

# ARTICLE

## IS LAW KILLING THE DEVELOPMENT OF NEW TECHNOLOGIES?: UBER AND AIRBNB IN JAPAN

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## UBER AND AIRBNB IN JAPAN

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## INTRODUCTION

The development of the Internet has brought about a revolution in both technology and modern business practice. Much of the public welcomes these changes, but they often face resistance in the form of outdated government regulation and old, but normative, business practice. As a result, at times these disruptive technologies face either forced termination or the false promise of acceptance, but acceptance subject to government regulation so stringent as to rob the technologies of their revolutionary character. What role should the law play in this battle between old business practices and disruptive technologies?

This article will examine the Japanese legal response to two such disruptive technologies: Uber and Airbnb. The development of both the Internet and the “sharing economy”<sup>1</sup> has made these new businesses possible. In allowing customers share their resources, new technologies like Uber and Airbnb represent tremendous potential for economic development, but they also represent tremendous potential for radical change in normative business practice. As a result, both have faced tremendous resistance upon introduction.<sup>2</sup> This article examines

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<sup>1</sup> “Sharing economy” is defined as “an economic system that is based on people sharing possessions and services, either for free or for payment, usually using the internet to organize this.” *Sharing Economy*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/sharing-economy> [<https://perma.cc/W6AR-CES8>] (explaining the term via an explanation which states “[t]he article discussed Uber, Airbnb, and the consequences of the sharing economy.”). See also *First International Workshop on the Sharing Economy*, UTRECHT U., <https://www.uu.nl/en/IWSE2015> [<https://perma.cc/Q9UH-JVZN>] (last visited Jan. 21, 2019) (advertising for a conference held in June 2015 and defining “sharing economy” as “consumers granting each other (‘peer-to-peer’) temporary access to their underutilized physical assets, possibly for money.”). Although some dispute discrete definitions of the term, many believe that Uber and Airbnb are typical examples of the sharing economy. See, e.g., Koen Frenken, Toon Meelen, Martijn Arets & Pieter van de Glind, *Smarter Regulation for the Sharing Economy*, GUARDIAN (May 20, 2015, 2:00 EDT), <https://www.theguardian.com/science/political-science/2015/may/20/smarter-regulation-for-the-sharing-economy> [<https://perma.cc/C5NN-NNT6>].

<sup>2</sup> Some countries banned Uber, while some permit its operation under strict conditions. Anna Rhodes, *Uber: Which Countries Have Banned Controversial Taxi App*, THE INDEPENDENT (Sept. 22, 2017), <http://www.independent.co.uk/travel/news-and-advice/uber-ban-countries-where-world-taxi-app-europe-taxi-us-states-china-asia-legal-a7707436.html> [<https://perma.cc/WXB7-SUYA>]. Likewise, some countries take issue with Airbnb, with Amsterdam, Barcelona and Spain deciding to penalize hosts who list illegal rentals and Berlin banning most short-term rentals. Katie Benner, *Airbnb Sues Over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html>. The City of Vancouver had banned both short-term rental and ride-sharing, but as of April 19, 2018 has legalized short-term rentals under strict conditions. See Ian Austen, *Vancouver Limits Airbnb, Effort to Combat Its Housing Crisis*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/world/canada/vancouver-housing-airbnb.html>; *City Legalizes Short-term Rentals in Vancouver*, CITY OF VANCOUVER

the Japanese experience in order to explore whether the law is and should be killing these new technologies. It will show that the Japanese reaction is mixed: although the government shut down Uber, it accepted Airbnb, albeit under very strict new regulations which cast doubt on its sustainability. It will conclude that while the overwhelming demand for new and technologically innovative business models will force the government to face further challenges in the future, it may be wiser to simply acquiesce to this new reality so as to stimulate innovation, which is essential to thrive in the new millennium.

