned by the target company may be used as contemplated by the buyers after the transactions and consider any necessary actions required under the APPI and other applicable data protection laws. It should be noted that the amended APPI, enforced since April 2022, amended a wide range of matters, including strengthening regulations on international transfers, making it mandatory to report and notify in the case of a breach and adding an obligation to disclose safeguards.

Law stated - 29 July 2024

### Government rights

## Are there government march-in or step-in rights with respect to certain categories of technologies?

Under the Japanese Bayh-Dole system, intellectual property rights arising under government-funded research and development are to be vested solely in private companies conducting such research and development, subject to certain conditions, among others:

- the transfer and/or licensing of such intellectual property rights requires prior government approval;
- the government may require the licensing of such intellectual property rights to the government at no charge where necessary for the public interest; and
- if the intellectual property has not been used for a prolonged period of time without a legitimate reason, the government may require the licensing of such intellectual property rights to a third party where particularly necessary for promoting the use of the intellectual property. In practice, such conditions are included in agreements with the government for research and development.

In addition, under the FEFTA, the government may issue a recommendation or order to change the terms and conditions of the reviewed investment or to block its implementation if it believes that such investment raises national security or other public interest concerns. Also, the government may order the disposition of the acquired shares or other corrective actions with respect to investments or other transactions made in violation of the FEFTA.

**Law stated - 29 July 2024**

## Legal title

**How is legal title to each type of technology and intellectual property asset conveyed in your jurisdiction? What types of formalities are required to effect transfer?**

First, the contracting parties must agree to the transfer of technology and intellectual property asset; no special formalities (eg, in writing) are required in this regard. However, depending on the types of asset, registration is required to effect the transfer.

Patent rights, utility model rights, design rights and trademarks

It is notable that registration with the Japan Patent Office (JPO) is a requirement for the transfer (other than those by inheritance, merger, or other general succession) of patent rights, utility model rights, design rights and trademarks (collectively, 'industrial property rights') to take effect. In the event of a transfer of such industrial property rights by way of an inheritance or a merger, an ex-post notification to that effect must be submitted to the JPO, while the transfer takes effect upon the effective date of such inheritance or merger without any registration or other formalities.

Although the law is not clear, the succession of industrial property rights through a company split is practically treated in the same manner as a merger, in which case registration is not a requirement for the transfer, but ex-post notification is.

With respect to industrial property rights that are co-owned with other co-owners, the consent of all the other co-owners is required to transfer an interest in such industrial property rights, except in the case of general succession, such as inheritance or merger. In practice, it is understood that the succession of an interest in co-owned industrial property rights through a company split is treated in the same manner as a merger, in which case no consent of other co-owners is required. If there are any restrictions on the transfer of any interest in co-owned industrial property rights under any agreement between or among the co-owners (such as a joint development agreement or a joint application agreement), each party to such an agreement must comply with such restrictions.

## Copyrights

Unlike in the case of industrial property rights, copyrights are transferable without any registration or other formalities. However, a copyright is a bundle of rights stipulated in the Copyright Act, and among such rights, the rights under article 27 of the Act (translation rights, adaptation rights, and other rights) and the rights under article 28 of the Act (Rights of the original author in connection with the exploitation of a derivative work) are presumed not to be transferred unless explicitly stated to that effect as the purpose of the transfer. Thus, where transferring such rights, it is necessary to explicitly state in the transfer agreement that these rights under articles 27 and 28 of the Copyright Act are also transferred. Under Japanese law, the moral rights of an author of copyrighted work are personal rights and cannot be transferred or waived. Therefore, when any copyright is transferred or licensed, it is practically advisable to consider obtaining a covenant from the assignor or licensor (ie, an author of the copyrighted work) not to exercise moral rights to secure the freedom to exploit the copyrighted work.

## Trade secrets and data for limited provision

Trade secrets may be protected under the Unfair Competition Prevention Act (UCPA) if all the requirements of confidentiality, usefulness, and non-publicity are met. In some cases, even if data is not protected as a trade secret because the confidentiality requirement or non-publicity is not met, 'big data' may be protected as 'data for limited provision' under the UCPA. If such trade secrets and data for limited provision (collectively, 'trade secrets etc.') are infringed by certain fraudulent acts under the UCPA, the infringed party who has a legitimate right to hold and/or use such trade secrets etc. may have standing to seek legal remedies, such as damages or injunctive relief. These trade secrets etc. do not confer specific intellectual property rights which are assignable to others. However, as long as transferees of the applicable data meet the requirements therefor, they will be deemed to have succeeded in the standing to obtain such legal remedies, along with the data. The recent amendment to the UCPA enforced in April 2024, enhances the protection of trade secrets etc, by, for example, expanding the applicability of the presumption of the amount of damages in the case of infringement of trade secrets etc, and enabling a claim for damages in excess of the right holder's production capacity as the amount of licence fees in the event of infringement of trade secrets etc.

