

Construction 2022

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Robert S Peckar and Michael S Zicherman
Peckar & Abramson PC

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Construction*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 new chapters on Iraq and Turkey.

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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.

Lexology 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.



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Japan

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LOCAL MARKET

Foreign pursuit of the local market

- 1 | 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 can set up a subsidiary or branch for its continuous business pursuant to the Companies Act (86/2005).

The subsidiary of a foreign contractor or a foreign contractor itself (with a branch) must obtain a licence to operate a construction business. Licence requirements include the placement of a full-time manager and an engineer with practical experience and the appropriate qualification in Japan. The experience and the qualification in a foreign country can fulfil such requirements, provided that those are certified as equivalent by the Minister of Land, Infrastructure, Transport and Tourism. However, such certification is rarely used. Therefore, practically speaking, it is more or less a requirement to employ a Japanese individual for such purposes.

In addition, the language barrier should be considered, as almost all relevant documents (eg, contracts, specifications and drawings) are written in Japanese.

Licensing issues can become a key concern for a foreign designer. In practice, there may be a specific arrangement for a large project that involves a foreign designer who is in charge of only the design concept and another licensed designer who draws the design in accordance with that concept.

REGULATION AND COMPLIANCE

Licensing procedures

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

Under the Construction Business Act (100/1949), both foreign and domestic contractors must obtain a licence to operate a construction business, unless the individual conducts only small-scale construction works, the threshold of which is stipulated in the relevant cabinet order. A licence is necessary for each of the 29 categories of construction business listed in the act. An individual operating a construction site without a licence will be subject to imprisonment for up to three years or a fine of up to ¥3 million, while a corporate legal entity will be subject to a fine of up to ¥100 million.

The Act on Architects and Building Engineers (202/1950) requires that foreign and local individuals obtain a licence in accordance with the scale or type of architecture, in order to conduct design works in Japan. Any individual working without a licence will be subject to imprisonment or a fine and any corporate legal entity that employs such an individual or is represented by such an individual will also be subject to a fine.

Competition

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

No local laws provide advantages to domestic contractors in competition with foreign contractors.

In addition, no local laws oblige the Japanese government to purchase products made in Japan. Japan is a contracting party to the Agreement on Government Procurement under the World Trade Organization, which requires the Japanese government to treat the products and services of other contracting parties without discrimination.

Competition protections

- 4 | 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 on the Prohibition of Private Monopolisation and Maintenance of Fair Trade (54/1947) provides various measures against anti-competitive behaviour, including the Fair Trade Commission's orders to cease such behaviour and the imposition of surcharges corresponding to each type of anti-competitive behaviour. The act also orders the criminal penalties of imprisonment or a fine.

Where a public bidding is concerned, the Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. (101/2002) stipulates the mandatory demand for compensation by public entities against officers involved in bid rigging. The Act also provides for the criminal penalties of imprisonment or fines against such officers.

Bribery

- 5 | 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?

The Penal Code (45/1907) prohibits bribery involving a public official. Bribery among private individuals is beyond the scope of the code. Therefore, the enforceability of a private construction contract awarded through bribery depends mainly on how such behaviour is regulated within the contract. Contracts regarding public construction works often include a specific clause conferring on the employer the right to terminate on the grounds of bribery. Otherwise, the enforceability of such contracts is subject to the general principle of public policy under the Civil Code (89/1896).

Under the Penal Code, individuals who issue bribes will be subject to imprisonment for up to three years or a fine of up to ¥2.5 million, while individuals who accept bribes will be subject to imprisonment for

up to 20 years. In addition to criminal penalties, a contractor convicted of bribery may have their status of eligibility for public biddings suspended. Moreover, under the Construction Business Act (100/1949), a contractor may be ordered to suspend its business or have its licence for construction business rescinded.

Facilitation payments towards a public official may constitute bribery and are therefore illegal under Japanese law.

Reporting bribery

6 | 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?

No local laws oblige employees of the project team members to report suspicion or knowledge of the bribery of government employees in Japan.

Political contributions

7 | 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 Act (194/1948), foreign companies and nationals are prohibited from making political donations in Japan, while domestic companies and other forms of organisations are permitted to make political donations to political parties, the limitation of which is stipulated in the Act.