## I. UBER IN JAPAN

### A. Taxi Regulation

Japan's Ministry of Land, Infrastructure, Transport and Tourism (MLIT) has a long history of strictly regulating the Japanese taxi industry.<sup>3</sup> Legally speaking, per the *Road Transportation Act*, a taxi is a "general passenger auto transportation business,"<sup>4</sup> for which an operator must secure a permit from the Minister of Land, Infrastructure, Transport and Tourism.<sup>5</sup> In order to receive such a permit,

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(Oct. 5, 2018, 1:00 PM), <https://vancouver.ca/news-calendar/city-legalizes-short-term-rentals-in-vancouver.aspx> [<https://perma.cc/6DQA-SMJM>]; *Short-term Rental Business License*, CITY OF VANCOUVER (Oct. 5, 2018, 1:00 PM), <http://vancouver.ca/doing-business/short-term-rentals.aspx> [<https://perma.cc/V7FQ-4X2A>]. The government of British Columbia has just started to examine the possibility of introducing ride-sharing. SELECT STANDING COMM. ON CROWN CORP.: TRANSP. NETWORK COMPANIES IN B.C. (2018), [https://www.leg.bc.ca/content/CommitteeDocuments/41st-parliament/2nd-session/CrownCorporations/Report/SSC-CC\\_41-2\\_Report-2018-02-15\\_Web.pdf](https://www.leg.bc.ca/content/CommitteeDocuments/41st-parliament/2nd-session/CrownCorporations/Report/SSC-CC_41-2_Report-2018-02-15_Web.pdf) [<https://perma.cc/6496-FZQR>]; Kendra Manglone, *32 Recommendations Released for Ride-hailing in B.C.*, CTV NEWS VANCOUVER (Feb. 15, 2018), <https://bc.ctvnews.ca/32-recommendations-released-for-ride-hailing-in-b-c-1.3804971> [<https://perma.cc/MU3R-KFNX>].

<sup>3</sup> See *infra* notes 26-27.

<sup>4</sup> Douro unsōhō [Road Transportation Act], Act No. 183 of 1951 art. 3, item 1. The general passenger auto transportation business is divided into three categories: (1) the general ride-share passenger auto transportation business, *e.g.*, regular bus service running on established bus routes; (2) the general rental passenger auto transportation business, *e.g.*, sightseeing busses; and (3) the general ride passenger auto transportation business, *e.g.*, a "taxi" (passenger transportation service available to customers upon call or appointment, with fees based on factors such as distance and time) and/or a "hire" (passenger transportation service for primarily corporate customers, with hourly fees as set out in a prior contract). *Id.*; see also NIPPON KOTSU KABUSHIKIGAISHA, HIRE TOWA [WHAT IS HIRE?], <http://www.nihon-kotsu.co.jp/hire/about/> [<https://perma.cc/HM7K-ALHB>] (last visited Jan. 21, 2019) (explaining the difference between taxi and hire service).

<sup>5</sup> Road Transportation Act, art. 4, para. 1. An operator used to need a license, but the licensure requirement was abolished in 2000. See *infra* notes 29-30 and accompanying text. A number of individuals are ineligible for such a permit. Road Transportation Act, art. 7 (excluding, *inter alia*, applicants who, within the past five years, have been sentenced to imprisonment or confinement).

an applicant must first submit various documents detailing their business plan — including their prospective area of operation, and the number of taxis operating in each local branch office.<sup>6</sup> The Minister then decides whether the applicant satisfied the following three criteria to grant a permit:

1. the business plan is appropriate to ensure safe transportation;
2. the plan is appropriate given the first criterion and the business's intended operation; and
3. the applicant is sufficiently capable of adequately executing the business.<sup>7</sup>

If the applicant satisfies those criteria, it must further establish a fare and fee schedule.<sup>8</sup> That schedule is subject to the Minister's approval, which generally requires satisfaction of a four-factor test: proper profit, no-discrimination, no unfair competition and compliance with MLIT regulations.<sup>9</sup> Alternatively, the MLIT establishes minimum and maximum fare for a given locality, and will automatically approve a schedule that is within that range.<sup>10</sup> The Minister will reject schedules that include fares above an area's maximum, but may approve schedules that include fares below the area's minimum provided that sufficient profits justify the reduced fare.<sup>11</sup> Thus, a general passenger auto transportation business operator (an "operator") may, with substantial difficulty, offer below-market-rate fares.<sup>12</sup>

Even if an operator successfully obtains a permit, it continues to face significant MLIT regulation. First and foremost, they must comply with various obli-

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<sup>6</sup> *Id.* art. 5.

