Chambers
Global Practice
Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Corporate Governance 2022

Japan: Trends & Developments

Yoshitaka Sakamoto, Tsunemichi Nakano,
Michi Yamagami and Hideo Tsukamoto
Anderson Mori & Tomotsune

practiceguides.chambers.com

Trends and Developments

Contributed by:
Yoshitaka Sakamoto, Tsunemichi Nakano, Michi Yamagami and Hideo Tsukamoto
Anderson Mori & Tomotsune see p.9

Introduction

Procedures for general shareholders' meetings, an anchor of corporate governance in Japan, have undergone changes in recent years as a result of practical considerations and in response to the ongoing pandemic. These changes include a systemic revision of hard laws for the electronification of meeting processes, promotion of such electronification through soft laws, and practical shifts in the administration of general shareholders' meetings.

An example of the revision of hard laws is the amendment of the Companies Act (Act No 86 of 2005, as amended; the "Companies Act") to establish a system enabling provision of materials for general shareholders' meetings electronically (the "electronic provision system"). These revisions were enacted in December 2019, and are expected to come into effect on 1 September 2022, upon which application of the electronic provision system will be mandatory for all listed companies. This will have a significant practical impact on the operation of general meetings of shareholders.

The Industrial Competitiveness Enhancement Act (Act No 98 of 2013; as amended; the "ICEA") was also amended and came into effect on 16 June 2021 to allow the holding of virtual-only general shareholders' meetings. Before the amendment, virtual-only shareholders' meetings ("virtual-only meetings") were difficult to implement due to the provisions of the Companies Act. To reduce COVID-19 infection risks, however, the regulators decided to make fundamental changes to the law to enable virtual-only meetings. With these developments, an increasing number of listed companies are expected to adopt virtual-only meetings going forward, to facilitate the participation of remote shareholders, mitigate infection risks, and take advantage of the lower costs associated with virtual-only meetings. However, some have raised concerns about issues of transparency, stating that virtual-only meetings may allow companies to ignore any statement or questions on thorny issues from shareholders during such meetings.

In addition to the above, amendments to the Corporate Governance Code of Japan (the "CG Code"), which provides a set of non-legally binding codes of conduct for listed companies, were announced in June 2021. In particular, the amended CG Code specifies that listed companies transitioning to the Prime Market (which corresponds to the former First Section of the Tokyo Stock Exchange (the "TSE"), following the TSE's market restructuring on 4 April 2022), should at least enable usage of electronic voting platforms for institutional investors. Since the introduction of an electronic provision system is a precondition for adopting electronic voting platforms, this has provided the impetus for an increasing number of companies to adopt electronic provision systems, and has contributed to the electronification of general meetings.

In the context of the above, this article discusses the systemic revisions of the regulatory framework in Japan for the electronification of general shareholders' meetings through amendments to hard laws, including some of the key procedures and issues to keep in mind.

Electronic Provision System

Amendment of the Companies Act

The Act for Partial Amendment of the Companies Act (Act No 70 of 2019; as amended; the "Amended Companies Act") enacted on 4 December 2019 and the "Ministerial Ordinance for Partial Revision of the Ordinance for Enforcement of the Companies Act, etc." (Order of the Ministry of Justice No 52 of 2020; the "Revised Ordinance of the MOJ") promulgated on 27 November 2020, came into effect on 1 March 2021. However, enforcement of provisions regarding the establishment of electronic provision systems had been postponed because of the time needed by Japan Securities Depository Center, Inc., the body responsible for the custody and transfer of shares in listed companies, to develop a system for such enforcement.

With the requisite system now in place, however, it has been determined that enforcement of the electronic provision system requirement will commence on 1 September 2022. While the introduction of the electronic provision system will be a mandatory requirement for listed companies, those companies will have a grace period of approximately six months to put in place the necessary internal systems for compliance with this requirement. As a practical matter, therefore, enforcement of the electronic provision system will begin in March 2023, whereupon the electronic provision system will be mandatorily applicable to all general shareholders' meetings to be held by listed companies.