Political contributions are not generally considered to be part of doing business in Japan. Therefore, it is not recommended to make political contributions to facilitate business activities. No local laws restrict the ability of contractors and design professionals to work for public agencies.

Compliance

8 | 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 manager or other construction professional who holds the position of engaging in the performance of public duties in accordance with laws and regulations is subject to the same penalties for bribery as those under the Penal Code (45/1907). Compliance rules for government employees are applicable if they hold the status of government employees.

Other international legal considerations

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

No other important legal issues are known in Japan. Approximately 150 foreign contractors are operating businesses in the country.

Practically speaking, attention should be paid to commercial factors such as:

- the language barrier;
- the competitive market situation;
- the shortage of labour and skilled workers; and
- the fulfilment of local regulations.

In particular, in public construction works, almost all bidding documents are written in Japanese and subsequent communications will be made in Japanese. As such, the height of the language barrier should not be overlooked.

CONTRACTS AND INSURANCE

Construction contracts

10 | 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?

A standard contract form is widely used for domestic construction works in both the private and public sector. For private construction works, the General Conditions of Construction Contract is provided by a private committee. For public construction works – the employers of which are public bodies – the Public Work Standard Contract is provided by the Central Council for Construction Business. For design works, the General Conditions for Design and Supervision Works Contract provided by a private association is widely used.

No local laws impose any restrictions on:

- the language of the contract;
- the choice of law; or
- the venue for dispute resolution.

In practice, all of the standard forms commonly used in Japan are written in Japanese and Japanese law is implied as the governing law where no choice of law clause is provided. In regard to the venue for dispute resolution, the General Conditions of Construction Contract for private works or the Public Work Standard Contract for public works specify, as a forum of dispute resolution, the Committee for Adjustment of Construction Work Dispute, whose jurisdiction is specified in the Construction Business Act (100/1949).

Payment methods

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

An employer usually makes a payment by promissory notes or bank transfer. The frequency of payments varies with the size and complexity of the project as stipulated in the contract. For large projects, the employer typically applies an advance payment for completion of a milestone. The standard forms of contracts for both public and private works stipulate conditions for an advance payment.

Contractual matrix of international projects

12 | 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?

In major projects, several main contractors commonly constitute a consortium under the name of a joint venture and all main contractors become a party to the construction contract with the employer. A consortium or each of its members typically deploys subcontractors, which often deploy sub-subcontractors. The Construction Business Act (100/1949) prohibits contractors from subcontracting all construction works to a subcontractor, except where prior written consent is given by the employer in relation to a private construction project.

PPP and PFI**13 | Is there a formal statutory and regulatory framework for PPP and PFI contracts?**

The Act on Promotion of Private Finance Initiative (117/1999) provides the basic policy and procedure for PFI. However, there is no formal statutory or regulatory framework for other types of PPP. PFI can be classified into two categories – the conventional type and the concession type, which were both introduced recently. Under the conventional type, government entities pay consideration for services rendered by private entities, while under the concession type, government entities do not pay such consideration, as private entities run these projects on a self-financing, profit-oriented basis.

Specifically in relation to the conventional type, the PFI/PPP Promotion Office of the Cabinet Office has issued a standard PFI contract form and two guidelines explaining the aims, matters for special attention and definitions that should be contained in PFI contracts, as well as the main articles. These guidelines are generally adhered to and PFI contracts have become standardised in practice.

Conversely, the concession type – under which public entities concede their operation rights of public facilities to private operators – was only introduced in 2011. As such, concession contracts have not yet been standardised, although the relevant guideline issued by the PFI/PPP Promotion Office provides for the main concept to be considered in the drafting of concession contracts.

Joint ventures**14 | Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?**

In case of a major project, several main contractors commonly constitute a consortium under the name of a joint venture. In such cases, a consortium for a construction project is typically classified as a partnership under the Civil Code (89/1896). All members of a consortium will be held jointly and severally liable for the obligations borne by each of them in the operation of the consortium (ie, the entire project). Members may allocate liability and responsibility among them in accordance with the agreements made between them.

