

# Companies Act – India and Japan: Understanding the Basics

Very few countries have a specific law dealing with companies (the corporate form) and its governance. India is one such country which has the Companies Act, 2013 (earlier Companies Act, 1956). Japan is yet another country that has Companies Act (Act No.86 of 26 July 2005). There has been a lot of exchange on the technical and know-how between the two countries. The machinery or the structure which enables this exchange of technology is mostly the corporate form. Despite this form of existence for quite some time, certain procedural aspects need to be made known to the Japanese counterparts in India. An attempt is made to bring out some similarities and distinctions between the company law of both the countries for the information of the compliance professionals and the foreign nominees deputed in India.



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## INTRODUCTION

In the year 1991 the liberalized economic policy was announced and most of the sectors which were earlier protected for domestic investments were made open to the world. This helped India's technological and financial rapid growth. In the pre- 1991 era, the doors were not closed, but were controlled and were limited and guided by various permissions, for example, from Foreign Investment Promotion Board (FIPB), Reserve Bank of India (RBI)

and other regulatory agencies. However, there has been a lot of give and take between India and Japan through various types of collaborations, joint-ventures and other business types, enriching both of them commercially, technologically and on various other fronts.

India and Japan have a rich tradition and culture, which are the similarities. One more similarity is on the corporate front i.e., having Company Law. Some similarities and some distinctions in application of law and procedural aspects are bound to exist. However, the fundamental principles appear similar. There are many joint venture companies (listed/ unlisted and private companies) having Japanese corporates as their shareholders. It is a very normal practice that these bodies corporate appoint their representatives as directors on the Board (for the sake of brevity these entities are being referred as Japanese ventures).

The Companies Act, 2013 (earlier 1956) being the law of the land is applicable to these Japanese ventures in India. Company secretaries have to deal extensively with nominated directors, legal & commercial heads, etc. and explain the law. There are some interesting similarities and dissimilarities which sometimes make the company secretary's job crucial in explaining the requirements of Indian law.

## BASIC FORM OF COMPANIES

From the information available, it is understood that the Japanese Companies Bill which based on the Summary was submitted to the 162<sup>nd</sup> Japanese Parliamentary session. The Bill was passed with some slight amendments and the Companies Act (hereinafter referred to as the Companies Act 2005) was promulgated on 26 July 2005. It comes into force on 1 May 2006. This Companies Act of 2005 (hereinafter referred to as Japan Act) is equally exhaustive and complex as the Companies Act, 2013 (hereinafter referred to as Indian Act). Prior to the enactment of the Companies Act of Japan in 2006, the Companies Act was a part of the Commercial Code, and its provisions related to companies were included in Part II of the Commercial Code. In 2006, it was enacted as an independent law under the name of the Companies Act. The Japan Act is divided into 8 Parts comprising of 949 Articles (Sections). The Indian Act is divided into 29 Chapters comprising of 470 Sections and 7 Schedules, supplemented with various Rules. The

purpose of the Act is given as Article 1 of the Japan law whereas in the Indian context the purpose is not a part of the text, but is mentioned in the preamble. In the Indian context while referring to any law in general, we mention and refer it by the terminology of 'Section'. The Japan Act addresses this by using the term 'Article'.

The Indian Act deals categorically with companies—public and private. A listed entity is fundamentally a public company, whose shares are traded on stock exchanges, with additional conditions imposed by Listing Obligations and Disclosure Requirements (LODR). However, the Indian Act does not consider a Limited Liability Partnership or Partnership or any other form under the provisions of company law. A separate law is established to govern LLPs. However, it is an observation that the Japan Act covers all the forms under one enactment which will be evident from the subsequent comparison. Some important definitions and their comparison are given below –

