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Recalibrating Your Business Presence in Japan for the New Normal: Guide to Downsizing and Exit Options

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1. Introduction

As pandemic restriction ease, businesses around the world are looking to settle into the new normal. It is a time of optimism but also some lingering uncertainty. Some businesses have survived through cost cutting and downsizing of employees and may need time to recover. In some cases, the pandemic has ignited the momentum for digital transformation and has been a catalyst for business innovation. “Work from home” became widespread during the pandemic and changed the way many businesses and employees view the workplace. This has causes some businesses to rethink their office space needs.

For business owners reassessing their physical footprint in Japan whether to withdraw fully or simply streamline the local presence, there are a variety of legal issues to consider. This guidebook is intended to provide an overview of the some of the key considerations for reducing and/or shutting down business operations in Japan.[1]

2. Which Path?

There are various strategies to choose from when exiting the Japanese market or downsizing a business in Japan. The right strategy to adopt depends on a company’s business plans and financial condition. Generally, however, the number of options available diminishes with the deterioration of a company’s financial condition. Accordingly, advance planning is of vital importance to ensure adoption of the best strategy.

Possible Paths to Reduction/Exit	Objective/Business Parameters
Reduce local operations	**Objective: Remain in Japan with reduced footprint.** • Japan presence can be maintained if operations minimized
Sell off the business	**Objective: Exit from Japan.** • A willing buyer of the business has been found
Close down the business	**Objective: Exit from Japan.** • No buyer of the business can be found • Business is still solvent
Bankruptcy	**Objective: Seek protection from creditors and exit from Japan** • Efforts to save or sell of business have failed and the company has become insolvent

[1] For simplicity, we have focused on businesses operating in Japan through Japanese subsidiaries organized as corporations (*kabushiki kaisha*).

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3. Reduction of Local Presence

Where the business owner desires to maintain a presence in Japan but only on a reduced/limited basis, reduction of fixed costs, primarily with respect to office space and employees are likely to be key parts of the strategy. A reduced scope of operations may also involve the termination of some supply or service contracts.

A. Reduction of Office or Retail Space

In order to reduce office or retail space costs, it may be necessary to renegotiate the current lease for a smaller space or to terminate the lease for a less costly alternative.

Key points to confirm are:

- the term of the lease/when the term is set to expire and notice requirements for non-renewal;
- provisions regarding termination and notice requirements for early termination of the lease; and
- provisions concerning the lessee's responsibilities in connection with vacating the premises

Maintaining the Company's Commercial Registration

A Japanese company must have a head office address in Japan in order to maintain its commercial registration. There are now various service providers in Japan who offer virtual and serviced office solutions, including mailbox and reception services, thereby allowing businesses without a need for significant office space to maintain an address in Japan. In the event that the company opts for such an alternative, a filing should be made with the Legal Affairs Bureau to record the new address on the company's registration.

It is common practice for building owners in Japan to require a lessee to pay a deposit to the lessor at the commencement of the lease. The extent to which the lessor will be able to recover the deposit will depend on its compliance with the foregoing types of provisions. Depending on the terms of the lease, the Japanese company may even be required to pay compensation as well as penalty charges to the building owner upon the termination of the lease.

B. Termination of Supply/Service Contracts

The termination of supply/service contracts will also require an examination of the relevant contracts for provisions such as the following:

- the term of the contract/when the term is set to expire and notice requirements for non-renewal;
- provisions regarding termination and notice requirements for early termination of the contract; and
- provisions concerning party responsibilities upon/in connection with the termination of the contract (e.g. return of confidential information, handling of open orders).

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C. Reduction of Employees

Unlike some other jurisdictions, involuntary termination of employees in Japan is not as simple as providing notice or payment of a specified amount of severance pay. These do not inoculate an employer from a claim of unjust dismissal which could ultimately lead to a court order to reinstate the employee as well as pay back wages, unless the employer can prove that it has met the requirements for lawful termination.