In some cases, main contractors may prefer to utilise a company under the Companies Act (86/2005) for their consortium. If a consortium is established as a company under the Act, the members of the consortium will be responsible as shareholders of the company, to the extent limited by the value of their respective capital contributions.

Tort claims and indemnity**15 | 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?**

No local laws prohibit indemnities in general. Therefore, parties are not prohibited from stipulating an indemnification against all acts, errors and omissions arising from the work of the other party if they are caused by the negligence of the party claiming indemnification.

However, Japanese courts interpret these contractual provisions in such a way as to find the reasonable meaning, taking into consideration:

- the intent of both parties;
- the background of the negotiations;
- trade customs; and
- commercial common sense.

In addition, the fairness and equality of construction contracts are referenced under the Construction Business Act (100/1949). The general legal principles of good faith and public policy are also applicable.

Therefore, such indemnity provisions may be invalidated separately from the rest of the contract.

Liability to third parties**16 | 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 (89/1896), a contractor can be the subject of a tort claim brought by a third party that purchased a building constructed by the contractor, even if there is no contractual relationship between the two parties. Case law has held that contractors and designers have a duty of care towards residents, neighbours and passers-by to ensure the fundamental safety of a building. Any breach of this duty resulting in defects in a building that undermine its fundamental safety, thereby infringing the life, body or property of residents, may constitute claims for damages in tort.

Insurance**17 | 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 offered for a contractor is a commercial and business matter determined by private insurers. In general, a contractor may purchase an insurance policy covering:

- damage to the property of third parties;
- injury to workers or third parties; and
- delay damages for an employer.

Eligibility for insurance with regard to damages caused by environmental hazards (eg, typhoons, flooding, earthquakes and toxic substances) varies according to the insurer.

LABOUR AND CLOSURE OF OPERATIONS**Labour requirements****18 | Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?**

There are no local laws requiring a minimum number of Japanese employees for a construction project. However, in practice, foreign contractors must employ Japanese workers to obtain a construction business licence under the Construction Business Act (100/1949).

Local labour law**19 | 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?**

Apart from construction projects, under the Labour Standards Act (49/1947) and the Labour Contracts Act (128/2007), it is generally difficult for an employer to unilaterally dismiss an employee under their employment contract in Japan. To do so, the employer must give the employee at least 30 days' notice or make payment in lieu of notice. In addition, the employer must have an 'objectively and socially justifiable cause' for the dismissal. Otherwise, it is deemed to be an abuse of right and would therefore be null and void. The difficulty of dismissal should be noted.

In the case of termination of employment by the employer, some unperformed obligations under the employment contract will remain, including the obligation to pay unpaid salary or provide compensation for damages resulting from a breach of the employer's responsibilities. In addition, the Labour Standards Act (49/1947) imposes further obligations on the employer, which exist even after termination, such as the obligations to:

- deliver a certificate on the occasion of retirement; and
- return the reserve funds, security deposits, savings and any other money and goods to which the worker is rightfully entitled – regardless of the name or title by which such money or goods are referred.

If a severance payment is provided for in the labour-management agreement, the employer will pay the amount specified by the agreement. In addition, the employer is required to provide social insurance for its employees. If this is not paid, the payment may be subsequently enforced regardless of termination of employment.

Labour and human rights

20 | 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?

Under the Immigration Control and Refugee Recognition Act (Cabinet Order 319/1951), all foreign workers – not limited to those who work on construction projects – must obtain resident status in order to reside and work in Japan. Foreign workers are also required to act and work within the scope permitted by their residence status. This status is proven by the employee by submitting certain documents to the employer. Where the employment is found to be illegal, the employer will be subject to a fine. Further, the Labour Standards Act (49/1947) prohibits employers from discriminating on the basis of nationality in respect of working conditions.

Other than this, the laws that apply to Japanese workers – including the Labour Standard Act, the Labour Contracts Act (128/2007), the Industrial Safety and Health Act (57/1972) and the Minimum Wage Act (137/1959) – apply to foreign construction workers in the same manner.

