

Construction

Contributing editors

Robert S Peckar and Michael S Zicherman



2019

GETTING THE
DEAL THROUGH

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Robert S Peckar and Michael S Zicherman
Peckar & Abramson PC

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CONTENTS

Introduction	5	Italy	87
Robert S Peckar and Michael S Zicherman Peckar & Abramson PC		Giuseppe Broccoli, Elisabetta Ventrella and Fabio Zanchi BdaLaw	
Austria	6	Japan	94
Stefan Artner and Klaus Pfeiffer DORDA		Miho Niunoya and Masayuki Matsuura Atsumi & Sakai	
Brazil	13	Mexico	99
Júlio César Bueno Pinheiro Neto Advogados		Roberto Hernández García and Cynthia Irene Osio Sánchez COMAD SC	
Chile	23	New Zealand	104
Juan Eduardo Figueroa Valdés and Sergio Huidobro Martinez Figueroa, Illanes, Huidobro & Salamanca		Margaret A Helen Macfarlane, Christina Bryant and Nick Gillies Hesketh Henry	
China	28	Norway	112
Helena H C Chen and Nancy Ao Pinsent Masons LLP		Espen R Hamar and Erik Brannsten Kvale Advokatfirma DA	
Colombia	36	Singapore	118
Claudia Benavides and Jorge I Valencia Baker McKenzie		Shourav Lahiri Lahiri LLC	
Costa Rica	44	Sweden	126
Christian Díaz Barcia LPA Legal & Consulting		Jacob Hamilton, Richard Sahlberg and Per Vestman Foyen Advokatfirma	
Denmark	49	Switzerland	132
Lene Lange, Kristian Skovgaard Larsen and Charlotte F Malmqvist DLA Piper Denmark P/S		Thomas P Müller, Christian Eichenberger and André Kuhn Walder Wyss	
France	56	Taiwan	137
Frédéric Gillion and Stéphane Gasne Pinsent Masons LLP		Helena H C Chen Pinsent Masons LLP	
Germany	63	Turkey	143
Stefan Osing Heuking Kühn Lüer Wojtek		Ziya Akıncı and Cemile Demir Gökyayla Akıncı Law Office	
Ghana	69	United Kingdom	150
David Ofosu-Dorte, Ferdinand Adadzi and Sena Abla Agbekoh AB & David		Stacy Sinclair Fenwick Elliott LLP	
India	74	United States	158
Ramesh K Vaidyanathan and Probal Bose Advaya Legal		Robert S Peckar and Michael S Zicherman Peckar & Abramson PC	
Ireland	80		
Rhona Henry Matheson			

Preface

Construction 2019

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Construction*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Chile and Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Robert S Peckar and Michael S Zicherman, of Peckar & Abramson PC, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
July 2018

Japan

Miho Niunoya and Masayuki Matsuura

Atsumi & Sakai

1 Foreign pursuit of the local market

If a foreign designer or contractor wanted to set up an operation to pursue the local market, what are the key concerns they should consider before taking such a step?

A foreign designer or contractor may operate its business in Japan, if it sets up a subsidiary or a branch. In order for a subsidiary or branch to obtain a construction licence, it needs to have an operations manager and a technical specialist, who may be of foreign nationality. However, for construction projects in Japan, almost all the relevant contracts, specifications, designs and other documents are written in Japanese, as are the regulations applicable to construction projects, which are quite complicated. Therefore, it is essential to hire Japanese persons who are familiar with the practice, customs and regulations applicable to construction projects in Japan.

2 Licensing procedures

Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

Foreign construction contractors are required to obtain one of 29 categories of construction licence to perform work in Japan, unless the contractor handles only very small constructions. A licence issued by the Minister of Land, Infrastructure, Transport and Tourism is required to establish offices in more than one prefecture, and a licence issued by the prefectural governor is required to establish an office or offices within the prefecture. Operating a construction business without an appropriate construction licence can be punished with up to three years' imprisonment or a fine of up to ¥3 million, or both.

Although foreign design companies themselves do not need to obtain a licence, the individuals who conduct design work for such companies are required to have obtained an architect's licence.

3 Competition

Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

There are no laws in Japan that provide any advantage to Japanese contractors over foreign contractors.

