Chapter 6

JAPAN

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I GENERAL OVERVIEW

The Japanese fund market grew at a fast pace from the late 1990s to around 2007; then, as with many other major countries, market growth fell sharply in 2008 and 2009 due to the global financial crisis that hit the world in 2008. Under such a challenging situation, many fund managers in Japan have been struggling to raise funds from domestic and foreign investors, although the figures reported in some surveys of the recent Japanese fund market show signs of recovery in both the buyout fund and venture capital fund areas.

The peak of fundraising activities for buyout funds in Japan was in 2006–2008,[2] when approximately 20 private equity buyout funds were established and fund managers conducting business in Japan successfully raised more than $6 billion of commitments per year.[3] As these figures show, around that time the average amount of the commitment made to each buyout fund was thought to be about $250 to 350 million. Thereafter, the global financial turmoil triggered by the subprime loan crisis in 2008 caused the private equity fundraising market to shrink to its smallest size since 1999, and in 2011, the annual total amount of commitments to buyout funds was approximately $750 million and only five funds were able to raise funds. These figures indicate that the size of each fund became smaller in comparison with those established before 2008.

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2 The figures regarding buyouts are drawn from Japan Buyout Research Institute Corporation's *Japan Buyout Market Yearbook – The Second Half of 2011* and *Japan Buyout Market Yearbook – The First Half of 2012*. Japan Buyout Research Institute Corporation publishes such reports for every six months. The latest edition, published in October 2012, reports statistics for the first half of 2012.

3 Based on ¥80 per US dollar.

However, the buyout transaction volume grew sharply in 2011. The total amount of buyout transactions carried out in 2011 was approximately $9.3 billion, which was 2.5 times higher than in 2010; moreover, the number of transactions in 2011 increased to 53 from 44 in 2010. Furthermore, many private equity firms are said to be preparing to raise funds, and several buyout funds are scheduled to be raised from late-2012 to 2013.

The recovery in the venture capital funds market is clearer. One survey[4] reported that 31 venture capital funds were newly established in 2011, and such new funds collected over $1.4 billion of capital commitments from investors, substantially greater than the 13 funds and $600 million, respectively, in 2010. Such figures are anticipated to increase further in 2012.

One of the current trends in the Japanese fund market is Asia-focused private equity funds. Recently, some leading Japanese banking groups, with funding from Japanese government-affiliated financial institutions such as the Development Bank of Japan Inc ('the DBJ') or the Japan Bank for International Cooperation ('the JBIC') successively set up private equity funds targeting Asian countries, which will support the overseas business deployment of Japanese companies in Asia.

On the other hand, in the domestic market, many regional reconstruction funds have been established in various parts of Japan in 2011 and 2012. Especially in the Tohoku region, some fund managers have formed reconstruction funds aiming to rebuild and revive the economy in the areas stricken by the Great East Japan Earthquake in March 2011. The DBJ and the Organisation for Small and Medium Enterprises and Regional Innovation, JAPAN ('the SMRJ'), an independent administrative agency under the Ministry of Economy, Trade and Industry, often contribute capitals to such reconstruction funds.

In the general election held in December 2012, the Liberal Democratic Party ('LDP') won a majority in the House of Representatives, and LDP has been back in power. Anticipating the package of economic stimulus to be undertaken by the new government, the Japanese stock price index has been rising following the change of government, and the yen keeps weakening against foreign currencies. Currently, the Japanese economy shows signs of exiting a long recession. Accordingly, the venture capital fund market in Japan is expected to be an attractive market for investors and fund managers in the near future.

II LEGAL FRAMEWORK FOR FUNDRAISING

i Jurisdictions and legal forms

Japanese investment limited partnership and general partnership

Japanese fund managers often use a Japanese investment limited partnership ('JLPS') formed under the Limited Partnership Act for Investment ('the LPAI') as their private

4 Venture Enterprise Centre, Japan, 2011 Survey Results on Trends in Venture Capital Investment (Quick Estimation) and 2012 Survey Results on Trends in Venture Capital Investment (Quick Estimation), available at www.vec.or.jp/report_statistics/vec_whitepaper_dt3.

equity fund vehicle. Two major reasons why the JLPS is a frequent vehicle of choice for private equity funds are a limitation on the liabilities of its limited partners ('LPs') and the tax benefit of its pass-through status.