Close of operations

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

There are no local laws that apply only to foreign contractors in respect of closing their operations in Japan. However, if a foreign contractor has a branch or subsidiary in Japan, it must complete the requisite procedures in order to close the branch office or liquidate the subsidiary company. This is costly and takes a long time. In particular, if the branch or subsidiary has its own employees, the rules for dismissal will apply. Such procedures and processes apply not only to closing down operations and businesses in construction but also to conducting business in Japan in general, which is something that foreign contractors should consider.

Regarding any unique aspects of construction projects in Japan, it is sometimes the case that a construction contract includes provisions related not only to construction but also to the operation and maintenance of the constructed building or facility. The obligations related to this operation and maintenance can remain for a relatively long period after the construction is complete – in some cases, more than a decade. In this case, the contractor cannot cease to provide its services without obtaining the approval of the owner of the building or transferring the obligation to a third party.

PAYMENT

Payment rights

22 | 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?

Under the Civil Code (89/1896), contractors have a right to the retention of construction works in their possession until all costs and fees due to them by an employer have been paid. The right of retention is effective even for third parties. A contractor may also refuse to deliver construction works until the employer tenders a payment of remuneration for such works. In addition, a contractor may place a statutory lien on construction works to secure fees and costs for such works.

'Pay if paid' and 'pay when paid'

23 | 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 (100/1949) prohibits terms in certain subcontracts that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the employer. Specifically, the Act obliges an employer to make a payment within 50 days of an application of delivery of completed construction works, regardless of the status of its payments, on the conditions that:

- the main contractor conducts its business under a special construction business licence; and
- the subcontractor operates its business under an ordinary construction business licence with a stated capital of less than ¥40 million.

Contracting with government entities

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

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

Statutory payment protection

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

Pursuant to the amended Civil Code (89/1896) that took effect as of 1 April 2020, a contractor may receive partial payment for partially completed work in proportion to the rate that an employer benefits from that work if:

- the work becomes impossible to complete due to a cause not attributable to the employer; or
- a contract is cancelled before its completion.

The Civil Code prior to amendment applies to contracts entered into before 1 April 2020. In that case, if a contract is terminated based on a breach by either the contractor or the employer, case law stipulates that the termination can have only a prospective effect, except under special circumstances.

In either case, a contractor may receive full remuneration if that contractor is prevented from completing the work for a reason attributable to an employer. Alternatively, a contractor may claim damages, including lost profits, against an employer based on the employer's

breach of contract. In addition, the code permits an employer to terminate a construction contract at its discretion before completion of the work, on the condition that the employer must compensate the contractor for any damages suffered from the termination.

If the Japanese government is the employer, the Act on Prevention of Delay in Payment under Government Contracts, etc (256/1949) provides certainty regarding the date of payment and the rate of arrears interest, among other matters.

FORCE MAJEURE

Force majeure and acts of God

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

Pursuant to the Civil Code (89/1896), a contractor may raise the defence of force majeure to excuse its liability for the failure to perform contractual obligations, except in case of damages for failure to perform an obligation for the payment of money. However, the code has no definition of force majeure and case law has required an extremely high threshold to find the existence of such excusable causes. The amendment of the Code that took effect as of 1 April 2020 clarifies that the purpose of the relevant contract and commercial common sense shall be taken into account to determine whether an excusable cause exists. Therefore, construction practitioners will commonly include a force majeure clause in their construction contracts that enumerates several events that would entitle a contractor to raise the defence of force majeure.

DISPUTES

Courts and tribunals

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

Various departments are designated to resolving construction disputes in courts such as the Tokyo District Court and the Osaka District Court. With regard to alternative dispute resolution, there are two types of institution:

- the Committee for Adjustment of Construction Work Disputes, established pursuant to the Construction Business Act (100/1949) to solve disputes relating to construction contracts; and
- the Committee for Adjustment of Housing Disputes, established pursuant to the Housing Quality Assurance Act (81/1999) to solve disputes relating to specific housing contracts.

Dispute review boards

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

Dispute review boards (DRBs) are rarely used in domestic construction contracts. In fact, neither standard contract forms for public construction nor forms for private construction have applied provisions for DRBs. Legal status and the effect of decisions or recommendations rendered by DRBs may vary depending on the terms of the contract.