The requirements differ based on the reasons for termination. For example, termination for cause will be examined differently from termination for business reasons. Where termination of employment is adjudged an unjust dismissal, the employer will be required to compensate the employee for back-wages and to continue its employment of the relevant employee. As employers' situations differ from case to case, specific legal advice should be sought to mitigate the risks of unjust dismissal claims. (See ***Practical Strategies for Early Retirement.)***

Practical Strategies for Early Retirement

The recommended strategy in Japan for employee downsizing, whether on a small or large scale, is to negotiate the resignation of the target employees. While news of large scale employee downsizing by Japanese companies are sometimes reported in the media, particularly during times of economic downturns, the vast majority of these cases will have likely involved negotiated resignations using the "early retirement programs" designed by the company's managers. The strategy for negotiating resignations will be different for each case, and should be planned carefully in consideration of the worst case scenario of employees' refusal to resign. If an employer ultimately decides to unilaterally terminate its employees, its conduct up to that point could either help or harm the employer's legal position.

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4. Sell Off of Entity/Assets (Full Exit)

For a business owner desiring a full exit from Japan, sale of the business to a third party may be an option where a willing buyer of the business can be found. For an exiting business owner, sale of the Japanese company as a whole can be preferable to an asset transfer for a number of reasons.

- Selling the entity as a whole avoids the need for consents and other actions to transfer employees, contracts, and assets out of the entity to the buyer.
- All liabilities and obligations of the entity are transferred with the entity (although the buyer may negotiate for seller indemnify for certain liabilities/obligations in the share transfer agreement) whereas in an asset sale, some liabilities and obligations may remain with the entity; and
- In the case of an asset sale, the business owner is left with the entity and any remaining assets, liabilities and obligations that were not transferred to the buyer. In order to make a full exit, the business owner will need to dispose of any remaining assets and settle any outstanding liabilities and obligations and liquidate the entity (see *Closing Down the Business (Before Insolvency)* below).

Depending on the situation of the buyer and seller, a structure involving a statutory demerger using the "corporate split" provisions of the Companies Act, or some other transaction structure may also be feasible. For the sake of brevity, we have focused on share sale and asset sale in this Guide.

A. Share Sale

A share sale is the most straightforward structure for selling off the Japanese company as a whole. In such cases, the seller only needs to be concerned about the transfer of the shares and any legal obligations that may be triggered by the change in ownership. Also, because the employees remain employed by the same direct employer before and after the share transfer, no transfer of employees is required.

Key aspects of a share sale include:

- Buyer's due diligence of the Japanese company. (Seller-side due diligence is often advisable for purposes of negotiating the share transfer agreement.)
- Negotiation and execution of the share transfer agreement.
- Obtaining any necessary pre-closing governmental approvals (these will often be the buyer's obligation).
- Obtaining consents from, or making the required notices to third parties under any change of control provisions under the company's material contracts.
- Resignation of any seller-side directors of the Japanese company who will not remain post-closing.
- Necessary approval by the Japanese company (normally board or shareholder's approval) to comply with any transfer restrictions on its shares as set forth in its articles of incorporation.

B. Asset Sale

Selling off the business by way of an asset sale is more complicated than a share sale in many respects because, steps need to be taken to transfer each asset. In the case of third-party contracts, this will require third-party consents. In addition, in order for a Japanese company to transfer its employees to the buyer, the consent of its employees will be required. Another notable difference from a share sale is that all rights and obligations of the Japanese company that are not specifically assumed by the buyer in the asset transfer will stay with Japanese company. This may include warranty claims or encumbrances associated with the transferred assets as well as employment claims, such as claims for or in respect of back wages and unjust dismissal. Further, since regulatory approvals and business permits are generally non-transferable, any such regulatory approvals and permits related to the business will normally need to be applied for and obtained separately by the acquiring entity.