### Some important definitions (comparison) \*1

Term	Indian Act	Japan Act
Company	“Company” means a company incorporated under this Act or under any previous company law.	“Company” means any Stock Company, General Partnership Company, Limited Partnership Company or Limited Liability Company.
Public*2 Company	“Public Company” means a company which— (a) is not a private company, (b) has a minimum paid-up share capital of five lakh rupees or such higher paid-up capital, as may be prescribed.	“Public Company” means any Stock Company the articles of incorporation of which do not require, as a feature of all or part of its shares, the approval of the Stock Company for the acquisition of such shares by transfer.
Private*2 Company	“Private Company” means a company having a minimum paid-up share capital of one lakh rupees or such higher paid-up share capital as may be prescribed, and which by its articles— (i) restricts the right to transfer its shares; (ii) except in case of One Person Company, limits the number of its members to two hundred: and (iii) prohibits any invitation to the public to subscribe.	No definition specified. In general, “private company” is understood to be any stock company which only issued shares with Restriction on Transfer.
Large Company/ Small Company*2	“small company” means a company, other than a public company— (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees.	“Large Company” means any Stock Company which satisfies any of the following requirements: (a) that the amount of the stated capital in the balance sheet as of the end of its Most Recent Business Year (hereinafter in this (a) and (b) below referring to the balance sheet reported to the annual shareholders’ meeting under the provision of Article 439 in cases provided for in the first sentence of such Article, and referring to the balance sheet under Article 435(1) in cases where the first annual shareholders’ meeting after the incorporation of the Stock Company has not yet been held) is 500,000,000 yen or more; or (b) that the total sum of the amounts in the liabilities section of the balance sheet as of the end of its Most Recent Business Year is 20,000,000,000 yen or more.

Company with Board of Directors	No definition. There cannot be a company without a Board of Directors.	“Company with Board of Directors” means any Stock Company which has a board of directors, or any Stock Company which is required to have a board of directors under the provisions of this Act;
Company with Auditors	No definition. Every company, whether private or public must have auditor.	“Company with Auditors” means any Stock Company which has auditor(s) (excluding any Stock Company the articles of incorporation of which provide that the scope of the audit by its auditor(s) shall be limited to an audit related to accounting), or any Stock Company which is required to have auditor(s) under the provisions of this Act;
Share	“share” means a share in the share capital of a company and includes stock.	Not defined. But stock company can be inferred to as a Joint stock company with shares.

\*1 The company laws of both countries have been amended several times since their enactment until now, but in principle, this document does not consider such amendments and refers to the original provisions.

\*2 The provisions in these definitions are mentioned for ease of understanding.

The above comparative table makes it amply clear that there is a fundamental distinction between forms of companies viz. private company and public company. Listed company is a public company whose shares are listed on stock exchange(s).

## JAPAN LAW VERSION ABOUT TYPES OF COMPANIES

Under the Japan Act, in addition to stock company, there are three types of companies: “General Partnership Company”, “Limited Partnership Company” and “Limited Liability Company” (collectively, “Membership Company”). “General Partnership Company” means any company consisting of only unlimited partners, and “Limited Partnership Company” means any company consisting of unlimited partners and limited partners. “Limited Liability Company” means any company consisting of only limited partners and is a new company form established in 2006 with the enactment of the Companies Act. “Stock Company” means any company consisting of only limited partners, where the status of investors (partners) is expressed in the form of shares, and is the most popular corporate form in Japan. Depending on the size of the company and its choice, stock company can be either any company with auditors (company with board of auditors) or any company with committees. The following descriptions of Japanese law will focus on companies with auditors, which are currently the most popular type of company in Japan.

Under the India law, a company essentially has a Board of Directors. First auditors are appointed by the Board and subsequently the shareholders appoint the auditors. The concept of Independent directors is applicable to public companies fulfilling certain capital/ turnover conditions. There is no concept of Board of Auditors; but certain companies are required to constitute an Audit Committee (Committee of Directors).

### Directors

From the common business structure perspective private limited companies are the most popular form of business.

Some provisions related to directors under the India law are :

- A person cannot be appointed as a Director unless he obtains a Director Identification Number (DIN).
  - A private company has at least two directors and a public company has at least 3 directors.
  - The maximum number of directors is fixed at 15 but can be increased with the approval of shareholders. Independent Directors’ appointment is compulsory in respect of companies having -
    - ♦ paid up capital of Rs.10 Crores (Rs.100 Mn); or
    - ♦ turnover of Rs.100 Crores (Rs.1,000 Mn); or
    - ♦ outstanding debentures or public deposits of Rs.50 Crores (Rs.500 Mn).
- Similarly, certain public companies should have at least one-woman director. Both the conditions those of independent and woman director are not applicable to private companies.
- At least one director should be present in India for a period of not less than 180 days.
  - Every Director must attend at least one board meeting in a year. If a Director remains absent for the board meetings for a period of 12 months, he shall stand disqualified. Remaining absent for the above stated period even by obtaining leave of absence is will not hold good and vacation of office is the consequence.
  - The Managing or Whole Time Director can be appointed in a meeting of Board and not by circulation of resolution and the term of a Managing / Whole Time Director shall not exceed the tenure of 5 years at one time.