As data or information is intangible assets, no ownership rights under the Civil Code can be vested in such data or information. Thus, data and information may be transferred by agreement between the parties without any formalities.

## DUE DILIGENCE

### Typical areas

What are the typical areas of due diligence undertaken in your jurisdiction with respect to technology and intellectual property assets in technology M&A transactions? How is due diligence different for mergers or share acquisitions as compared to carveouts or asset purchases?

Typical areas of intellectual property and technology due diligence undertaken in Japan with respect to technology M&A transactions include:

- identifying all intellectual property assets, including registrations and applications thereof, owned by or licensed to the target;
- reviewing whether there are any pledges and other securities as well as other statutory or contractual restrictions on all (material) intellectual property rights owned by or licensed to the target;
- reviewing agreements relating to intellectual property rights or IT systems, including but not limited to licence agreements and joint research and development agreements to which the target is a party;
- analysing the risk of infringement by the target of intellectual property rights held by third parties, which may result in restrictions on the business activities of the target;
- analysing the risk of infringement by third parties of the target's intellectual property rights;
- reviewing how intellectual properties are managed by the target, including the IP management system; and
- reviewing the internal rules relating to employee inventions and employee work, and checking how these rules have been implemented, including identifying unpaid consideration for employee inventions and employee work.

In carve-outs or asset purchases, since only a portion of the target company's assets are transferred or assigned to a purchaser, essential intellectual property assets and/or IT systems may remain in the business that is not subject to the transfer, and the purchaser's business operations after the transaction may be hindered without the assignment or licensing of such assets, etc (stand-alone issues). Identifying such stand-alone issues is an integral part of the due diligence in carve-outs or asset purchase deals.

In addition, where a carve-out or asset purchase is carried out by way of a business transfer, as opposed to a company split, a purchaser needs to be mindful that registration is required to effect the transfer of industrial property rights via a business transfer.

In share acquisitions, it is important to identify any change-of-control clause when reviewing agreements relating to intellectual property rights or IT systems.



### Customary searches

What types of public searches are customarily performed when conducting technology M&A due diligence? What other types of publicly available information can be collected or reviewed in the conduct of technology M&A due diligence?

Patent rights, utility model rights, design rights and trademarks

For information on industrial property rights that require registration with the Japan Patent Office (JPO), it is common to access the Japan Platform for Patent Information (J-PlatPat), a free online database operated by the National Center for Industrial Property Information and Training (INPIT) under the authority of the Ministry of Economy, Trade and Industry. Since there is some time lag before the latest information is reflected on J-PlatPat and some information (eg, the details of pledges or other securities) cannot be verified on J-PlatPat, it is worth considering obtaining and reviewing a copy of the original registry for each registration. Considering cost and time, it is prudent in some cases to review a copy of the original registry only for material or otherwise limited number of industrial property rights.

Copyrights

No registration is required for copyrights to be vested. Copyrights may be registered to enjoy some legal consequences, including the perfection for the transfer, or the establishment of pledges over copyrights. However, such a registration system is not widely used in the market, and thus, there is little need to investigate the existence of such registration of copyrights in a due diligence process.

**Law stated - 29 July 2024**

### Registrable intellectual property

What types of intellectual property are registrable, what types of intellectual property are not, and what due diligence is typically undertaken with respect to each?

In Japan:

- patent rights, utility model rights, design rights and trademarks (collectively, 'industrial property rights') are registrable with the Japan Patent Office (JPO), and registration is required for such rights to be vested;
- copyrights are registrable with the Agency for Cultural Affairs (in the case of any works other than computer program works) or the Software Information Center (SOFTIC) (in the case of computer program works). However, registration is not required to be vested (all copyrights automatically accrue upon creation of a work) and not widely used;
- trade secrets and data for limited provision are not registrable; and
- domain names are registrable with domain name registrars.

With respect to industrial property rights, it is common practice for the purchaser to request the target to provide a list of registrations of and applications for industrial property rights owned by or licensed to the target. Public searches using J-PlatPat are typically conducted, through which the lists provided are cross-checked against the latest registration information.