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Key aspects of an asset sale include:

- Buyer's due diligence of the target assets. (Seller-side due diligence is often advisable for purposes of negotiating the asset transfer agreement.)
- Negotiation and execution of the asset transfer agreement.
- Obtaining any necessary pre-closing governmental approvals/permits (these will often be the buyer's obligation).
- Obtaining consents from third parties for transferring contracts (in certain cases, depending on the nature of the contract and the terms of the contract, a notice to the third party may be sufficient.)
- If the lease agreement in respect of office or retail space will also be transferred to buyer, consent of the lessor.
- Obtaining consents from the employees for the transfer of their employment to the buyer. Employees cannot be forced to transfer or terminated simply for refusing such transfer (see *Reduction of Presence; Reduction of Employees* above). Both the seller and buyer will need to cooperate in order to achieve the transfer of the employees. In this connection, it is advisable to conduct a mapping exercise of employment terms at the seller and buyer in order to determine the employment packages to be offered to the transferring employees.

Different Structures for Employee Transfers

(1) Resign and rehire: Under this method, the employees resign from the seller with a payout of all accrued benefits and are rehired anew by the buyer. Unless specifically agreed by buyer in the employment contract with an employee, the employee's years of service is reset at the time of hire.

(2) Transfer of employment contract: Under this method, the employees are transferred to a buyer with all employment conditions remaining the same and accrued benefits and years of service to continue accruing with the buyer, unless otherwise agreed by the buyer with the employee. This method is generally more favorable to the employees and seller.

- Necessary approval by the Japanese company (normally board or shareholder's approval) to comply with any transfer restrictions on its shares as set forth in its articles of incorporation.

Because the Japanese company will remain after the asset sale is completed, the necessary steps to liquidate the company will need to be taken in order for the business owner/shareholder to be able to complete its exit (see *Closing Down the Business (Before Insolvency)* below). Any liabilities remaining with the company, whether contingent or non-contingent, could complicate the liquidation process, and accordingly should be resolved to the extent possible before the legal process to liquidate the company is commenced.

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5. Closing Down the Business (Full Exit Before Insolvency)

Where the business owner wishes to exit from the Japanese business entirely, but is unable to sell off the shares of the Japanese company, the "**ordinary liquidation**" procedure under the Companies Act may be considered.

Ordinary liquidation is not an insolvency process, but rather a voluntary legal process for ending a solvent company's existence. If the company is insolvent but is able to attain solvency via waiver of its debts by creditors, ordinary liquidation would still be an available option (see *Ordinary Liquidation vs Special Liquidation* in the column). The following actions must be completed within the framework of this legal process:

(1) settling the company's accounts (i.e., collecting receivables and repaying debts) and sale of any assets of the company; and

(2) after completion of the above, distribution of any remaining assets (residual assets) to the shareholders.

Ideally, the legal process should commence only after the business operations of the company has been wound down to a minimum so that such operations or any hiccups in closing down the operations do not interfere with the legal process. The winding down of business operations will involve termination of business contracts, employment agreements and other business arrangements of the company (see *Reduction of Operations* on the legal considerations in this regard) as well as inventory management.

Ordinary Liquidation vs Special Liquidation

There are two types of procedures available under the Japanese Companies Act for liquidating a Japanese corporation: (1) **ordinary liquidation**; and (2) **special liquidation**.

- **Ordinary liquidation** is an internally-managed corporate process and is only available where the corporation is solvent. If the corporation is able to attain solvency via waiver of its debts by its creditors (such as its shareholders or other companies in the same corporate group, in a situation where its debts arise from intercompany loans), ordinary liquidation would still be an available option.
- **Special liquidation** is a court-supervised process for insolvent companies. It is a process that is generally suitable under limited circumstances where the creditors are not large in number and are friendly to the debtor company. Accordingly, this Guide will instead focus on **bankruptcy** under the Japanese Bankruptcy Act as the means for liquidation and exit when the company is insolvent (See *Bankruptcy (Full Exit When Insolvency Cannot Be Averted)*.)

A. Making the Decision to Liquidate – Resolution of the Shareholders

Ordinary liquidation begins with a shareholder's resolution to dissolve the company and appoint a liquidator. Unlike insolvency proceedings, the company can choose who to select as the liquidator to manage the process[2]. The individual does not have to be an independent third party and can be selected from among the previous directors of the company[3] if the company so chooses.