Outline of the Electronic Provision System and Its Impact on General Meetings

What is the electronic provision system?

Simply put, the electronic provision system refers to a system under which reference information and documents for general meetings of shareholders, voting forms, business reports and (consolidated) financial statements (collectively, the "reference information") may be legitimately provided to shareholders by publishing them on the company's website without having to obtain the individual consent of shareholders.

The advantages of this system include reduced printing, sealing, and mailing costs, which in turn would enhance the ability of companies to prepare reference information in greater detail. This is expected to raise the degree of disclosure by companies and benefit shareholders.

Compulsory for listed companies

As a general rule, companies may determine at their discretion whether to adopt the electronic provision system. Accordingly, private companies, even those without a board of directors, may choose to adopt the system.

To adopt the system, a company is required to amend its articles of incorporation ("articles") to include a provision to the effect that "electronic provision measures" will be taken. As such an amendment to a company's articles requires updating of its commercial register, a company choosing to adopt such a system will be required to undergo the relevant registration procedures in addition to the procedures for amending its articles.

Adoption of the electronic provision system for listed companies is, however, compulsory. This is because the electronic provision system was created to address the needs of shareholders in listed companies.

Procedures in respect of the electronic provision system

In principle, reference information to be provided by electronic means should be made available by no later than three weeks before the date of a general shareholders' meeting.

Provision of reference information by electronic means involves, in effect, uploading such docu-

ments on the website of a company, thereby making them available to shareholders. This should be done at whichever of the following is earlier:

- three weeks before the date of the general shareholders' meeting; or
- the date of dispatch of an access notice (as defined below).

The uploaded reference information should remain on the company's website for at least three months after the date of the general shareholders' meeting. In addition, listed companies are required by the listing rules of the TSE to make efforts, where practicable, to provide reference information electronically, even earlier than three weeks before general shareholders' meetings.

Considering that the Companies Act currently requires the dispatch of a convocation notice two weeks before a general shareholders' meeting, the Amended Companies Act (when enforcement of the relevant provisions therein relating to the establishment of electronic provision systems begins) and the rules of the TSE will ensure early disclosure of reference information. This is expected to be beneficial to shareholders in general.

Reference information required to be provided by electronic means ("electronic reference information") includes:

- basic information such as the date, time and venue of general shareholders' meetings, meeting agenda and the fact that votes may be cast in writing or by electronic means;
- matters to be stated in the reference documents and voting forms;
- matters concerning shareholder proposals;
- matters stated and recorded in financial statements and business reports;
- matters stated and recorded in consolidated financial statements; and
- if any of the above information is amended, a statement to that effect (and the information before such amendment was made should also be provided).

It should be noted, however, that electronic provision of voting forms may be omitted provided that such forms are physically delivered. This is because voting forms must include shareholder-specific information, such as the name of a shareholder and the number of voting rights held by that shareholder, and disclosure of such information on a company's website would not be appropriate. Moreover, it would be a heavy burden for a company to develop a system that allows each of its shareholders to download its own information from a website. In practice, therefore, most companies are expected to continue with physical delivery of their voting forms for now.

There is no requirement for a company to publish electronic reference information on its own website. What this means is that a company may release such information on the website of a third-party contractor if it so chooses. The release of such information on two or more websites is also permissible. In practice, it is likely that companies will release the information on their own website and also indicate on the relevant TSE web page where electronic reference information on their general shareholders' meetings can be found.

The following shows a comparison of the method and deadline for the provision of materials for general shareholders' meetings by listed companies before and after the provisions in the Amended Companies Act relating to the establishment of electronic provision systems are enforced.

Contributed by: *Yoshitaka Sakamoto, Tsunemichi Nakano, Michi Yamagami and Hideo Tsukamoto,*
Anderson Mori & Tomotsune

The manner of providing materials for a general shareholders' meeting is as follows.