4 Competition protections

What legal protections exist to ensure fair and open competition to secure contracts with public entities, and to prevent bid rigging or other anticompetitive behaviour?

The Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade stipulates that the Japan Fair Trade Commission may issue an order for a situation violating the Act to be eliminated, and may impose an administrative fine on a bidder who conducted any bid rigging. The Act also provides criminal punishment of imprisonment for up to five years or a fine of up to ¥5 million on the person who conducted the bid rigging, and a fine of up to ¥500 million on the company for which the person works. The Penal Code also imposes a penalty of imprisonment for up to three years or a fine of up to ¥2.5 million. In cases where a public officer is involved in bid

rigging, under the Act on Elimination and Prevention of Involvement in Bid Rigging, etc, and Punishments for Acts by Employees that Harm Fairness of Bidding, etc, damage compensation can be claimed against the officer, and this Act provides for up to five years' imprisonment or a fine of up to ¥2.5 million on the officer.

5 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

Contracts commonly stipulate that, if a contractor wins a bid by collusion (eg, with other bidders to fix the bid), it can have the following effects:

- invalidation of the bid;
- the bid-riggers being banned from contracting for the project;
- invalidation of any contract already executed; and
- the bid-riggers being liable to financial penalties.

In contrast, provisions regarding bids won as a result of bribery are less clear, but contracts could still be invalidated on the basis of a violation of 'public order and morals'.

Both the bribe-giver and the bribe-taker can be indicted, and the bribe-giver can be punished with up to three years' imprisonment or a fine of up to ¥2.5 million, while the bribe-taker can be punished with up to 20 years' imprisonment.

Further, if a contractor has won a contract by an illegal act such as bribery, the contractor may be subject to administrative sanctions such as business instruction, suspension of business or revocation of the licence, or all of them, and may also be prevented from participating in bidding on future public works projects for a certain period.

Facilitation payments are not allowed and are illegal in Japan.

6 Reporting bribery

Under local law, must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?

There are no laws in Japan that oblige employees of project team members to report suspicion or knowledge of bribery of government employees.

7 Political contributions

Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

Under the Political Funds Control Law, companies and organisations are banned from making political donations to individual politicians (including political candidates) or organisations other than political parties.

Donations to political parties do not constitute part of doing business in Japan. Therefore, contractors or design professionals cannot be subject to any restrictions when working for public agencies because of their financial support for a particular political party.

8 Compliance

Is a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) subject to the same anti-corruption and compliance as government employees?

A construction professional that acts as a public entity's representative or agent is deemed a public officer and is subject to the sanctions for bribery under the Penal Code as if he were a public officer.

9 Other international legal considerations

Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

There is no such legal issue. However, in practice, foreign contractors are not active in the construction market in Japan, mostly for business and commercial reasons such as language, the need for local engineers, the size and competitiveness of local contractors, and the need for specialist skills, such as those needed for the construction of buildings to cope with earthquakes.

10 Construction contracts

What standard contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

Two standard forms of construction contracts are widely used: the general conditions of construction contract, which is provided by a private-sector association and the general conditions of construction contract for public work, which is provided by the Central Council on Construction Contracting Business. The former is used if the owner is a private company and the latter if the owner is a public institution.

For design contracts, a general conditions of design and supervision contract is provided by a private-sector association, and is widely used.

There are no restrictions on choice of contract language or governing law. However, it is common practice for the Japanese language and Japanese law to be specified as the contract language and governing law because the construction work is conducted in Japan. In terms of venue for dispute resolution, Japanese law does not restrict the choice of jurisdiction or arbitration forum. However, in the general conditions of construction contract for public work and the general conditions of construction contract, the Committee for Adjustment of Construction Work Disputes is the specified forum for the resolution of disputes. In the case of public works, even if the general conditions of construction contract for public work is not used, it would be difficult to persuade the public institution owner to agree to the use of a foreign language, law or jurisdiction.

11 Payment methods

How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Contractors are typically paid by electronic payment or note. It is common for the contract fee to be paid in several instalments. For example, typically, the first instalment would be paid upon entering into a construction contract, a further instalment paid upon completion of some portion of the work and the remainder paid upon completion of all construction work. In the case of large-scale construction projects, milestone payment is common, where the owners pay a portion of the contract price upon completion of each major portion of the building.