B. Liquidation and Procedure

From the dissolution date, the company is still in existence but in the process of liquidation. This is where the work of the liquidator begins. In parallel with settling the company's accounts and selling off any assets of the company, the liquidator must complete the actions required under the Companies Act in connection with the ordinary liquidation process.

- *File dissolution with Legal Affairs Bureau*: The dissolution must be filed with the Legal Affairs Bureau

[2] Residence in Japan is not a requirement to be a liquidator. This means that overseas residents also qualify as liquidators.
[3] On the date of dissolution, the directors of the company are automatically retired from their positions.

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for recording on the company's commercial register. The deadline for filing is within two weeks after the dissolution date.

Determine/approve dissolution date assets: The liquidator must take inventory of the company's assets and prepare the balance sheet as at the dissolution date and submit this to the shareholders for approval.

- *2-Month Notice Period*: The liquidator must make the necessary arrangements for the mandatory two-month notice period that must be given to creditors. For creditors of the company, this two-month period is a final opportunity to notify the company of any outstanding claims. For the company, the two months is effectively a moratorium period during which it must preserve its assets in order to be in a position to discharge claims of creditors who may come forward during the notice period. After the notice period has expired, the company may resume settling its debts, including debts to any creditors who came forward during the notice period.

> ***Tax Filings***
>
> During the course of the process, the company in liquidation will also need to submit certain tax filings.
> - ***Dissolution date tax return****: within two months after the dissolution date of the company*
> - ***Final tax return****: within one month after all other debts of the company are settled, or, in the case where distribution of residual assets to shareholders is applicable, by the day before the distribution of residual assets to the shareholder.*

- *Determine residual assets and distribute to shareholder*: The residual assets of the company after all accounts are settled (including any taxes owed to the National Tax Agency as well as the relevant local tax authority), should be determined by the liquidator and, once determined, distributed to the shareholder. Any unsettled business of the company will delay this step and thereby also delay completion of the liquidation process. In order to avoid such problems at this stage, it is desirable to wind up the company's business affairs and settle any potential disputes before the resolution to dissolve the company, when the company is still operational and has the human resources and more flexibility to address such business issues.

- *Completion (the final settlement report)*: After the distribution to the shareholder is completed, the liquidator must prepare the final report outlining the settlement of the company's accounts and the distribution of the residual assets, and submit such report for the approval of the shareholder. With the shareholder's approval, the company's existence as a legal entity ends.

C. Post-Completion Steps

Although the foregoing steps end the company's existence as a legal entity, the liquidator is still responsible for a few remaining items.

- *File completion with Legal Affairs Bureau*: The liquidator must file the completion with the Legal Affairs Bureau within two weeks after the shareholder's approval of the final settlement report. This will close the company register and deregister the company.

- *Notification of Status to Tax Authorities*: The liquidator must file a notification of change in taxpayer status (in respect of the liquidated company) to the Japanese tax authorities. The company's certificate of closed company register should be submitted with this filing.

- *Liquidator's document retention obligation*: The liquidator will remain responsible to comply with the 10-year document retention obligation in respect of the company's books and records.