- Before enforcement – in principle, materials are provided physically (but can be provided electronically with individual shareholder approval). Online disclosure of part of information in the materials is possible if the manner of disclosure is stipulated in the articles.
- After enforcement – materials will be provided electronically. Only basic information will be provided physically in the form of an access notice (see below).

The deadline for provision of materials for a general shareholders' meeting is as follows.

- Before enforcement – no later than two weeks prior to the date of the general shareholders' meeting.
- After enforcement – in principle, no later than three weeks prior to the date of the general shareholders' meeting. The access notice must be sent at least two weeks prior to the date of the general shareholders' meeting.

Apart from the general disclosure of electronic reference information through their website three weeks prior to a general shareholders' meeting, companies that adopt an electronic provision system are required to issue an access notice in writing to each of their shareholders by no later than two weeks prior to the date of the general meeting. Such a notice must at least contain information on the date, time, venue, and agenda of the general shareholders' meeting, a statement to the effect that measures for the electronic provision of information have been taken, and the URL of the websites on which such information can be found.

Shareholders' right to demand physical delivery of documents

Companies are required to take into consideration shareholders with no access to the internet as no physical delivery of reference information to shareholders will be made under the electronic provision system.

Shareholders may request a company, directly or through a securities house, by the record date for the exercise of voting rights, to deliver those documents that will be included in the electronic reference information. In such cases, a company will be required to deliver the relevant documents together with an access notice to the requesting shareholder at least two weeks before the date of the general meeting.

Virtual-Only Meetings

Enactment of the ICEA

The Companies Act requires the "venue" of a general shareholders' meeting to be determined at the time of its convocation. What this means in effect is that virtual-only meetings, in which attendance by directors and shareholders "solely" through access to the internet without a physical venue, are impermissible.

However, there have been growing calls in the public and private sectors to lift the ban on virtual-only meetings in response to the COVID-19 pandemic and to promote constructive dialogue with shareholders. This has been further supported by the fact that virtual-only meetings are permitted in many other jurisdictions. In this context, the ICEA, which includes provisions to allow the holding of virtual-only meetings in certain cases, and the Ministerial Ordinance on Shareholder Meetings without Designation of Venue under the ICEA (the "Ministerial Ordinance") were promulgated, and came into force on 16 June 2021.

Contributed by: *Yoshitaka Sakamoto, Tsunemichi Nakano, Michi Yamagami and Hideo Tsukamoto,*
Anderson Mori & Tomotsune

Requirements of holding virtual-only meetings

According to the ICEA and the Ministerial Ordinance, a company must meet the following requirements to hold a virtual-only meeting:

- it must be a listed company;
- it must obtain confirmation from the Minister of Economy, Trade and Industry and the Minister of Justice that the relevant requirements specified in the Ministerial Ordinance (the "Ministerial Requirements") have been satisfied;
- its articles must permit the holding of virtual-only meetings; and
- it must have satisfied the Ministerial Requirements at the time of its decision to convene a virtual-only meeting.

Each of these requirements is briefly described below.

Being a listed company

Under the ICEA, only companies listed on a financial instruments exchange can hold virtual-only meetings. This is because listed companies typically have a large number of shareholders, and virtual-only meetings are anticipated to support the revitalisation, efficiency, and facilitation of general shareholders' meetings. Moreover, as listed companies are subject to public disclosure requirements, their virtual-only meetings can be expected to be held in a transparent and fair manner.

Obtaining confirmation from the Minister of Economy, Trade and Industry and the Minister of Justice that Ministerial Requirements have been satisfied.

A listed company is required to obtain confirmation from the Minister of Economy, Trade and Industry and the Minister of Justice that the Ministerial Requirements have been satisfied as a precondition for amending the company's articles under item (iii) above. To obtain such confirmation, a listed company must have satisfied the Ministerial Requirements at the time of its decision to convene a virtual-only meeting (see item (iv)). It should be noted in this connection that the confirmation requirement under item (ii) is primarily for the purpose of amending a company's articles under item (iii). Accordingly, once a company's articles have been amended in accordance with item (iii), confirmation under item (ii) will no longer be required for the holding of subsequent virtual-only meetings.