## POSITION AS PER THE JAPAN LAW

Under the Japan Act, the organs of a stock company include the general meeting of Shareholders, Directors, Corporate Auditors, and Accounting Auditors etc. Of these, the general

meeting of Shareholders and directors are mandatory organs. Some provisions relating to directors under the Japan act are:

- a) A Stock Company shall have one or more directors.
- b) The following persons may not act as directors:
  - i) A juridical person;
  - ii) An adult ward, a person under curatorship, or a person who is similarly treated under foreign laws and regulations;
  - iii) A person who has been sentenced to a penalty for having violated the provisions of Japan Act or certain laws, for whom 2 years have not elapsed since the day on which the execution of the sentence was completed or the sentence no longer applied.
  - iv) A person who violated the provisions of laws and regulations other than those provided for in the preceding item, was sentenced to imprisonment or severer penalty and who has not completed the execution of the sentence or to whom the sentence still applies (excluding persons for whom the execution of the sentence is suspended).
- c) Directors shall be elected by resolution of a shareholders' meeting.
- d) A Company with Board of Directors shall have three or more directors.
- e) In a company with a board of directors, board of directors shall appoint Representative Directors from among the directors. Representative Directors shall have authority to do any and all judicial and non-judicial acts in connection with the operations of the Stock Company.
- f) Directors' terms of office shall continue until the conclusion of the annual shareholders meeting for the last business year which ends within two years from the time of their election; provided, however, that this shall not preclude the shortening the term of the directors by the articles of incorporation or by the resolution of the shareholders' meeting.
- g) The provisions of the preceding paragraph shall not preclude a Stock Company which is not a Public Company (excluding a Company with Committees) from extending, by the articles of incorporation, the term of office under that paragraph until the conclusion of the annual shareholders meeting for the last business year which ends within ten years from the time of the election.
- h) A company with auditors need not have outside directors. In addition, there are no provisions for independent directors and woman directors under the Japan Act.

### ANNUAL GENERAL MEETINGS (AGMs)

- a) Under the Indian law a company should held one meeting as the Annual General Meeting (AGM) every year. Here calendar year is considered. There is an exception for the first AGM after formation of the Company.

There has been a lot of exchange on the technical and know-how aspects between the two countries. The machinery or the structure which enables this exchange of technology is mostly the corporate form. Despite this form of existence for quite some time, certain procedural aspects need to be made known to the Japanese counterparts in India. An attempt is made to bring out some similarities and distinctions between the company law of both the countries for the information of the compliance professionals and the foreign nominees deputed in India.

- b) The AGM must be held within 6 months from the closure of financial year. Further, the gap between two AGMs shall not exceed fifteen months. The agenda for the AGM under the Indian law is fixed and shall normally contain the following –
  - ♦ Approval of annual accounts,
  - ♦ Declaration of dividend [If the Board doesn't recommend dividend, then this item is skipped],
  - ♦ Reappointment of directors liable to retire by rotation,
  - ♦ Appointment / reappointment of statutory auditors,
  - ♦ Ratification of remuneration of the cost auditor (can also be considered in an extraordinary general meeting).

The annual general meeting must be held on a day which is not a public holiday and shall be held within time from 9:00 a.m. to 6:00 p.m.

### POSITION AS PER THE JAPAN LAW

#### Annual General Meetings (AGMs)

- a) Under the Japan Act a company should hold AGM at a certain time after the end of the business year.
- b) The AGM should normally be held within three months after the end of the business year (from the Record Date specified in the Articles of Incorporation). The agenda of the AGM of a public company (the Company with Board of Directors) is stipulated in the Japan Act, and the representative ones are as follows. In addition, other agenda may be added by stipulating in the Articles of Incorporation.
  - ♦ Report the contents of the Business Report to shareholders.
  - ♦ Approval of financial statement (meaning balance sheet, profit and loss statement, statements of changes in net assets, tables of explanatory notes on unconsolidated financial statements).
  - ♦ Election(re-election) and Dismissal of Officers (meaning directors, accounting advisors and company auditors).

- ♦ Dividends from Surplus.
  - ♦ Election (re-election) and Dismissal of accounting auditors.
- c) There are no particular restrictions on the day and time of holding time of the AGM unlike the Indian law.