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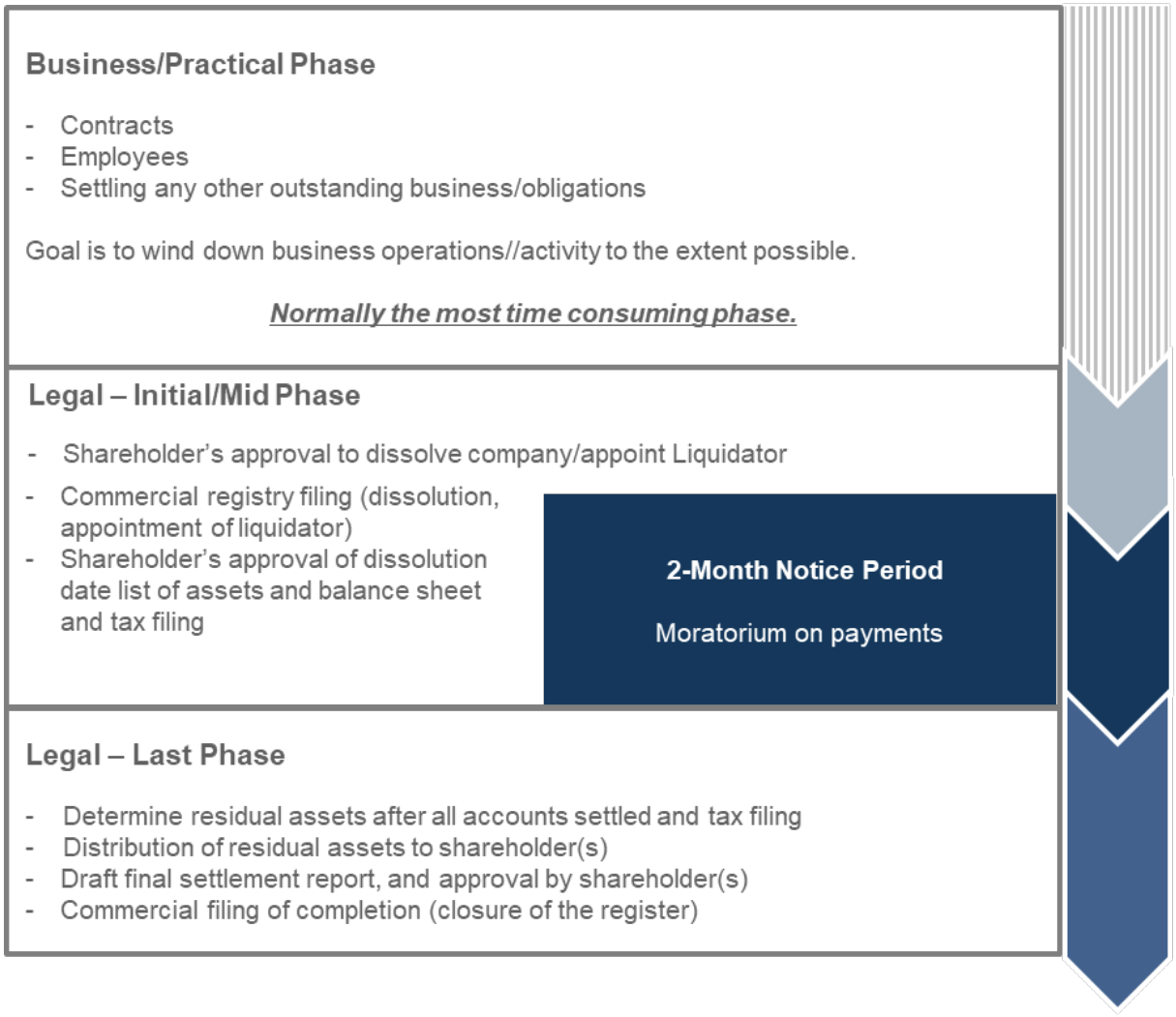
D. Timeframe

Where the business affairs of the company have been largely wound up prior to the resolution to dissolve the company, such that there are no remaining disputes or complications to be handled during the ordinary liquidation process, the steps can generally be completed within four months.



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6. Bankruptcy (Full Exit When Insolvency Cannot Be Averted)

If the business owner finds itself in a situation where efforts to save or sell off the business have failed and where the liquidation procedures under the Companies Act are not available for an orderly exit due to the Japanese company's inability to pay its debts to creditors when due, it may be necessary to consider filing for ***bankruptcy*** protection under the Bankruptcy Act of Japan.

A company will qualify for bankruptcy where:

(a) it is unable to pay debts, generally and on a continuing basis, as they become due (commercial insolvency); or

(b) where its liabilities exceed its assets (balance sheet insolvency).

When to Petition for Bankruptcy

If the Japanese company is insolvent, it can qualify for bankruptcy. A key feature of ***bankruptcy*** is that the management of the company is turned over to a court-appointed trustee selected from a roster comprised primarily of Japanese attorneys with experience in the field.

If the company is insolvent and cannot recover to solvent status, it will then need to consider the option of bankruptcy. In particular, when faced with threats, from multiple creditors, of legal actions to enforce their rights against the assets of the company, it would be appropriate to seek bankruptcy protection.