A JLPS consists of one or more general partners, who operate the JLPS's business and assume unlimited liability with respect to the liability of the JLPS, and one or more LPs, each of whose liability is limited to the amount of the capital contribution to be made by the LP. Where a JLPS is used as a vehicle for a private equity fund, generally the fund manager or its affiliate serves as a general partner ('GP'), and investors make capital contributions as LPs to the extent of their respective capital commitments. This limitation of investors' liability is the great advantage of a JLPS. As to taxation, a JLPS is treated as a pass-through entity and such a fund is not subject to corporate tax in Japan (see Section III, *infra*).

In contrast, a general partnership, a form of a partnership established under the Civil Code, is used as a private equity fund vehicle less frequently than a JLPS. As all partners of the general partnership are liable for the liabilities of the general partnership, which are allocated among partners in accordance with their respective contributions, risk-averse investors tend to prefer – and, therefore, fund managers tend to select – a JLPS as a fund vehicle. Nonetheless, a general partnership receives the same advantageous tax treatment as a JLPS (other than in the case of foreign investors, as described in Section III, *infra*), and the general partnership does have certain positive features, such as flexibility and low establishment cost. Accordingly, although the general partnership has the disadvantage of the unlimited liability of its partners, it is sometimes used as a private equity fund vehicle where, for example, the fund size is comparatively small or all the investors are affiliates of the fund manager.

Restriction on investment targets

Several amendments to the LPAI have broadened the possible investment targets and methods available for a JLPS, and now it covers most of the types of assets that private equity funds typically acquire. Fund managers should, however, pay attention to the regulation that restricts JLPS investments in foreign (non-Japanese) companies. A JLPS may acquire equity interests, warrants and debts issued by foreign companies only to the extent that the amount of such investment is less than 50 per cent of the partners' total capital contribution. Although criticised by market participants, this restriction has not changed since the enactment of the LPAI. Thus, if a private equity fund manager contemplates investments in foreign companies that are likely to exceed more than half of the fund's whole investments, it must select another vehicle.

In such a case, one of the alternatives is to use a general partnership, which has no restrictions on its investment targets. Due to the unlimited liability described above, however, fund managers often instead choose foreign entities as vehicles. In this respect, fund managers typically use an exempted limited partnership established in the Cayman Islands, while limited partnerships formed in other tax haven jurisdictions such as the British Virgin Islands and Luxembourg are less frequently selected.

Fund vehicles for foreign investors

As previously noted, Japanese fund managers often use a JLPS as a vehicle for private equity funds. Historically, however, they have not solicited non-residents to become LPs

of the JLPS because of a potential risk of the foreign investor being deemed to have a permanent establishment in Japan by virtue of investing in the JLPS and therefore subject to Japanese tax. Hence, fund managers contemplating soliciting foreign investors have often established a foreign entity as a parallel fund vehicle designed to be able to make investments alongside a domestic fund, but in order to avoid the permanent establishment risk that the fund manager may be deemed an agent of the foreign investors (an 'agent permanent establishment'), the fund manager will not directly manage the foreign-entity vehicle. Such foreign entities are also often organised in the Cayman Islands or other tax haven countries.

Nonetheless, in the past few years, certain reforms to Japanese tax law have come into force that ease the tax burden of foreign investors (see Section III, *infra*), and the situation has been changing. Recently, some Japanese fund managers have stopped establishing foreign parallel funds and directly solicited foreign investors to participate in domestic funds.

ii Key legal terms

Although terms and conditions of partnership agreements vary widely depending on the policy of each fund manager and type of the fund, terms often negotiated between the GP and LPs include:

a the percentage of the GP's commitment;
b restrictions on the follow-up investment and scope of the follow-on investment;
c key-person clause;
d the powers and responsibilities of the LPs' advisory board;
e the restrictions on the investments or fund management by the GP outside the fund;
f the scope of reinvestment of capital;
g the restrictions on distributions in kind;
h the timing and speed of distributions;
i a waterfall structure (including priority returns to LPs and catch-up by the GP);
j the percentages and calculating methods of the carried interest (performance fee) and management fee received by the GP;
k who bears various fund-related expenses, whether the GP or LPs;
l the GP's fee income offsets;
m the GP clawback;
n a divorce clause (including with or without cause); and
o an exemption from the obligations of LPs or exclusion from the participations in investments.