With respect to copyrights, the purchaser, in addition to verifying the indication of author and copyright notice, checks the involvement of third parties (including subcontractors and employees) and the content of the agreements with such third parties. In particular, if the target is a software vendor or content production company, it is essential to confirm that the production is created in a way that satisfies the requirements of an employee-work or otherwise transfers the copyright of the created work to the target.

As for non-registrable intellectual property such as a trade secret and data for limited provision, depending on individual circumstances, it is advisable to review how such data is managed by the target to confirm that it meets the respective requirements under the Unfair Competition Prevention Act, and whether there have been any unintended disclosure breaches of such data.

**Law stated - 29 July 2024**

## Liens

**Can liens or security interests be granted on intellectual property or technology assets, and if so, how do acquirers conduct due diligence on them?**

Pledges can be granted on patent rights, utility model rights, design rights, trademarks, and their statutory exclusive and non-exclusive licences. Registration is required for pledges on these industrial property rights and exclusive licences to become effective. Pledges on statutory non-exclusive licences, on the other hand, become effective and can be asserted against third parties, including an acquirer of the relevant rights, without registration except for trademarks for which registration is a requirement to be asserted against a third party.

Pledges can also be granted on copyrights. Pledges on copyrights may come into effect without registration.

Securities by way of assignment can also be granted for each of the above intellectual property rights, but there is no registration system for such securities. Securities by way of assignment are useful to rights that cannot be subject to pledges, such as patent applications prior to the registration thereof.

As can be seen from the above, not all security interests are recorded in the IP Registry. Thus, the purchaser typically requests the target to disclose a list of securities granted on the IP rights owned by the target, security interest agreements and other related agreements.

**Law stated - 29 July 2024**

## Employees and contractors

## What due diligence is typically undertaken with respect to employee-created and contractor-created intellectual property and technology?

Due diligence of employee-created inventions or works typically includes detailed analysis of the following:

- internal rules relating to employee-inventions and employee-works;
- outline of rights for which the target pays benefits as an employee-invention and the materiality of the invention for the target business;
- actual application of the rules including the method for determining the amount of reasonable economic benefits to be paid for employee-inventions; and
- details of any disputes between the target and its employees (including former employees) over employee-inventions or employee-works (if any).

Since the risks associated with an employee invention depend on post-transaction circumstances, such as sales of related products, it is practically important to gather such information before conducting due diligence.

Under Japanese law, the rules on employee-inventions and employee-works do not generally apply to contractor-created inventions or works. Thus, the due diligence of such inventions or works typically includes an analysis of the relevant service agreements and licence agreements with the contractors.

**Law stated - 29 7 2024**

## Transferring licensed intellectual property

**Are there any requirements to enable the transfer or assignment of licensed intellectual property and technology? Are exclusive and non-exclusive licences treated differently?**

Exclusive and non-exclusive licences

Under the Patent Act, the Utility Model Act, the Design Act and the Trademark Act, there are two types of licences: a statutory non-exclusive licence and a statutory exclusive licence. Under a statutory exclusive licence, the licensor is prohibited from granting a license to third parties other than the licensee and also using the licensed IP by itself. Such statutory exclusive licences are not widely used in practice since the licensor is prohibited from using the licensed IP by itself, and the registration of the statutory exclusive licence is a requirement for the licence to take effect. Instead, as a way of granting an exclusive licence, it is practically common to grant a statutory non-exclusive licence with a contractual agreement that the licensor is prohibited from granting a licence to third parties other than the licensee.

The Copyright Act stipulates only a non-exclusive licence, but an exclusive licence can also be achieved through a contractual agreement.

Transfer or assignment of licensed intellectual property and technology

There are no statutory requirements to enable the transfer or assignment of licensed intellectual property and technology, regardless of whether such licences are exclusive or non-exclusive. Thus, there is a risk that the third party to whom these rights have been transferred or assigned will assert an infringement of these rights by the licensee; however, there are some measures under the relevant laws to protect the licensee in such a situation. First, if the licence at issue is a statutory exclusive licence, the licensee may assert such statutory exclusive licence against a third party if it has been registered with the Japan Patent Office (JPO) prior to the transfer or assignment of the licensed intellectual property such as a patent, utility model or design right. Second, a statutory non-exclusive licence of these rights can be asserted against a third party to whom these rights have been transferred or assigned without any registration, and the same measure to protect a licensee has been in place for copyrights since October 2020. A trademark licence cannot be asserted against a third party without registration, even if it is a non-exclusive licence.