Bankruptcy under the Bankruptcy Act of Japan is a court supervised process by which a trustee takes over the management of the debtor with the ultimate aim of reducing the debtor's assets to cash for an orderly distribution to creditors. It is in effect a procedure for the liquidation of the company, unlike the other insolvency procedures available under other Japanese statutes where the aim is to rescue the business and allow the company to continue as a going concern.[4]

A. Making the Decision to File – Board Approval

Where the company has a board of directors, filing a petition for bankruptcy protection, being a major decision of the company, will require approval by a resolution of the company's board of directors.

B. Filing the Petition and the Court Process

The bankruptcy process can involve a variety of complications depending on the debtor's particular circumstances, including the amount of its debt and the number and type of creditors it has. Some of the key aspects of the process include the following.

- *Filing the petition for bankruptcy with the court*: The debtor company may file for bankruptcy protection by submitting a petition for bankruptcy in the required form and providing the necessary information, including the grounds for bankruptcy and a list of the company's creditors.

- *Application for provisional stay*: Filing the petition for bankruptcy does not result in an automatic stay; accordingly, the company should file for a provisional stay together with its petition for bankruptcy in order to obtain protection against creditors until the commencement order is issued.

- *Commencement order*: If the company has met the requirements for bankruptcy and has filed the necessary documentation with its petition, the court will appoint the trustee and issue a commencement order after the petition for bankruptcy is filed and the court examines the filed documents. A stay will also be ordered at this time.

- *Recording on the company's commercial register*: If the court issues a commencement order for the bankruptcy proceedings of the company, the court will also notify the Legal Affairs Bureau so that

[4] Other insolvency procedures such as *corporate reorganization* under the Corporate Reorganization Act and *civil rehabilitation* under the Civil Rehabilitation Act are also available in Japan. These mechanisms are for circumstances where it is desired that the Japanese company will continue in operation. For the sake of brevity, a discussion of these mechanisms is omitted from this Guide.

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this can be recorded on the company's commercial register. Once recorded, the register will show that the company is in bankruptcy.

- *Notification to creditors*: Once the commencement order is issued, individual notices will promptly be arranged to be sent out to known creditors and a public notice will be made in the national gazette for notification to unknown creditors of the company. All unsecured creditors will need to file proofs of claims by the deadline specified by the court in the notice in order to preserve their rights.

- *Hearing to examine allowable claims*: A court hearing will be held in order to report the status of the company's assets as well as the balance sheet, and to determine which of the proofs of claims submitted by the deadline will be allowed and which will be rejected. The hearing will usually be held within 3 months after the commencement order.

- *Trustee's work to maximize the estate*: During the course of the process, the trustee will collect on the company's receivables and pursue all the company's rights against third parties in order to maximize the estate from which the creditors must share in order of priority at the end of the process. The court may decide to hold explanation sessions from time to time during the process to update the creditors on the status of the estate.

- *Paying secured creditors*: Because secured creditors are not bound by the bankruptcy process, the trustee must honor the payments to such creditors in accordance with the contract or other legal foundation of the secured creditor's rights.

- *Distribution to creditors*. At the end of the process, the trustee will have collected as much as it can and converted all of the company's assets to cash, so that distributions can be made to unsecured creditors in order of priority. Claims with priority over ordinary trade creditors include claims for administrative expenses (for example, taxes and fees of the trustee) and a certain scope of employee wages and retirement benefits.

- *Notification of completion to the Legal Affairs Bureau:* Following distribution to the creditors, the Legal Affairs Bureau will be notified (usually by the court) of the completion of the process, upon which the company's commercial register will be closed.