In addition, when a Japanese bank or insurance company participates in a fund as an LP, a clause designed to prevent the fund from holding a certain percentage of shares in a portfolio company for more than 10 years often becomes one topic of the negotiation. Under Japanese law, Japanese banks and insurance companies are permitted to own more than their usual threshold percentages of shares in a company through the partnership, but only for a maximum of 10 years.

iii Key items for disclosure

Under the Financial Instruments and Exchange Act ('the FIEA'), the GP of a partnership-type fund must make certain prior disclosure by the filing of a securities registration statement and be subject to continuous disclosure only when 500 or more investors in Japan acquire the fund interests as a result of a solicitation (called a 'public offering' in the FIEA) and the securities held by the fund exceed 50 per cent of the total fund assets. In contrast, when the number of investors holding fund interests is less than 500 as a result of a solicitation (called a 'private placement' in the FIEA), the FIEA requires that the GP notify the investors of only certain limited matters.[5] In such cases, fund managers thus generally prepare a private placement memorandum and deliver it to potential investors; in the case of a private placement, no public disclosure or delivery of a statutory prospectus is required. In practice, since it is not generally the case that 500 or more investors are intended to participate in a fund, the private placement memorandum is the most important disclosure material.

iv Solicitation

First, as previously stated, because a public offering is very costly and cumbersome, GPs generally solicit investors by means of a private offering in which less than 500 investors acquire the fund interests. For the reason stated below, in practice the number of investors accepted by the GP is usually much less.

Second, in order to offer the fund interests in Japan, the GP is in principle required to be registered as a 'financial instruments business operator' ('FIBO') to conduct 'type II financial instruments business' under the FIEA. Exemptions may apply, and one way to solicit Japanese investors without such registration is to entrust to another registered FIBO all authority to offer the fund interests on behalf of the GP. Another exemption is the 'QII-targeted fund exemption', by which the GP may accept only 'qualified institutional investors' ('QIIs') plus a limited number of non-QIIs in Japan.[6] The latter exemption has the following requirements:

a there is at least one QII as an LP; such QII must be prohibited from transferring its fund interests to a non-QII by the fund agreement;

b the number of non-QIIs as LPs is less than 50; the fund agreement must prohibit each such non-QII from transferring its fund interests, except for the transfer of all its interests to a single investor;

c the GP files a short-form notice of the QII-targeted fund with the relevant local financial bureau before it starts solicitation; and

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5 Specifically, the GP must notify investors that the offering has not been registered in Japan on the ground that the fund interests are securities set out in Article 2, Paragraph 2, item 5 (or, in the case of a non-Japanese fund, item 6) of the FIEA; and the offering of the fund interests falls under the category of the small number private placement exemption. In practice, this notification is often included in the legend of the private placement memorandum or the fund agreement.

6 Article 63 of the FIEA.

d no LP is a disqualified person, which is any of certain types of special purpose company investors or partnership investors,[7] unless otherwise exempted under the FIEA.

It is generally understood that the foregoing requirements need not be fulfilled with regard to non-Japanese investors solicited overseas.

Since 2007, when the FIEA came into force, most private equity funds, both domestic and foreign, have relied on the QII-targeted fund exemption.

v Fiduciary duties

By law, the GP of the JLPS owes to the LPs the 'duties of the due care of a prudent manager'.[8] While Japanese law does not specifically define such duties, they can be understood to include both a duty of care and a duty of loyalty to the partners. If the GP breaches such duty, it will be held liable for the LPs' resulting damages regardless of whether such duties are set out in the partnership agreement.

In addition, in practice the partnership agreement generally has specific provisions that reflect in part the spirit of such duties, such as the restrictions on the GP's own investments or its management of other funds, grants of the rights to the LPs' advisory board, the GP's fee income offsets, and required reports to the LPs.