12 Contractual matrix of international projects

What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

Construction project participants typically form a contract-based consortium and all the members of the consortium sign a construction contract directly with the owner.

Subcontractors are commonly used, and it is not rare for a subcontractor to use sub-subcontractors. However, in principle it is prohibited under the Construction Business Act to use a subcontractor for all or the major portion of the construction work, except in private projects, where all or the major portion of the work may be subcontracted with the owner's prior written consent. There is no such exception for public projects.

13 PPP and PFI

Is there a formal statutory and regulatory framework for PPP and PFI contracts?

The PFI Act stipulates the basic policy and procedures of the government in promoting and operating PFI projects. The PFI Act was substantially revised in 2011 and one of the main changes was the introduction of a concession system, which enables public institutions to offer business rights to the private sector in relation to public facilities. The PFI Act stipulates items that must be set forth in such concession agreements, although it does not provide any formal framework for other PFI contracts.

The PFI Promotion Office in the Cabinet Office, a governmental agency, has released a standard PFI contract, 'Guidelines on PFI Contracts', and a paper entitled 'Basic Approaches to Issues on PFI Contracts'.

The PFI Promotion Office also released a guideline in June 2013 related to concessions, which provides details of its procedure. However, the PFI Act does not cover all types of PPP contract and, as there is no official statutory or regulatory framework for PPP contracts not covered by the PFI Act, the public sector usually follows the samples of PFI precedents.

14 Joint ventures

Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

A consortium is typically established as a form of partnership, in which case (or if it is operated so as to seem to be legally a partnership) all members will be jointly and severally liable for obligations assumed by the consortium or for which it is held liable; members of such a consortium may allocate liabilities of the consortium between themselves as they see fit, but this would not bind third parties unless they are aware of the allocation. If a consortium is established as a company, then the members of the consortium company are liable for the project within the limit of the value of their capital contributions. In addition, they are liable for the project to the extent of the agreements into which they enter with the consortium company.

15 Tort claims and indemnity

Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

It is possible to stipulate in contracts that a contracting party be indemnified against all acts, errors and omissions arising from the work of the other party, regardless of whether the first party was negligent in any way, and such provisions are, at least in principle, valid.

However, the Construction Business Act requires parties to construction contracts to enter into fair contracts based on an agreement on an equal footing. Therefore, contracts that expose one party to excessive responsibility are more likely to be determined to be invalid due to violation of the principle of faith and trust. Such indemnity provisions may also become an issue in terms of abuse of a superior bargaining position. Parties should, therefore, exercise caution when including such clauses in agreements.

16 Liability to third parties

Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

Pursuant to the Civil Code, a person whose action has negligently or intentionally infringed any right of another shall be liable to compensate that person for any damages resulting from that act. Therefore, in the context of building construction, if there is any defect in the building that causes damage to third parties, the contractor will be liable to the third parties for that damage. However, since the third parties need to prove negligence or intentional infringement by the contractor, it can be difficult to establish a liability. Nevertheless, in recent years there have been a number of cases in which courts have accepted tort liability on the part of a contractor, particularly in the case of illegal defects.

17 Insurance

To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards? Does the local law limit contractors' liability for damages?

The extent of insurance coverage is a purely commercial matter determined by the insured. Contractors commonly purchase construction insurance (which covers damage arising from any accident, for example, fire, during the construction), damages insurance (which covers compensation claimed by a third party, for example, a third party who was injured or suffered damage to their property due to the construction by the contractor) and labour insurance (which covers injury, etc, suffered by employees of the contractor, and is in addition to the coverage by the government labour insurance). Local law does not limit contractors' liability for damages.

18 Labour requirements

Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

There is no requirement for local labour to be employed on construction projects in Japan. However, in order to obtain a construction licence, a foreign contractor must show it employs engineers with a certain level of practical experience. Also, it is often difficult for a foreign national to obtain a working visa and work in Japan without special skills. As a result, foreign contractors have little choice but to rely on local labour in most cases.

19 Local labour law

If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

As a general rule, parties to a labour contract may agree the timing and consequences of termination of the contract. However, even if the parties agree that no rights or obligations under the contract will continue after completion of the employment, unperformed obligations (eg, unpaid salaries) may continue and the contractor, foreign or otherwise, can be liable for expenses or damages arising from injuries caused during the period of employment. Also, the contractor may be required to provide social insurance (eg, medical and pension insurance) for employees, and if not paid, payment may be enforced even after completion of the employment.