<sup>7</sup> *Id.* art. 6. The applicant requires the Minister's approval for transfer of business, *id.* art. 36, para. 1, as well as advance notification to terminate business. *Id.* art. 38, para. 1.

<sup>8</sup> *Id.* art. 9-3, para. 1.

<sup>9</sup> *Id.* art. 9-3, para. 2. More specifically, those factors require that:

1. the schedule does not exceed the proper combination of profit and operating costs under the principle of efficient management;
2. the schedule does not discriminate against particular passengers;
3. the schedule does not cause unfair competition with other general passenger auto transportation business operators; and
4. if applicable, the schedule must comply with MLIT rules regarding distance-based fee systems.

*Id.*

<sup>10</sup> *Id.* art. 9-3, para. 3; *see also* MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, TAXI NO UNCHIN SEIDO NITSUITE [ON FARE APPROVAL SYSTEM FOR TAXI] 3 (2015), <http://www.mlit.go.jp/common/001108272.pdf> [<https://perma.cc/K9AS-YQFR>].

<sup>11</sup> MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, *supra* note 10, at 3.

<sup>12</sup> As we will see, the government has later introduced much stronger fare regulations in certain areas where there is an excess of taxis. *See infra* text accompanying notes 53-56.

gations relating to business operations — primarily for the protection of customers and employee welfare,<sup>13</sup> transportation safety<sup>14</sup> and their status as common carriers.<sup>15</sup> But, although any changes to the business plan generally require the Minister's approval, an operator only needs to provide advance notification to the Minister before amending the number of taxis assigned to a given area.<sup>16</sup> In other words, taxi operators can increase the number of taxi with just an advance notification.

Perhaps most notable for the purposes of this article, the MLIT heavily regulates receiving pay for the use of private vehicles to transport passengers. Such use is generally only permitted in limited circumstances, including transportation:

1. in the case of a disaster;

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<sup>13</sup> Operators must comply with all of the following requirements:

1. Establish transportation contract stipulations and submit those stipulations for approval, which the Minister will automatically grant if the operator chooses to accept the Minister's standard stipulation. Road Transportation Act, art. 11, paras. 1, 3.
2. Display both those stipulations and their fare schedule at their offices. *Id.* art. 12, para. 1.
3. Operate in accordance with its business plan except for in emergencies. *Id.* art. 16, para. 1.
4. To secure the transportation safety by appointing a Minister-certified operation administrator who is responsible for managing transportation safety, retaining a sufficient number of drivers, maintaining healthy working conditions for both those drivers and their passengers, and reporting serious accidents to the Minister. *Id.* art. 23, para. 1; art. 27, paras. 1 – 2; art. 29.

<sup>14</sup> Operators must (1) strive to improve transportation safety; (2) establish safety protocols — which include matters on the execution of the business, management system, and management method for ensuring safety — and notify the Minister as to those protocols, and (3) appoint a Minister-certified chief safety control manager. *Id.* art. 22; art 22-2, paras. 1, 2, 4. The operators must further hire drivers who meet Cabinet Order promulgated requirements, including requirements regarding age and driving history. *Id.* art. 25.

<sup>15</sup> Operators may only refuse transportation to a passenger in certain circumstances, include instances in which:

1. the passenger's request is not consistent with the operator's contract stipulations;
2. the operator does not have equipment appropriate given the transportation at issue;
3. the operator would face a special burden if they honored the request;
4. the transportation at issue would violate the law, public order or good morals;
5. unavoidable circumstances, such as natural disaster, prevent the transportation; or
6. for other reasons that, per MLIT regulations, are legitimate.