### Board Meetings

Board meetings is one of the crucial topics in the functioning of any company. Under the Indian law some of the key points to remember are:

- a) Gap between two board meetings not to exceed 120 days.
- b) Notice to be sent as per the provisions of articles of association and in absence of any provision in the articles minimum 7 days' notice is required. Shorter notice is possible with the consent of directors.
- c) Quorum shall be 1/3<sup>rd</sup> of the total number of directors unless the articles of association prescribe a higher number.
- d) Board meetings can be held through video conferencing and the attendance (participation) through video conferencing is recognized for the purpose of quorum. A specific protocol about declarations, video recording, etc. is followed when the Board meetings are held through video conferencing to ensure the confidentiality, sanctity and clarity in participation and conduct.
- e) The Chairman of the Board shall act as the Chairman of the meetings of shareholders.
- f) Decisions shall be by majority unless wherever it is specified a unanimous approval is needed either by law or in the Articles.
- g) Chairman can have a casting vote in case of tie, if the Articles provide.

### POSITION UNDER THE JAPAN LAW

Under the Japan Act, some provisions and some of the key points to remember regarding boards of directors are as follows:

- a) The directors shall report the status of the execution of his/her duties to the board of directors at least once every three months. Therefore, the Board of Directors must meet at least once every three months.
- b) A person who calls a board of directors' meeting shall dispatch the notice thereof to each director (or, for a Company with Auditors, to each director and each company auditor) no later than one week (or if a shorter period of time is prescribed in the articles of incorporation, such period of time) prior to the day of the board of directors meeting.
- c) The resolution of a board of directors meeting shall be made by a majority (in cases where a higher proportion is provided for in the articles of incorporation, such proportion or more) of the directors present at the meeting where the majority (in cases where a higher proportion is provided for in the articles of incorporation, such proportion or more) of the directors entitled to participate in the vote are present.

- d) Although there are no provisions in the Japan Act regarding remote attendance of the Board of Directors, it is understood that remote attendance via video, web conference, etc. is permitted as a quorum in accordance with Article 101, Paragraph 3 of the Regulations for Enforcement of the Companies Act. It is understood that when there are attendees participating remotely, the voice of the attendees should be immediately transmitted to the other attendees over the conference call system etc. and the attendees should be in a state of being able to have sufficient mutual discussions as if they were meeting together.

- e) There are no provisions in the Japan Act regarding the selection of the chairman of the General Meeting of Shareholders and the chairman of the Board of Directors. In general, it is often stated in the articles of incorporation that the president shall act as the chairman of the general meeting of shareholders.
- f) Directors who have a special interest in the resolution may not participate in the voting on such resolution.

### CONCLUSION


Considering the wide amplitude of both the laws it is not possible to cover each and every aspect. However, it can be observed that there are some fundamental differences in certain concepts and the expressions. However, the underlying principles of disclosures, reporting and / or approval from shareholders are evident. The foregoing will give an overview to the aspiring or potential officers being deputed in India, or vice-versa, to hold Board positions in Indian subsidiaries or overseas companies in Japan. The above will help one get acclimatized with both the laws. Knowing the differences and similarities in some routine and frequently handled areas of company law. It will also help in smooth and efficient board process, enhanced governance and ease of operations across the organization. The kind of understanding envisaged above will help in bridging gap, clarifying basic doubts and augment easy decision making with proper compliance and governance.

### REFERENCES:

#### References to various sections under the Indian Law

- 1) Companies Act, 2013 (Provisions of the Bare Act)
- 2) Section references– Section 2 Definitions, 149, 152,157 (Directors), 96 & (Annual General Meetings), 173, 174 (Board Meetings)

#### References to various sections under the Japan Law

- 1) Companies Act, 2005
- 2) Section references–PART I (General Provisions) Chapter 1 (Common Provisions), PART II (Stock Company) Chapter IV (Organ) Section 1 (Shareholders Meeting and Class Meeting), PART II (Stock Company) Chapter IV (Organ) Section 2 (Establishment of Organs Other Than Shareholders Meeting), PART II (Stock Company) Chapter IV (Organ) Section 3 (Election and Dismissal of Officers and Accounting Auditors), PART II (Stock Company) Chapter IV (Organ) Section 4 (Directors), PART II (Stock Company) Chapter IV (Organ) Section 5 (Board of Directors) 



# RESEARCH PAPER

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