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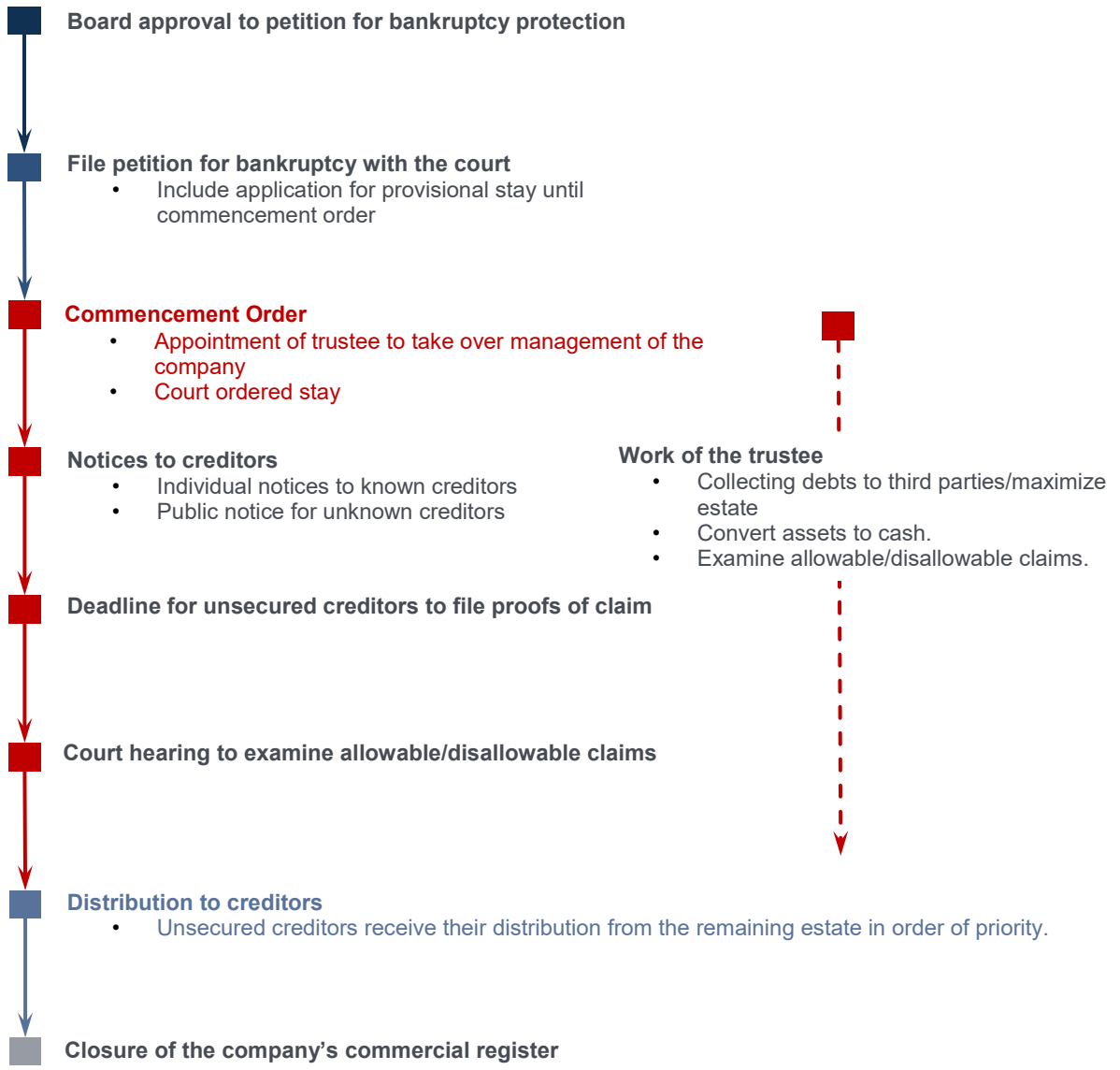
C. Timeframe

The duration of a bankruptcy process can vary greatly by company depending on the specific circumstances involved. As a guide, data collected by the Supreme Court (Justice Statistics)[5] indicates that bankruptcy proceedings filed with the Tokyo District Court on average were completed within 6 months from the filing of the petition for bankruptcy. When considering the timeframe, it is important to keep in mind the time needed for preparation of the bankruptcy petition before the actual filing. The general sequence of the key stages in the bankruptcy process is illustrated in the diagram below.