#### Transfer or assignment of licences

In mergers and company splits, since the target assets, liabilities and agreements are comprehensively succeeded to an acquiring entity, in principle, it is not necessary to obtain the individual consent of a counterparty for the succession of each licence agreement. However, licence agreements may contain change-of-control clauses that require the prior consent from the counterparty or subsequent notice by the target in the event of a merger or company split, or that enable the counterparty to unilaterally terminate the licence agreement in the case of a merger or company split.

Regarding a patent, utility model or design right, in the event of a transfer of the statutory exclusive licence due to a merger or company split, notification to that effect must be submitted to the JPO.

In share acquisitions, the parties to the licence agreement remain unchanged. However, it is essential to check, as a part of the due diligence process, whether the licence agreement contains a change-of-control clause that is triggered by a change in the controlling shareholder of the target company.

In asset purchases, it is necessary to obtain the individual consent of the counterparty for the transfer of each licence agreement.

In this regard, it is notable that a statutory exclusive and non-exclusive licence of a patent, utility model or design right may be transferred without the consent of the licensor, if the licence is transferred together with the business to which such licence pertains. However, it is generally understood that such rules are only applicable to statutory licences, and the third party to whom the licensee is transferred cannot assert what was agreed in the licence agreement against the licensor. Thus, practically, it would be prudent to obtain the licensor's consent with respect to the transfer of the licence agreement.

Regarding a patent, utility model or design right, registration is a requirement for the transfer of a statutory exclusive licence to take effect.

**Law stated - 29 7 2024**

## Software due diligence

**What types of software due diligence is typically undertaken in your jurisdiction? Do targets customarily provide code scans for third-party or open source code?**

In Japan, it is not customary for the target to provide code scans for third-party or open-source code as part of a legal due diligence process. The legal due diligence review process is limited to asking questions to the target about whether or not open-source software is used in the target business and, if so, how the target manages the use of open-source software in compliance with applicable terms of each open-source software, and does not include software vulnerability testing.

Instead, the software due diligence is conducted as a part of the legal due diligence on the target's IT systems. It is common to obtain an overview of the important IT systems used in the business, as well as related agreements and terms of use, and to ask some relevant questions about the IT system's role in the business, including the impact on the business in the event of a system failure, and to review whether there are any provisions in the agreements that might hinder the consummation of the transaction.

**Law stated - 29 7 2024**

## Special or emerging technologies

**What are the additional areas of due diligence undertaken or unique legal considerations in your jurisdiction with respect to special or emerging technologies?**

Artificial intelligence

There are no specific laws and regulations that directly regulate utilisation of artificial intelligence (AI); however, conflicts may arise with constitutional law, intellectual property laws, labour laws, personal information protection laws, and any other laws or regulations. Thus, a thorough review is recommended if artificial intelligence plays an important role in the target business. The scope and granularity of the required review and risk assessment will vary depending on the importance of AI for the target business.

Notably, in a recent lawsuit brought against the Japan Patent Office (JPO) by the plaintiff, who filed a patent application listing the AI as the inventor and was dismissed from the application, the Tokyo District Court concluded that an inventor as defined in the Patent Act is limited to natural persons (Tokyo District Court Decision dated 16 May 2024). The 'Interim Report of the Study Group on Intellectual Property Rights in the AI Era' published in May 2024, reports the results of discussions in the relevant ministries and agencies concerning (1) measures with respect to concerns and risks regarding generative AI and intellectual property and (2) protection of inventions based on developments in AI technology, makes a similar view but notes that further consideration is desirable with respect to 'the consideration of cases in which an AI is able to autonomously complete a distinctive part of an invention' and 'the legal capacity of AI itself' in light of international trends and other factors. This report is not legally binding but would be a valuable resource for the review related to AI.

## Big data

If the target is utilising big data, it is recommended to check whether such big data has been properly obtained, whether the target has a legal right to retain and utilise such big data, and whether there are any contractual or statutory restrictions on the utilisation of such big data. In particular, if personal information is included in the big data being utilised in the target business, due diligence must be conducted from the perspective of compliance with the Act on the Protection of Personal Information and other related regulations and guidelines, and if applicable, foreign data protection laws.