20 Labour and human rights

What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?

Foreigners are only allowed to work within the field permitted by their residency qualifications under the Immigration Control and Refugee

Recognition Act. In this regard, an employer must verify the residency qualification, etc, by a 'resident card' and notify the public employment security office when it hires a foreigner. In case of hiring an illegal foreign worker, the employer can be punished with up to three years' imprisonment or a fine of up to ¥3 million, or both.

As a general rule, Japanese labour laws and regulations such as the Labour Standards Act, the Minimum Wage Act and the Industrial Accident Compensation Insurance Act are applicable to foreign workers. Therefore, foreign workers have the same rights with regard to worker protection as Japanese nationals. It is prohibited for an employer to discriminate against any foreign worker with respect to the working conditions including wages and working hours.

21 Close of operations

If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

Since a foreign contractor needs to establish a branch office or subsidiary company in Japan in order to do business there, it will be necessary to go through the process of closing the branch office or dissolution and liquidation of the subsidiary company, or both, when it withdraws from its Japanese business. Both require specific procedures to be followed, which can be quite time-consuming and lengthy. There are no specific legal obstacles to effecting such closures, although creditors may object to the closures and will need to be dealt with.

When a foreign contractor ceases operations in Japan, it is likely that employees engaged in the project will need to be dismissed. In the case of fixed-term labour contracts, employers cannot generally dismiss employees during the term of the contract, except where there are unavoidable grounds for doing so. For labour contracts where there is no fixed term, dismissal is treated as an abuse of rights and is invalid under labour laws if it lacks objectively reasonable grounds and is not considered to be appropriate by social standards.

The closure of a branch office or liquidation of a subsidiary company is usually considered sufficient grounds for a valid dismissal, although, in practice, employers need to offer substantial amounts in compensation for dismissal.

Except as stated above, there are no generally applicable obstacles to withdrawal from business in Japan.

22 Payment rights

How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

A contractor has a statutory right of retention in respect of the building being constructed in order to secure a claim for construction fees or other costs. This gives the contractor the right to refuse to deliver the building until it receives payment of its construction fees and other costs.

Contractors also have a statutory lien on construction work to secure claims pertaining to construction fees and other costs for the construction work.

Given this, construction contracts normally stipulate that the contractor will deliver the building upon payment of the remainder of the contract price.

23 'Pay if paid' and 'pay when paid'

Does local law prohibit construction contracts from containing terms that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the owner, thereby causing the subcontractor to bear the risk of the owner's non-payment or late payment?

The Construction Business Act prohibits construction contracts which contain terms that make a payment contingent on a main contractor's receipt of payment from the owner if certain conditions are met. Where (i) the main contractor is a 'special construction operator' (which has a special construction licence to contract out the construction of ¥40 million or more per project to subcontractors) and (ii) the subcontractor is a 'general construction operator' (which has a general construction licence) whose stated capital is less than ¥40 million, the main contractor shall make a payment within 50 days of the offer of the delivery by

the subcontractor, regardless of the main contractor's receipt of payment from the owner under the Construction Business Act.

24 Contracting with government entities

Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

A government agency cannot claim sovereign immunity as a defence to a contractor's claim for payment.

25 Statutory payment protection

Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Under the Civil Code, if a contract is terminated due to it being breached by a party, the breaching party must compensate the other party (or parties) for consequential damages suffered. The Civil Code also provides that the project owner may terminate the project at any time until the construction work is completed, even if the contractor has not breached the relevant contract, provided, however, that the project owner compensates the contractor for the damages it suffers as a result of the termination.

On the other hand, under the Civil Code, when bankruptcy procedures have commenced in respect of a project owner, either the contractor or the bankruptcy administrator may terminate the existing construction contract and the contractor may claim for any unpaid work in the bankruptcy procedure. However, the damage caused by the termination may be compensated only when the bankruptcy administrator, not the contractor, terminates the contract.

26 Force majeure and acts of God

Under local law, are contractors excused from performing contractual obligations owing to events beyond their control?