*Id.* art. 13. Further, operators (1) must offer transportation on a first come, first served basis, except in cases of emergency, *id.* art. 14.; and (2) may not carry a passenger when both the pickup location and final destination are outside of the operator's area of operation. *Id.* art. 20.

<sup>16</sup> *Id.* art 15, paras. 1, 3. As we will see, the government has later introduced much stronger fleet regulations in certain areas where there is an excess of taxis. *See infra* text accompanying notes 48-51.

2. by a city, town, village or specified non-profit organization, who is transporting local residents within its jurisdiction; or
3. pursuant to a limited Minister-issued permit, which restricts operation to instances in which temporal and geographical factors necessitate the operation in order to secure the public welfare.<sup>17</sup>

Further, in order to receive pay for carrying local residents on behalf of a municipality or non-profit organization (“NPO”) as provided above, an operator must obtain a Minister-issued registration.<sup>18</sup> If they do successfully receive such a registration, they may then only carry residents of rural/depopulated areas, or residents of urban/populated areas who are disabled and for whom other methods of transportation, such as public busses or taxis, cannot serve their needs.<sup>19</sup> Absent those conditions, receiving pay for use of private motor vehicles to transport passengers is strictly prohibited.<sup>20</sup>

Moreover, operators are generally not allowed to ride-share. The MLIT allows ride-sharing only pursuant to a general passenger ride-share auto transportation permit, which an operator may only receive after submitting an application specifying the ride-share’s route and schedule or allows a general ride passenger auto transportation business operators to offer ride-share with a special permit only in exceptional circumstances.<sup>21</sup> The Minister primarily grants such permits to taxi operators (1) servicing areas that either connect urban railway stations with satellite residential areas, or are rural and thus do not provide easy access to public transportation; and (2) who so operate during times in which public transportation is non-operational.<sup>22</sup>

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<sup>17</sup> *Id.* art. 78.

<sup>18</sup> *Id.* art. 79.

<sup>19</sup> Douro unsouhō sekou kisoku [Road Transportation Act Enforcement Regulation], Ministry of Land, Infrastructure, Transp. & Tourism Reg. No. 75 of 1951, art. 49. In order to be allowed registration, an operator must establish a management committee consisting of relevant stakeholders, including existing public transportation business operators as well as their unions, and get a consensus. Road Transportation Act, art. 79-4, para. 1, item 5; Road Transportation Act Enforcement Regulation, art. 51-3, item 5; art. 51-7; art. 51-8, para. 1. Therefore, except in very rural and/or depopulated areas, operation of such a business is difficult.

<sup>20</sup> Road Transportation Act, art. 78.

<sup>21</sup> *Id.* art. 3, item 1; art. 4; art. 21.

<sup>22</sup> MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, IPPAN NORIAI RYOKYAKU JIDOSHU UNO SHINSEI NITAI SURU SHORIHOSHIN NITSUITE [ON TREATMENT POLICY FOR APPLICATION OF GENERAL RIDE-SHARE PASSENGER AUTO TRANSPORTATION BUSINESS] (last updated Jan. 24, 2016), <http://www.mlit.go.jp/common/001125641.pdf> [<https://perma.cc/HPK3-LF58>]; Kumamoto-shi kokyokoutsu kuuhakuchiki oyobi huben chiiki niokeru noriai taxi nitsuite [On Ride-Share Taxis in Areas Public Transportation System Does Not Exist or is Difficult to Use], KUMAMOTO CITY (Oct. 1, 2018), [https://www.city.kumamoto.jp/hpKiji/pub/detail.aspx?c\\_id=5&id=6696&class\\_set\\_id=2&class\\_id=71](https://www.city.kumamoto.jp/hpKiji/pub/detail.aspx?c_id=5&id=6696&class_set_id=2&class_id=71) [<https://perma.cc/UJU8-KZFY>].