Law stated - 29 July 2024

## PURCHASE AGREEMENT

### Representations and warranties

**In technology M&A transactions, is it customary to include representations and warranties for intellectual property, technology, cybersecurity or data privacy?**

A wide range of representations and warranties for IP and technology are typically included in technology M&A transactions. Although the detailed provisions and their wording will depend on the business of the target company and the bargaining power of the parties, the following are typical, key IP and technology-related representations and warranties:

- ownership or the right to use all (in some cases, qualified by materiality) IP rights used for the target business;
- sole ownership of IP rights free of all encumbrances (other than permitted encumbrances);
- no infringement of third-party IP rights by the target company (in some cases, qualified by knowledge) and of the target company's IP rights by any third party (typically qualified by knowledge);
- no challenges to the validity or enforceability of registered IP owned by the target;
- no obligation to pay incentive remuneration or other financial benefits to officers or employees for employee inventions or works;
- ownership or right to use material IT systems; and
- appropriate management of know-how as a trade secret.

It is often the case that representations and warranties on data privacy and cybersecurity concerning personal data are not provided separately, as failure to comply with the applicable data protection laws or to provide the necessary and appropriate level of cybersecurity required by data protection laws may be covered by the representations and warranties on 'no material breach of laws and regulations'. Having said that, given that system vulnerabilities are a business risk even in industries that do not primarily handle personal information, in some cases, representations and warranties will indicate that appropriate and

reasonable security has been established and that no data breaches or cyber incidents have occurred.

**Law stated - 29 7 2024**

### **Customary ancillary agreements**

#### **What types of ancillary agreements are customary in a carveout or asset sale?**

Depending on the assets and contracts to be transferred in the carve-out or asset sale transactions, technology-related ancillary agreements typically include the following:

- licence agreements of patents and know-how;
- transitional brand or trademark licence agreements; and
- transitional services agreements for IT-related services.

**Law stated - 29 7 2024**

### **Conditions and covenants**

#### **What kinds of intellectual property or tech-related pre- or post-closing conditions or covenants do acquirers typically require?**

If a foreign investor acquires shares in a target company operating in one of the designated industries, the definitive agreement typically provides as a condition precedent obtaining clearance under the FEFTA (including, the expiration of the waiting period and the absence of any government order restricting the contemplated transaction or activity). The conditions precedent and covenants required by buyers will vary depending on the transaction structure, and the due diligence findings and their significance. Typical pre-closing covenants include the items below. Among these items, those that the buyer considers material will also be provided as conditions precedent.

- obtain consent from counterparties to material licensing, cross-licensing and IT-related agreements that may be terminated or amended due to a change of control clause as a result of the M&A transaction, or enter into new agreements with such counterparts for the target business;
- negotiate and enter into tech-related ancillary agreements;
- complete the update of the registration of the IP rights to reflect the latest status;
- enter into an agreement between the target company and the inventor or IP rights holder or other third parties to ensure the target company's ownership of the IP rights;
- obtain consent from authors of copyright work not to exercise their moral rights; and
- resolve IP- and IT-related disputes (particularly between the target company and its employees, such as those concerning employee inventions).

The typical post-closing covenants include the items below.

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if patents or other registerable IP rights will be transferred, complete transfer registration procedures and other perfection requirements in post-closing; and

- (instead of executing an ancillary agreement) grant a licence of trademark or brands for the continued use for a certain period after closing and prohibit its use after the expiration of such period.

**Law stated - 29 7 2024**

### **Survival period**

**Are intellectual property representations and warranties typically subject to longer survival periods than other representations and warranties?**

Survival periods for IP representations and warranties are normally not longer than those for other representations and warranties, regardless of whether the M&A transaction involves the technology sector. Although fundamental representations and warranties are subject to longer survival periods than general representations and warranties, it is not common in Japanese M&A transactions to include IP representations and warranties in fundamental representations and warranties.

**Law stated - 29 7 2024**

### **Liabilities for breach**

**Are liabilities for breach of intellectual property representations and warranties typically subject to a cap that is higher than the liability cap for breach of other representations and warranties?**

It is not common to provide a higher cap amount for a breach of an IP-related representation or warranty than the cap for a breach of other representations and warranties. However, where material IP-related issues and risks are identified in due diligence, there have been cases where a higher cap amount of indemnity is provided for a breach of IP-related representations and warranties, depending on factors such as the significance of the IP rights, the nature of the risk, and the bargaining power of the parties (in some cases, the amount of 80 per cent or more of the purchase price is provided as the cap).

**Law stated - 29 7 2024**

### **Liabilities for breach**

**Are liabilities for breach of intellectual property representations subject to, or carved out from, de minimis thresholds, baskets, or deductibles or other limitations on recovery?**

Unless any particular issue or risk is identified, liabilities for breach of IP-related representations and warranties are usually subject to the same de minimis thresholds, baskets or deductibles as others.