There are no laws or regulations pertaining to the handling of obligations in the case of force majeure in relation to construction work in Japan. Therefore, the parties are not automatically exempted from contractual obligations. However, if a construction contract specifies that the contracting parties can terminate the contract, or will be exempt from performing contractual obligations in the case of force majeure events, then the contracting parties may terminate the contract pursuant to such clause and may be relieved from their obligations. It is common practice to include such provisions.

The Construction Business Act requires a construction contract to stipulate any change in its construction period or liability for damages (and the method of calculation of such damages) owing to a natural disaster or other force majeure.

27 Courts and tribunals

Are there any specialised tribunals that are dedicated to resolving construction disputes?

The Construction Works Dispute Settlement Board and the Resident Disputes Examination Board are only used for construction disputes.

28 Dispute review boards

Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

DRBs are not commonly used in Japan. In cases where DRBs are used, whether their decisions are binding or not depends on the contract.

29 Mediation

Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where do the mediators come from? If not, why not?

The Construction Works Dispute Settlement Board is regulated under the Construction Business Act and is commonly used to mediate construction disputes. The parties may elect to use the Board's reconciliation, mediation or arbitration processes. It is not mandatory to use the

Board and the parties may go to a court unless they have already agreed to settle disputes by arbitration.

30 Confidentiality in mediation

Are statements made in mediation confidential?

Statements in mediation are confidential and cannot be used in subsequent litigation or arbitration; the confidentiality is contract-based and a breaching party is liable to a penalty for its breach.

31 Arbitration of private disputes

What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Mainly there are two types of private arbitration bodies for construction disputes in Japan: the Construction Works Dispute Settlement Board (which operates nationally, with each prefecture having its own board) and the Japan Commercial Arbitration Association (JCAA). Arbitration is widely used in the resolution of construction disputes as they require highly specialised experts and confidentiality is protected during the arbitration process. Court proceedings are also used in many cases.

32 Governing law and arbitration providers

If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

The JCAA is preferred by Japanese parties. The Singapore International Arbitration Centre is also popular because of its location and its clear rules and procedures.

33 Dispute resolution with government entities

May government agencies participate in private arbitration and be bound by the arbitrators' award?

It is possible for government agencies to participate in private arbitration and be bound by its award, although it would be unusual for a Japanese government agency to do so.

34 Arbitral award

Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

The Arbitration Law in Japan provides the basis of rejection of an arbitral award issued by a foreign or international tribunal, which is upon the same basis provided by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

35 Limitation periods

Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services, and are there any statutory preconditions for commencing or maintaining such proceedings?

The Civil Code sets a limitation period of three years from completion of the construction for claims, such as for non-payment for work done. An invocation is required for a plaintiff to make the statutory limitation effective.

36 International environmental law

Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

Japan is party to the Stockholm Declaration of 1972. Japan has many laws and regulations to protect the environment, for example, the Basic Environment Act, the Water Pollution Control Act, the Air Pollution Control Act, the Soil Contamination Countermeasures Act, the Noise

Control Act and the Environmental Assessment Act. In addition, contractors of large projects are obliged to recycle certain construction materials under the Construction Material Recycling Law.

37 Local environmental responsibility

What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

Each environmental law provides a different sanction depending on the nature and seriousness of the violation, for example, a contractor that does not have a licence for the treatment and disposal of construction waste and either disposes of the waste itself or entrusts it to a company that does not have such a licence either, may be punished with up to five years' imprisonment or a fine of up to ¥10 million.

38 International treaties

Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Japan is a signatory to economic partnership agreements (EPAs) with a number of countries. The EPAs provide stronger protection for investment into Japan, including national treatment at the approval stage. One such agreement defines 'investment' as every kind of asset, particularly including 'rights under contracts, including turnkey, construction, management, production and revenue-sharing contracts'.

39 Tax treaties

Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Japan is party to 55 double taxation treaties with 66 countries or areas.

40 Currency controls

Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

There are no such controls in Japan.

41 Removal of revenues, profits and investment

Are there any controls or laws that restrict removal of revenues, profits or investments from your jurisdiction?

There are no such controls or laws in Japan, other than transfer pricing taxation, which is a special tax treatment to prevent multinational corporations from shifting profits overseas through transactions with foreign affiliates. Under transfer pricing taxation, Japanese tax authorities will impose a tax on a corporation when there is a gap between arm's-length price and the actual price in transactions with a foreign affiliate, by regarding the arm's-length price as the actual transaction price.



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