A violation of these regulations carries a steep price. As, in Japan, private motor vehicles use white license plates and taxis use green license plates, a private motor vehicle which receives pay for unlawfully transporting passengers is generally known as a “white taxi” or a “white plate taxi.”<sup>23</sup> Anyone who operates such a “white plate taxi” faces imprisonment for no more than three years, or a fine of no more than three million Japanese yen (“JPY”),<sup>24</sup> which, as of this writing, amounts to approximately \$27,200 U.S. dollars (“USD”).<sup>25</sup>

### *B. Specified Areas and the Reintroduction of Much Tighter Regulation*

Heavily regulated though it might be today, the Japanese taxi industry used to face far more stringent regulation. Prior to in 2000, the MLIT restricted entry into and growth of the taxi industry — requiring a license to operate a taxi business and subjecting such business to adjustment of acceptable fleet size to meet the supply-and-demand balance in a given area.<sup>26</sup> Moreover, all taxi companies in a given area had to maintain the same fare schedule without exception.<sup>27</sup>

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<sup>23</sup> Akinobu Iwasawa & Mio Sadakata, *Chinese ‘White Taxis’ Skirt Japan’s Rules under Police Noses*, NIKKEI ASIAN REV. (Nov. 27, 2017, 16:30 JST), <https://asia.nikkei.com/Editors-Picks/Japan-Update/Chinese-white-taxis-skirt-Japan-s-rules-under-police-noses> [<https://perma.cc/Z2T5-LUL6>] (“These chauffeured vehicles have been dubbed *shiro-taku*, or ‘white taxis.’ The name might give the impression of innocence, but the practice is completely illegal—it is a reference to the white license plates on private vehicles as opposed to the green ones reserved for taxis.”)

<sup>24</sup> Road Transportation Act, art. 96, item 1.

<sup>25</sup> *Currencies Quote – JPY/USD*, REUTERS, <https://www.reuters.com/finance/currencies/quote?srcCurr=JPY&destCurr=USD> [<https://perma.cc/457A-P82E>] (last visited Jan. 21, 2019) (reporting an exchange rate of roughly one hundred and eleven JPY to one USD).

<sup>26</sup> NAT’L DIET, KEIZAIBUNYA NIOKERU KISEIKAIKAKU NO EIKYO TO TAISAKU [IMPACTS OF DEREGULATION IN THE ECONOMIC FIELDS AND THE POSSIBLE COUNTERMEASURES], TAXI JIGYO [TAXI BUSINESS] 3 (2010), <http://www.ndl.go.jp/jp/diet/publication/document/2009/200886/03.pdf> [<https://perma.cc/2DHK-YQQZ>]; *Cabinet Looks to Ease Taxi, Bus Rules*, JAPAN TIMES (Mar. 1, 2000), <https://www.japantimes.co.jp/news/2000/03/01/business/cabinet-looks-to-ease-taxi-bus-rules/#.XCprL89Kgs> [<https://perma.cc/W62W-AUFW>].

<sup>27</sup> Ministry of Transp., Ippan jouyou ryokyaku jidousha unsou jigyou no kanri ni-tsuite [Notification Regarding Management of General Passenger Auto Transportation Business] (July 23, 1955) (on file with author); Kazuhiro Ohta, *Taxi unchin no kiseiseido to kadai* [Regulatory System of Taxi Fare and Its Agenda], UN-YU SEISAKU KENKYU, Winter 2017 at 13, 15. Moreover, in 1970, the Taxi gyoumu tekiseika rinjisochihō [Temporary Measures Act to Stabilize the Taxi Industry] (later renamed to Taxi gyoumu tekiseika tokubetsu-sochihō [Special Measure Act on Stabilization of Taxi Industry]) was enacted in response to abusive practices that taxi drivers in certain areas had been engaging in, such as charging unreasonably high fees and unreasonably refusing to carry passengers at night. Act No. 75 of 1970. Additional regulations mandating, *inter alia*, driver registration and the display thereof, were introduced as temporary measures in “designated areas” (*shitei-chiiki*) so as to stabilize the taxi industry.