Permitting virtual-only meetings in the articles

To hold a virtual-only meeting, a company's articles must include a provision permitting general shareholders' meetings to be held without a designated venue. This is necessary from the viewpoint of protecting shareholder interests.

Amendments to the articles of a company are subject to the approval of shareholders by way of a special resolution (ie, affirmative votes from at least two thirds of shareholders who are present and entitled to exercise their voting rights in such a shareholders' meeting). However, as a transitional measure, the ICEA provides for a period of two years following enforcement of the ICEA during which a listed company that has received the confirmation under item (ii) above will be deemed to have made necessary amendments to its articles. This transitional measure has been introduced in consideration of the difficulty of holding a separate physical general shareholders' meeting for approving amendments to a company's articles due to the spread of COVID-19. After this two-year period, it will be necessary for companies to hold a physical general shareholders' meeting to formally approve the necessary amendments to their articles.

Contributed by: *Yoshitaka Sakamoto, Tsunemichi Nakano, Michi Yamagami and Hideo Tsukamoto,*
Anderson Mori & Tomotsune

Satisfaction of Ministerial Requirements at the time of a decision to convene a virtual-only meeting

To hold a virtual-only meeting, a company must meet the Ministerial Requirements at the time of its decision to convene the meeting. The following is an outline of the Ministerial Requirements:

- a person must be assigned to take charge of the method of communication adopted for sending and receiving information in proceedings for holding a general shareholders' meeting with no designated venue (the "method of communication");
- the company must establish a policy on the measures it will take in the event of failures or errors in the method of communication (the "policy"), eg, putting in place plans for alternative means of communication in the event of such failure or errors;
- the company must establish a policy that considers the interests of shareholders who have difficulty in accessing the internet as a method of communication (eg, setting up a written voting system for shareholders who wish to exercise their voting rights but have difficulty accessing the internet); and
- the number of shareholders described or recorded in the company's shareholders' register should number at least 100.

Trends and issues of virtual-only meetings

Based on the ICEA, Euglena Co., Ltd. held a virtual-only extraordinary general shareholders' meeting in August 2021. This was followed by freee K.K., which held a virtual-only general shareholders' meeting in September 2021. Some other companies have also changed their articles with the objective of holding virtual-only meetings. Such changes indicate the possibility that virtual-only meetings may fast become the norm in Japan.

On the other hand, some have argued that virtual-only meetings may allow companies to ignore statements or questions on thorny issues from shareholders at shareholders' meetings, to the detriment of the principles of objectivity and transparency. Taking such concerns into account, some voting advisory companies have advised that shareholders should, in principle, vote against proposals to amend articles to allow virtual-only meetings, except where such meetings are necessitated by the outbreak of infectious diseases or natural disasters. Listed companies should accordingly be aware that there are some who are opposed to virtual-only meetings.

Other issues concerning virtual-only meetings have also been raised, such as whether such meetings should be adjourned in the event of internet connection issues. Most of these issues are expected to be fully considered and resolved as the practice of holding virtual-only meetings takes root in Japan. In the meantime, listed companies should closely monitor developments in this area of corporate governance and practice.

Implications for foreign investors and shareholders

The amendments of rules surrounding general shareholders' meetings discussed in this article should generally be beneficial for foreign investors and shareholders of Japanese companies. In particular, the electronic provision system enables shareholders to access reference information earlier than under previous rules. This will give foreign investors and shareholders in general more time to consider meeting agendas. Additionally, virtual-only meetings will provide foreign investors and shareholders who are unable to physically attend general shareholders' meetings with the opportunity to actually participate in such meetings.