Further, if the GP is registered as a FIBO, the FIEA expressly imposes duties of the due care of a prudent manager and duties of loyalty,[9] as well as various other obligations and restrictions.[10]

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7 Specifically, the disqualified special purpose company investors and partnership investors are:
- *a* a 'specific purpose company' under the Act on Securitisation of Assets, if asset-backed securities issued by it are held by any non-QII;
- *b* a business operator of an anonymous partnership whose partners include any non-QII;
- *c* a special purpose company, if bonds, shares, share options or promissory notes issued by it are held by any non-QII; and
- *d* a certain type of partnership whose partners include any non-QII, unless otherwise exempted under the FIEA.

8 Article 16 of the LPAI and Articles 671 and 644 of the Civil Code.

9 Article 42 of the FIEA.

10 The obligations of and restrictions on the registered FIBO include the following:
- *a* obligation of good faith and fair practice to clients;
- *b* prohibition of name lending;
- *c* restriction on advertisements;
- *d* obligation to deliver a written document prior to entry into a contract in respect of a financial instrument transaction;
- *e* obligation to deliver a written document at the closing of a transaction; and
- *f* prohibition of certain acts, including prohibition of the following (unless excepted under the relevant regulations):
  - loss compensation;
  - offering of fund interests where proper segregation of assets is not in place;

III REGULATORY DEVELOPMENTS

i Regulatory agency

Fund-related activities, including offering and management, are regulated by the Financial Services Agency ('the FSA') mainly under the FIEA. The FSA is a Japanese regulatory agency responsible for overseeing all finance-related activities, including banking, securities and exchange and insurance. Part of its authority has been delegated to certain regional branch offices of the Ministry of Finance, called 'local finance bureaus'. Filings and registrations by fund managers must generally be conducted at the relevant local finance bureau.

The FSA has the authority to order the registered FIBO, its affiliates and its business partners who conduct transactions with the FIBO to report to the FSA, and to inspect them. In addition, if the FSA considers that the FIBO's business operation or the status of its property risks is causing harm to investors or the public interest, it may order the FIBO to improve such operation or property status, rescind its registration, or order suspension of all or part of its business under the FIEA.

Oversight of non-registered fund managers relying on the QII-targeted fund exemption is relatively relaxed. The FSA may order such a non-registered manager to report and may inspect it, but does not have authority to impose administrative sanctions. Nonetheless, the FSA has recently focused on the fact that fraudulent transactions often involve investment funds relying on the QII-targeted fund exemption, which resulted in an amendment of the notification requirement effective 1 April 2012. Accordingly, now the notification must clearly state the fund's name and the name of at least one QII investor, in order to make sure that the requirements for the QII-targeted fund exemption are actually satisfied.

ii Registration

The JLPS must be registered at the relevant local legal affairs bureau with jurisdiction over the location of the JLPS, in principle, within two weeks after the partnership agreement comes into effect. In addition, subsequent changes in any registered matters must be registered within two weeks. This registration is intended mainly to disclose information

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- investing in transactions through its own accounts or those of its directors or executive officers;
- investing in cross-trading between portfolio assets;
- engaging in transactions with no proper ground in respect of specific financial instruments, financial indexes or options for the purpose of obtaining benefits for itself or a third party by utilising fluctuations of prices, indexes, figures or an amount of consideration that would result from such transactions;
- investing in transactions with unusual terms and conditions that would be detrimental to the interests of investors; and
- selling or purchasing securities or engaging in other transactions on one's own account by utilising information obtained in the course of transactions entered as investment management business.

relating to the fund to persons intending to conduct transactions with the fund. The basic particulars to be registered are as follows:

a the businesses of the partnership;
b the name of the partnership;
c the date on which the partnership agreement has taken effect;
d the duration of the existence of the partnership;
e the name and address of each GP;
f the offices of the partnership; and
g the event of dissolution stipulated in the partnership agreement.

As noted in Section II, *supra*, a GP is required to register under the FIEA to solicit investors in Japan unless it entrusts the fund offering to another registered FIBO or relies on the QII-targeted fund exemption.