[5] Administrative Office of the Japan Supreme Court: the Judicial Statistics, 2020 Annual Report of the Civil and Administrative Cases, available at: https://www.courts.go.jp/app/sihotokei_jp/list?page=8&filter%5Btype%5D=1&filter%5ByYear%5D=2020&filter%5ByCategory%5D=1

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D. Caution: Pre-Bankruptcy Transactions

When the group is in trouble

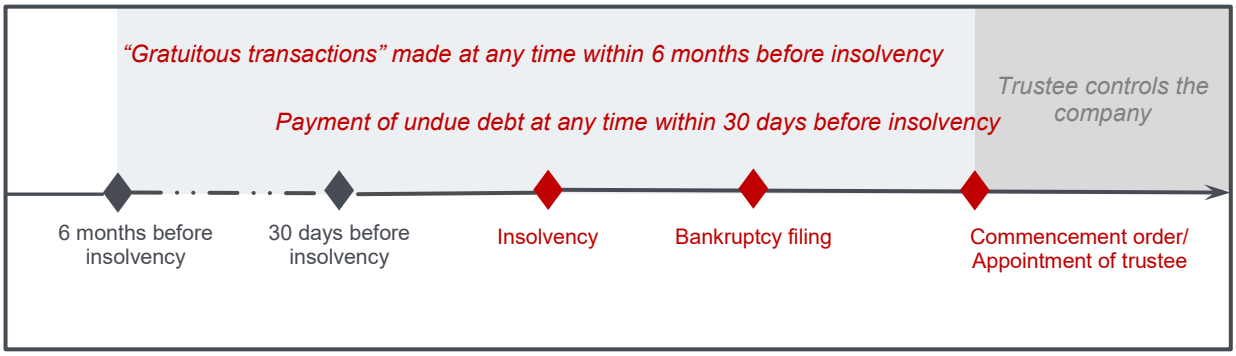
There may be circumstances where the Japanese company, its shareholder and other companies in the group are experiencing financial difficulty at the same time. Under such circumstances, management may be under pressure to shift assets from the Japanese subsidiary or have the Japanese company waive intercompany debt in order to provide relief to other entities in the group. It is critical to tread carefully in such cases. In the event that the Japanese company does enter into bankruptcy proceedings later on, such prior transactions may be challenged by the trustee. *Hindsight is 20/20*, but at the relevant time, it may be a difficult judgement call. In order to navigate the risks of pre-bankruptcy transactions, specific legal advice should be sought from Japanese law perspectives as well as the laws of the relevant shareholder or affiliate's jurisdiction. The following highlights some of the pitfalls to be aware of.

Trustee's avoidance powers

A trustee in bankruptcy has "avoidance" powers to challenge the prior transactions of a debtor. This gives the trustee the ability to seek the recovery of assets transferred, or payments made by the debtor before or after the bankruptcy filing and even prior to the debtor becoming insolvent. The types of transactions that a trustee may challenge are broad and can include transactions completed long before the debtor company became insolvent (for example, even a transaction closed a year before the debtor became insolvent is not immune from challenge). Special care in particular should be taken with respect to the following types of transactions because they are vulnerable to challenge even if the payee/beneficiary had no knowledge of the debtor company's financial trouble or that the transaction could cause the debtor to become insolvent:

(1) **Gratuitous transactions** (i.e. transactions in which the debtor receives no consideration) at any time within 6 months from the date on which the debtor is deemed to have become insolvent[6]; and

(2) **Payment of undue debt by the debtor** made at any time **within 30 days** from the date on which the debtor is deemed to have become insolvent.[7]



[6] Technically, there are several types of "insolvency" status stipulated under the Bankruptcy Act. For the sake of brevity, a discussion of these details is omitted from this Guide.
[7] Such payment is not avoidable if the beneficiary had no knowledge that the payment harms other creditors. However, the burden of proof, which is generally quite difficult to overcome, is on the beneficiary.

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Contributors

Anderson Mori & Tomotsune's financial restructuring and insolvency group is always available to discuss any of the topics in this guidebook. Should you wish to receive further information or discuss any of these issues, or if you have any specific question not covered in this guidebook, please feel free to contact any of the authors listed below.

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