Mediation

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

Standard contract forms for both public and private constructions stipulate a multi-tier dispute resolution mechanism, in which parties are initially obliged to refer their disputes to the Committee for Adjustment of Construction Work Disputes established pursuant to the Construction Business Act (100/1949). The committee offers mediation services by three mediators, as well as conciliation and arbitration services. One of the three mediators will have a legal background, usually as an attorney, and the others will have a technical background or experience with public officials for the administration of the construction sector.

In the case of construction disputes before the Tokyo District Court, although it is not mandatory, parties are usually asked to undergo concurrent proceedings of litigation and mediation conducted simultaneously by a judge, who also acts as the presiding mediator of the three mediators.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

Mediation proceedings before the court and the Committee for Adjustment of Construction Work Disputes are conducted in private. However, Japanese laws do not prohibit the parties from referring to statements or evidence made or disclosed in the course of mediation. Therefore, if the parties also wish to ensure the confidentiality of mediation in subsequent proceedings (eg, litigation or arbitration), a contractual agreement executed between the parties prohibiting them from referring to such information is required.

Arbitration of private disputes

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

Domestic arbitration held by the Committee for Adjustment of Construction Work Disputes and international arbitration held by the Japan Commercial Arbitration Association (JCAA) are as common as court litigation for the resolution of construction disputes.

Governing law and arbitration providers

32 | 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 among Japanese parties because the seat of arbitration and venue for hearings are likely to be in Tokyo or another city in Japan. If the seat of arbitration or venue for hearings is overseas, Japanese parties typically choose a jurisdiction that is not the other party's origin country. In this sense, Singapore has become a popular choice for dispute resolution. The International Chamber of Commerce, the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre are also preferred arbitral institutions for Japanese parties.

As to governing law, Japanese parties prefer to choose Japanese law. The second option is to choose the law of a neutral country (eg, England and Wales or Singapore).

Dispute resolution with government entities

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

Government agencies may participate in private arbitration and be bound by an arbitral award. In fact, the standard contract form for public works permits the use of arbitration held by the Committee for Adjustment of Construction Work Disputes.

Arbitral award

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

Japan is a party to the New York Convention with the reservation of reciprocity, and the convention is applied directly in the enforcement of foreign awards made in other party states. In addition, the Arbitration Act (138/2003) has adopted almost all the provisions of the UNCITRAL Model Law, and the requirements for the enforcement of foreign awards under the Act are almost the same as those of the convention. Currently, the Ministry of Justice is in the process of preparing a bill for the Act to reflect the 2006 amendment to the UNCITRAL Model Law.

Limitation periods

35 | 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 amended Civil Code (89/1896) stipulated limitation periods for contractual claims that accrue on and after 1 April 2020:

- five years from the time when a creditor becomes aware of the possibility of exercising the right; or
- 10 years from the time when it has become possible to exercise the right.

The limitation periods contained in the pre-amendment Civil Code and the pre-amendment Commercial Code (48/1899) remain applicable for contractual claims that accrued before 1 April 2020. In general, contractual claims based on commercial contracts shall be subject to a limitation period of five years, and a specific limitation period related to construction works is three years from the completion of work.

In either case, the Civil Code stipulates various measures to prevent the expiration of limitation periods, including the commencement of judicial claims and of demands outside of the court procedure. The effect and conditions of each measure differ. As measures, effects, and conditions stipulated in the amended Code differ from those in the previous Code, close attention should be paid before taking such measures.

ENVIRONMENTAL REGULATION

International environmental law

36 | 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 a signatory to the Stockholm Declaration of 1972 and has enacted various local environmental laws, including:

- the Basic Environment Act (91/1993);
- the Air Pollution Control Act (97/1968);
- the Water Pollution Prevention Act (138/1970); and
- the Soil Contamination Countermeasures Act (53/2002).

In regard to construction projects, the relevant laws and regulations include the Construction Material Recycling Act (104/2000) and the Act on Ensuring Hygienic Environment in Buildings (20/1970).

Local environmental responsibility

37 | 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?