**Law stated - 29 7 2024**



## Indemnities

**Does the definitive agreement customarily include specific indemnities related to intellectual property, data security or privacy matters?**

When (material) issues or risks are identified in due diligence, and it is difficult to reflect such risks in the financial valuation (ie, these are likely to be cases in which it is difficult to quantify the risk or to lower the price due to negotiation considerations with the seller), buyers typically require a special indemnity in the definitive agreement. The same is true for intellectual property, data security, or privacy issues, in that, if (material) issues or risks are identified (eg, the target company is involved in a lawsuit brought by a third party for IP infringement), special indemnities are often included. Special identification gives the buyer the rights to seek indemnification for a specified event, regardless of whether the buyer is aware of the issues or risks involved, and whether they are covered by representations and warranties. Depending on the significance of the issue, the nature of the risk, and the bargaining power of the parties, higher caps are often included, de minimis thresholds, baskets or deductibles are not included, and longer survival periods are often included than for those for breaches of general representations and warranties.

**Law stated - 29 7 2024**

## Walk rights

**As a closing condition, are intellectual property representations and warranties required to be true in all respects, in all material respects, or except as would not cause a material adverse effect?**

The condition 'no breach of representations and warranties' is one of the typical closing conditions, and this includes the accuracy of IP-related representations and warranties. While it depends on the nature of the target business and the bargaining power of the parties, in general, there are not many instances where 'true in all respects' is required as a closing condition. The terms 'in all material respects' and 'except as would not cause a material adverse effect' are both typically used, but if the purchaser and seller are on equal footing, the term 'in all material respects' tends to be used more often. It is not common to provide a specific closing condition regarding the accuracy of IP-related representations and warranties.

Since materiality qualifiers are often included in representations and warranties themselves, a closing condition provision typically eliminates 'double materiality'.

**Law stated - 29 7 2024**

## UPDATES AND TRENDS

### Key developments of the past year

**What were the key cases, decisions, judgments and policy and legislative developments of the past year?**

The amended [Telecommunications Business Act](#) was made into force in June 2023. The amendment introduces the regulations on Cookies and similar technologies by which the user information stored in the user's device is sent externally, which regulations require prior notification or publication of such user information, destination, and purpose of use of such user information. The new regulations would apply not only to companies registered or notified as telecommunications carriers, but also to providers of (1) online services that intermediate messages between users, (2) online services that enable unspecified users to review the information provided by other users (such as SNS, e-commerce malls and online games), (3) online search services and (4) online services that provide unspecified users with certain information (such as news, weather and maps), unless a certain exception applies. The compliance by a target company with such new regulations should be covered in the due diligence of technology M&A.

The Act on the Protection of Personal Information is to be reviewed every three years, and the amended law is expected to be submitted to the National Diet in 2025. According to the interim report released in June 2024 by the Personal Information Protection Commission, the amendment may include, among others, the creation of special rules regarding biometric data and children's personal information, as well as changes in reporting requirements in the event of a personal information breach, etc.

The Economic Security Promotion Act (ESPA), which includes the following four core pillars, has been in effect step by step since August 2022, and all of the four pillars became in force in May 2024.

- strengthening the supply chains of critical substances;
- securing key infrastructures;
- strengthening the infrastructure for advanced technologies and public-private research; and
- non-disclosure of patents.

In the context of technology M&A, it is necessary to identify as part of the due diligence:

- whether the target company or business has operations, assets or technologies subject to the ESPA; and
- whether there are any restrictions on the contemplated M&A transactions and their impact on the target company's operations, particularly where a foreign company is a buyer.

In addition, the above patent non-disclosure system allows the government to take measures such as licensing restrictions and disclosure prohibitions on patents that are highly likely to impair the security of Japan and its nationals if they are publicly disclosed. Although the scope of the applicable patents is expected to be limited, this system should be kept in mind in implementing M&A transactions.

Furthermore, the recent amendment to the Foreign Exchange and Foreign Trade Act (FEFTA) has expanded the scope of the industries subject to review by Japanese government authorities in order to cover the 'critical substances' designated under the ESPA. The newly added industries by the amendment in 2023 include, among others, semiconductor production equipment manufacturing and industrial robot manufacturing. As with that, some other industries, such as (1) manufacturing of semiconductor-related equipment and (2)

manufacturing of advanced electronic components, are expected to be newly included in the scope by the amendment in 2024.

**Law stated - 29 7 2024**