These restrictions, however, were heavily criticized,<sup>28</sup> and the Japanese government radically amended them in the year 2000.<sup>29</sup> Now, the MLIT requires permits based on safety, rather than market demand, and no longer mandates that operators seek approval prior to increasing their fleet size, but rather merely that operators provide notice.<sup>30</sup> Further, taxi companies now have limited flexibility in establishing fare schedules.<sup>31</sup> Together, these regulations — which allow some operators to offer cheaper fares and increase the size of their fleet — have led to substantial competition among taxi operators<sup>32</sup> and mark a clear move toward deregulation.<sup>33</sup>

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*Id.* arts. 2-2, 3, 13. Moreover, these additional regulations included new restrictions on pick-up locations and hours in some areas. *Id.* art. 43.

<sup>28</sup> Kazutaka Shida, *Jidousha unso jigyo to dokusen kinshihō [Auto Transportation Business and the Anti-Trust Law]*, 5 HOKKAIDO U. GRADUATE SCH. OF L. JUNIOR RES. J. 147, 152 (1998) (pointing out various problems resulting from entry restriction and taxi fare regulation).

<sup>29</sup> Douro unsouhō oyobi taxi gyōmu tekiseika rinjisochihō no ichibu wo kaiseisuru hōritsu [Act to Amend Parts of the Road Transportation Act and the Temporary Measures Act to Stabilize the Taxi Industry], Act No. 86 of 2000; MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, DOURO UNSOUHŌ OYOBI TAXI GYŌMU TEKISEIKA RINJISOCIHŌ NO ICHIBU WO KAISEISURU HŌRITSU NO SEKOUTŌ NITOMONAU SEIREI OYOBI SHUREI NO KAISEI [AMENDMENT TO CABINET ORDER AND MINISTRY ORDER ACCOMPANIED WITH THE ENFORCEMENT OF THE ACT TO AMEND PARTS OF THE ROAD TRANSPORTATION ACT AND THE TEMPORARY MEASURES ACT TO STABILIZE THE TAXI INDUSTRY] (Oct. 2000).

<sup>30</sup> See *supra* text accompanying notes 5-7, 16.

<sup>31</sup> See *supra* text accompanying notes 8-12.

<sup>32</sup> Nobuhiro Yamagoshi, *Jukyūhōseikisei teppai de hiheishitsutsuaru taxi jigyou wo sukueruka [Could We Save the Taxi Industry Suffered after the Deregulation]*, 267 RIPPŌ TO CHŌSA 66, 67 (2007), [http://www.dl.ndl.go.jp/view/download/digidepo\\_1003850\\_po\\_20070420066.pdf?contentNo=1&alternativeNo=](http://www.dl.ndl.go.jp/view/download/digidepo_1003850_po_20070420066.pdf?contentNo=1&alternativeNo=) [https://perma.cc/5MG3-QMR5] (explaining that the number of taxis jumped from 211,067 in 1999 to 219,120 in 2004, and the actual occupation rate among taxi drivers dropped from 43.4% in 1999 to 41.4% in 2004).

<sup>33</sup> On the other hand, the Temporary Measures Act to Stabilize the Taxi Industry, *supra* note 27, is now permanent and codified as Taxi gyōmu tekiseika tokubetsu sochihō [Special Measures Act to Stabilize the Taxi Industry], Act No. 75 of 1970. Most of the Tokyo, Osaka, and Yokohama areas are designated as areas which face the most stringent regulation. KOKUDO KOUTSUSHO KOKUJI DAI57GOU [MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM NOTICE NO. 57], <http://www.mlit.go.jp/common/001025577.pdf> [https://perma.cc/2CPH-EJML] (specifying areas to which additional regulations apply).