Contributed by: *Yoshitaka Sakamoto, Tsunemichi Nakano, Michi Yamagami and Hideo Tsukamoto,*
Anderson Mori & Tomotsune

These amendments are expected to strengthen corporate governance and promote constructive engagement between listed companies and their shareholders.

Contributed by: *Yoshitaka Sakamoto, Tsunemichi Nakano, Michi Yamagami and Hideo Tsukamoto,*
Anderson Mori & Tomotsune

Anderson Mori & Tomotsune is one of the largest full-service law firms in Japan, with more than 500 lawyers. It is headquartered in Tokyo, with branch offices in Osaka and Nagoya, and overseas offices in Beijing, Shanghai, Singapore, Ho Chi Minh City and Bangkok. AMT has also established associated firms in Jakarta and Hong Kong. The combined resources and network of AMT provide an extraordinarily powerful value proposition and have enabled the firm to advise on some of the largest and most complex cross-sector transactions. AMT regularly advises listed companies and investors from the standpoint of corporate governance. Recently the firm has also advised listed companies on shareholder proposals, including the countermeasures available against proposals from activist funds or disputing shareholders, and subsequent proxy fights.

AUTHORS

Yoshitaka Sakamoto is a partner at Anderson Mori & Tomotsune and practises principally in the fields of M&A transactions and corporate matters, including corporate governance. His experience includes participation in the legislative revision of the Companies Act of Japan during his secondment with the Civil Affairs Bureau of the Ministry of Justice from 2017 to 2019. He was admitted to the Japanese Bar in 2009 and the California Bar in 2019. His recent publications include “Q&A on Practical Responses to the Revised Companies Act” (2021) and “Q&A 2019 Revised Companies Act” (2020).

Tsunemichi Nakano is a partner at Anderson Mori & Tomotsune and specialises in the area of corporate and M&A transactions, including cross-border matters. He acts for both Japanese clients and foreign clients and has extensive experience assisting foreign clients on a variety of corporate matters. He also took part in drafting the Corporate Governance Code when he was seconded to the Financial Services Agency in Japan from 2014 to 2015. He was admitted to the Japanese Bar in 2010. His recent publications include “Due Diligence Coverage, Process and Issues for M&A in Japan” (2022).

Contributed by: *Yoshitaka Sakamoto, Tsunemichi Nakano, Michi Yamagami and Hideo Tsukamoto,* ***Anderson Mori & Tomotsune***

Michi Yamagami is a partner at Anderson Mori & Tomotsune and has extensive experience in a wide variety of domestic and cross-border transactions, including cross-border M&A transactions, joint ventures, and strategic alliances. He also regularly advises public companies on corporate governance and internal investigation matters. He was admitted to the Japanese Bar in 1999 and the New York Bar in 2005. His recent publications include "Introduction to Japanese Business Law & Practice, Fifth Edition" (2021) and "Mergers & Acquisitions, 2nd Edition (Japan Chapter)" (2016).

Hideo Tsukamoto is a partner at Anderson Mori & Tomotsune. He was admitted to the Japanese Bar in 2004 and practises principally in the fields of M&A, corporate governance, shareholders' meetings, shareholder activism, and general corporate matters. His experience includes participation in the legislative revision of the Companies Act of Japan during his secondment with the Civil Affairs Bureau of the Ministry of Justice from 2010 to 2013. His recent publications include "Comparison and Analysis of Voting Guidelines of Institutional Investors" (2022) and "Overview of METI's Practical Guidelines for Independent Directors" (2021).

Anderson Mori & Tomotsune

Otemachi Park Building 1-1-1
Otemachi
Chiyoda-ku
Tokyo 100-8136
Japan

Tel: +81 3 6775 1229
Fax: +81 3 6775 2229
Email: tsunemichi.nakano@amt-law.com
Web: www.amt-law.com/en/

ANDERSON MŌRI & TOMOTSUNE

Chambers Global Practice Guides

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe.
Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com