Likewise, in order to conduct fund management as a GP after the fundraising, in principle the fund manager needs to be registered as a FIBO for conducting 'investment management business' under the FIEA. Similarly, however, it may manage its fund as a GP without such registration by relying on the QII-targeted fund exemption or entrusting the fund management to another such registered FIBO.[11]

Since it is often quite cumbersome or impossible for fund managers to satisfy the requirements for registration as a FIBO and substantial ongoing obligations are imposed, the vast majority of fund managers operating partnership-type funds take the path of relying on the QII-targeted fund exemption.

iii Taxation

As previously noted, under Japanese tax law a partnership-type fund such as a JLPS or general partnership is not itself subject to corporate tax and is treated as a pass-through entity.[12] Thus, the fund's investment income or loss can be allocated to each partner without tax imposition at the partnership level, and additionally it is generally understood that no tax on capital gains will be imposed when the fund distributes investment assets in kind to each partner in accordance with their proportional interests in the fund. As to individual investors, the type of income each partner derives from the partnership is, in principle, also determined depending on that of the partnership.

Investment income or loss of the fund allocated to each partner is deemed to be included in the partner's profit or loss for the calendar year (for individual partners) or fiscal year (for corporate investors) containing the last day of the relevant accounting period of the fund, provided that the fund's investment income or loss must be calculated at least once a year; and allocated investment income or loss must be included for the partner within one year after the generation of the relevant investment income or loss.[13]

11 To avoid the registration requirement by such entrustment, the partnership agreement and the entrustment agreement must contain certain provisions, proper segregation of assets must be in place and notification to the FSA is necessary.

12 Corporate Tax Basic Notification 14-1-1, Income Tax Basic Notification 36 and 37-19.

13 Corporate Tax Basic Notification 14-1-1-2, Income Tax Basic Notification 36 and 37-19-2.

Further, corporate investors should note that the effective rate of Japanese corporate income tax has been reduced to approximately 36 per cent from April 2012.

Foreign investors are only liable for certain types of corporate and income tax on domestically sourced income, and the range of a foreign investor's taxable income normally varies depending on whether it has private equity in Japan.

It has been generally understood that a foreign investor will have a permanent establishment by virtue of investing in a Japanese partnership or similar foreign entity operated by a Japanese fund manager, as all partners are deemed to carry out such investment activities jointly in Japan through the Japanese fund manager.[14] If a foreign investor has a permanent establishment in Japan, all domestic-sourced income is subject to Japanese taxation. Thus, all investment income derived from the partnership would be subject to Japanese taxation. Further, all distributions made by the partnership to the foreign investor would be generally subject to withholding tax at a rate of 20 per cent.

In addition, even if the foreign investor does not have a permanent establishment in Japan, capital gains resulting from any of the following share transfers ('taxable share transfers') are subject to Japanese tax unless otherwise exempted:

a the transfer of the shares in a domestic company by conducting certain market manipulations or greenmail activities against the domestic company;

b the transfer of more than 2 per cent (in the case of the listed shares, 5 per cent) of the shares in a company that derives 50 per cent or more of the value of its gross assets directly or indirectly from real estate (including related rights over real estate) in Japan by the foreign investor and other 'specially-related shareholders'; and

c the transfer of shares that consist of 5 per cent or more of the shares in a domestic company by the foreign investor and other 'specially related shareholders' (see below), where they own 25 per cent or more of the domestic company's shares at any time within three years prior to the last day of the business year containing the date of transfer (the '25 per cent/5 per cent rule').

Thus, for foreign investors, critical issues are whether they have a permanent establishment and whether the disposition of shares held by the fund is a taxable share transfer.

Amendments to Japanese tax law effective in 2009 provides for a safe harbour for investment in a partnership by foreign investors. Foreign investors as LPs of a JLPS or similar foreign entity who satisfy certain requirements ('exempted partners') are deemed to have no permanent establishment in Japan regardless of the existence of a Japanese fund manager.[15] In such cases, distributions made to the exempted partner that would otherwise be subject to taxation because of a permanent establishment will not be taxable through withholding tax in Japan, and no obligation to file a Japanese tax return is

14 Income Tax Basic Notification 164-7.

15 Article 41-21 and Article 67-16 of the Act on Special Measures Concerning Taxation, and Article 26-30 and Article 39-33 of the Order for Enforcement of the Act on Special Measures Concerning Taxation.

imposed. In order to rely on the exemption, the foreign investor must satisfy all of the following requirements:

a such foreign investor is an LP in a JLPS or substantially similar entity established in a foreign jurisdiction;

b such foreign investor is not involved in the conduct of the operations or management of the partnership;

c such foreign investor holds less than 25 per cent of the partnership interests;

d such foreign investor does not have any special relationship with the GP;

e such foreign investor has no private equity in Japan other than by virtue of having invested in the partnership; and

f such foreign investor has applied in advance for the exemption, submitting the required documents, including a copy of the partnership agreement, to the Japanese tax authorities via the GP.