Not all taxi operators and drivers supported this deregulation.<sup>34</sup> It led to a sudden increase in the number of taxis,<sup>35</sup> declining numbers of passengers,<sup>36</sup> much stiffer competition, declining income for drivers,<sup>37</sup> long working hours<sup>38</sup> and consequently, an increased possibility of traffic accidents.<sup>39</sup> These effects were particularly acute in certain areas, where the supply of taxis following deregulation was overwhelming.<sup>40</sup> Taxi companies and taxi drivers thus came to call for the re-introduction of stricter regulations.<sup>41</sup>

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<sup>34</sup> See JAPAN TIMES, *supra* note 26.

<sup>35</sup> According to the MLIT, the number of taxis increased from 256,343 in 2000 to 271,327 in 2008. MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, HIRE/TAXI NO SHARYOSU OYOBI YUSOUJIN-IN [NUMBER OF HIRE/TAXI AND NUMBER OF PASSENGERS CARRIED] (2018), <http://www.mlit.go.jp/common/000147689.pdf> [<https://perma.cc/JQ93-R9NK>].

<sup>36</sup> The number of passengers carried declined from 2.4 billion in 2000 to 2 billion in 2008. *Id.*

<sup>37</sup> Yamagoshi, *supra* note 32 (wage difference between the average male workers and the taxi workers expanded from 221.19 in 1998 to 250.73 in 2004). According to other research, male Japanese taxi drivers earned, on average, roughly 3.2 million JPY (\$29,000 USD) in 2016, whereas Japanese men working in other industries earned an average of roughly 5.5 million JPY (\$50,000 USD). JAPAN FED'N OF HIRE-TAXI ASS'NS, HEISEI 28NEN TAXI UNTENSHA NO CHINGIN/ROUDOUJOUKEN NO GENKYO [CURRENT STATUS OF WAGES AND WORKING HOURS FOR TAXI DRIVERS IN 2016], [http://www.taxi-japan.or.jp/pdf/toukei\\_chousa/tingin28.pdf](http://www.taxi-japan.or.jp/pdf/toukei_chousa/tingin28.pdf) [<https://perma.cc/9HXV-3YK6>].

<sup>38</sup> Yamagoshi, *supra* note 32 (explaining that the average annual working hours of taxi drivers declined from 2,477 hours in 1998 to 2,464 hours in 2004, while the average annual working hours of male workers in other industries increased slightly from 2,012 hours in 1998 to 2,015 hours in 2004 — still indicating that taxi drivers work substantially more hours than the norm). Likewise, according to other research, in 2016, male Japanese taxi drivers worked an average of 193 hours per month, while Japanese men working in other industries worked an average of 181 hours per month. JAPAN FED'N OF HIRE-TAXI ASS'NS, *supra* note 37.

<sup>39</sup> While the number of traffic accidents involving taxis increased from 26,052 in 2001 to 27,794 in 2005, it declined shortly thereafter to 24,030 in 2008. MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, JIDOSHUA UNSO JIGYO NIKAKAWARU KOUTSUJIKO YUIN BUNSEKI KENTOKAI HOUKOKUSHO [REPORT OF THE FACTOR ANALYSIS OF TRAFFIC ACCIDENTS INVOLVING AUTO TRANSPORTATION BUSINESS] 5 (2011), [https://www.mlit.go.jp/jidosha/anzen/03analysis/resource/data/h23\\_1.pdf](https://www.mlit.go.jp/jidosha/anzen/03analysis/resource/data/h23_1.pdf) [<https://perma.cc/MY5T-UMUG>]. This casts some doubt on whether deregulation has actually resulted in increased accident rates.

<sup>40</sup> NAT'L DIET, *supra* note 26, at 36 (noting particularly serious effects in the Sendai City, Miyagi Prefecture).

<sup>41</sup> See JAPAN TIMES, *supra* note 26.