Various Japanese local environmental laws (eg, the Basic Environment Act, the Air Pollution Control Act, the Water Pollution Prevention Act, and the Soil Contamination Countermeasures Act) provide regulations and measures to protect the environment and impose penalties for any breaches thereof in accordance with the importance and extent of the breach. For example, the Construction Material Recycling Act imposes an obligation on the contractor to recycle specific construction materials.

CROSS-BORDER ISSUES

International treaties

38 | 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 several bilateral investment treaties (BITs) and economic partnership agreements (EPAs) that provide for the protection of investments in Japan. In recent years, Japan entered into separate EPAs with the EU, the US and the UK. In addition, Japan signed on to two regional economic agreements, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in 2018 and the Regional Comprehensive Economic Partnership Agreement in 2020, which is likely to become effective in 2021.

The definition of 'investment' varies for individual agreements because Japan does not have a model BIT or EPA. For example, the CPTPP defines 'investment' in a broad way, which includes 'turnkey, construction, management, production, concession, revenue-sharing and other similar contracts'.

Tax treaties

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

Japan has entered into 66 tax treaties with 75 jurisdictions as of 1 May 2021 in order to avoid double taxation and prevent tax evasion and avoidance.

Currency controls

40 | 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 currency controls in Japan.

Removal of revenues, profits and investment

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

There is no local law that restricts the removal of revenues, profits or investments from Japan, apart from transfer pricing taxation, which prevents multinationals from avoiding or reducing corporate income taxes by transferring income to foreign affiliates.

In exceptional circumstances (eg, where international economic sanctions come into play), overseas payments and capital transactions are controlled pursuant to the Foreign Exchange and Foreign Trade Act (228/1949). Under the Act, the investor must report to the Bank of Japan in advance or subsequently, depending on which industry it intends to inject on. In addition, certain transactions are monitored under the Act on Prevention of Transfer of Criminal Proceeds (22/2007).

UPDATE AND TRENDS

Emerging trends

42 | Are there any emerging trends or hot topics in construction regulation in your jurisdiction?

Apart from extreme factors related to the covid-19 pandemic, working conditions in the construction industry have been a topic of discussion for a long period. In particular, long working hours and the ability to secure social insurance have raised significant issues for construction workers. To address these issues, the amendment to the Construction Business Act (100/1949) and the ordinance of the Ministry of Land, Infrastructure, Transport and Tourism, which became effective in October 2020, stipulate the mandatory requirement that applicants for a licence to operate in the construction business must ensure that their employees enrol in social insurance. In addition, the amended Act prohibits employers from entering into a contract with a term that is much shorter than normal and practicable for a subject project. The Central Council for Construction Business specified the issues that should be taken into consideration to determine the standard periods for construction projects.

Coronavirus

43 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In light of the covid-19 pandemic, the amendment to the Act on Special Measures for Pandemic Influenza and New Infectious Diseases became effective in March 2020. In accordance with that Act, the Japanese government declared a state of emergency for the first time in April 2020 to suppress the coronavirus outbreak in seven prefectures, including Tokyo and Osaka. The state of emergency was later extended nationwide following an increase in the rate of infection. In response to the extent of infection for relevant areas, including Tokyo and Osaka, a state of emergency has been declared twice in 2021.

Under the current legislation following further amendment to the Act, the governor of the prefecture for which the central government has declared a state of emergency may request or order (if especially necessary) the closure of facilities that attract many visitors, such as restaurants, shops and department stores. However, the governor is unable to take strict 'lockdown' measures against the public because the Act only confers the limited power to ask members of the public to stay home.

In relation to the construction business, the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) announced during the first state of emergency that certain events, such as instances in which the procurement of materials had become difficult owing to the covid-19 outbreak, or in which the relevant workers contracted covid-19, should be construed as force majeure events or causes that were not attributable to a contractor. The MLIT has repeated that announcement during the second and third states of emergency. Although it remains uncertain

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whether a court would accept that view, an employer, in particular from the public sector, is assumed to accept in practice the extension of time or the adjustment in contract price in accordance with a force majeure clause in a relevant contract. In fact, several PFI and PPP projects involving construction phases have experienced suspension of construction, extension of time or budgetary support, including deferment of the payment schedule for service fees.

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