With respect to the application of the 25 per cent/5 per cent rule, 'specially related shareholders' includes other partners of the partnership, and thus the 25 per cent/5 per cent threshold is generally measured at the partnership level. If, however, a foreign investor that is an LP in a JLPS or substantially similar foreign entity satisfies certain conditions, it may rely on an exemption from the 25 per cent/5 per cent rule, also introduced by the 2009 amendments. In such a case, the other partners of the partnership are not treated as 'specially related shareholders', and accordingly the 25 per cent/5 per cent threshold will be measured not at the partnership level but at the level of each LP.[16] The exemption applies when such a foreign investor satisfies the following requirements:

a such foreign investor does not have a permanent establishment in Japan (which can be satisfied by the foreign investor being an exempted partner);

b either the partnership is one to which the exemption previously discussed applies; or during the relevant three-year period, the foreign investor was not involved in the conduct of the operations or management of the partnership;

c at any time during that three-year period, no specially related person (other than other partners) of such foreign investor has held 25 per cent or more of the domestic company;

d the fund held the relevant shares for more than one year;

e the investment target is not a certain type of insolvent financial institution; and

f such foreign investor files certain documents with the Japanese tax authorities by 15 March of the following year (for an individual investor) or two months after the fiscal year-end (for a corporate investor).

IV OUTLOOK

While the global private equity fund market has been stagnant, over the past few years several reforms have been made to the Japanese infrastructure for fundraising and fund investment activities so as to assist investors – especially foreign investors – to invest

16 Article 26-31 and Article 39-33-2 of the Order for Enforcement of the Act on Special Measures Concerning Taxation.

in private equity funds in Japan. In addition to recent tax amendments noted above, the Ministry of Economy, Trade and Industry has published a new model limited partnership agreement and English translation.[17] Active investment in many private funds by government-affiliated organisations, such as the DBJ, the SMRJ and the JBIC, are actually showing practical effects.

The budding recovery of the private equity market in Japan indicated by recent surveys is strongly expected to take root.

17 The model limited partnership agreement and its English translation are available at www.meti.go.jp/policy/economy/keiei_innovation/sangyokinyu/lps_model2211.pdf. Such new model agreement was drafted by authors of this chapter.

Appendix 1

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Kei Ito is a partner at Nishimura & Asahi specialising in asset management, mutual funds, derivatives, securities, banking, and other financial and international transactions.

He received his law degree from the University of Tokyo in 1990, and a master of laws degree from the New York University School of Law in 1997.

Mr Ito has significant experience ranging from traditional asset management business, such as investment trusts (mutual funds) and investment advisers, to alternative investments, such as private equity funds, buyout funds, infrastructure funds and hedge funds. He has also advised Japanese and non-Japanese clients in all aspects of asset management. His asset management practice covers the offer and sale of various offshore funds, notably the sale and cross-listing in Japan of exchange-traded funds listed on foreign stock exchanges. He is also a lecturer at Hitotsubashi Law School.

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Taku Ishizu was a partner at Nishimura & Asahi and is now a partner at Marunouchi International Law Office, and his practice mainly focuses on asset management, leveraged buyouts, capital markets, corporate finance transactions, other international finance transactions and banking.

He received his law degree from the University of Tokyo in 1995, and a master of laws degree from the Boston University School of Law in 2003.

Mr Ishizu acts in a wide range of matters in relation to fund formation, fundraising, governance and organisational structures for the sponsors of private equity funds, including buyout funds and venture capital funds. Further, he assists clients with the structuring, negotiation and execution of transactions and with portfolio company matters.

He has published many articles and books in the finance area, and has served as a lecturer at several seminars.

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