As a result — despite criticism in the mass media,<sup>42</sup> but with strong support from taxi operators and drivers alike<sup>43</sup> — the Japanese government unanimously reversed the deregulation in 2009.<sup>44</sup> The Minister is now authorized to designate “specified areas” (tokutei-chiiki) if it finds that (1) those areas have an oversupply of taxis; and that adjustment and revitalization is necessary to (2) secure the healthy management of the general passenger auto transportation industry; (3) bolster transportation safety; (4) promote customer convenience; and (5) to ensure that local public transportation appropriately responds to market demand, given each taxi’s income and the degree to which its operator is properly managing its business, including violations of law and instances of traffic accidents.<sup>45</sup> These specified areas — which the Minister has in fact designated<sup>46</sup> — may establish a council consisting of the head of the relevant local government, operators, drivers’ associations (unions), and local residents.<sup>47</sup> Such councils

<sup>42</sup> *Okami no kisei kyōka: Taxi ryoukin kyousei neage ga makaritooru ijousa* [Introduction of Much Stronger Government Regulation: Crazy in Allowing Mandatory Taxi Fare Raise], SANKEI SHIMBUN (Jan. 31, 2014), <http://www.sankei.com/economy/news/140131/ecn1401310058-n2.html> [<https://perma.cc/8AY8-9SL2>]; *Nattoku shigatai taxi kisei* [Introduction of Stronger Taxi Regulation Not Convincing], NIHON KEIZAI SHIMBUN (May 4, 2014), <http://www.nikkei.com/article/DGXDZO70775550U4A500C1PE8000/> [<https://perma.cc/G3CS-S5N6>].

<sup>43</sup> *Kiseikyōka to gensha no jitsugen* [Accomplishment of Re-regulation and Reduction of Fleet], JIKO SOUREN (Aug. 2011), <http://www.jikosoren.jp/check/kisei-kyōka/kisei-kyōka.html> [<https://perma.cc/43B9-4VJ3>].

<sup>44</sup> Tokuteichiiki oyobi jun-tokuteichiiki niokeru ippan jouyou ryōkyaku jidōsha unsou jigyou no tekiseika oyobi kasseika nikansuru tokubetsusochihō [Special Measures Act on Adjustment and Revitalization of General Ride Passenger Auto Transportation Business in Specified Areas and Quasi-Specified Areas], Act No. 64 of 2009. The act passed with unanimous support in the House of Councillors. *Plenary session voting result in the House of Councillors, Special Measures Act on Adjustment and Revitalization of General Ride Passenger Auto Transportation Business in Specified Areas and Quasi-Specified Areas, Act No. 64 of 2009*, 171st Diet (2009), <http://www.sangiin.go.jp/japanese/joho1/kousei/vote/171/171-0619-v006.htm> [<https://perma.cc/7KT8-Q6QJ>]. The Diet revised the regulation in 2013, adding a designation for quasi-specified areas. Tokutei chiki niokeru ippan jōyō ryōkaku jidōsha unsō jigyōno tekiseika oyobi kasseika nikansuru tokubetsu sochi-hōtō no ichibu wo kaisei suru hōritsu [Act to Revise the Special Measures Act on Adjustment and Revitalization of General Ride Passenger Auto Transportation Business in Specified Areas and Quasi-Specified Areas], Act No. 83 of 2013.

<sup>45</sup> Special Measures Act on Adjustment and Revitalization of General Ride Passenger Auto Transportation Business in Specified Areas and Quasi-Specified Areas, art. 3, para. 1.

<sup>46</sup> MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, TOKUTEI-CHIKI ICHIRAN [LIST OF SPECIFIED AREAS], <http://www.mlit.go.jp/common/000226518.pdf> [<https://perma.cc/79US-LGKE>] (last updated October 1, 2012). Thereafter, each area has been designated individually.

<sup>47</sup> Special Measures Act on Adjustment and Revitalization of General Ride Passenger Auto Transportation Business in Specified Areas and Quasi-Specified Areas, art. 8.

must establish an Minister-approved adjustment and revitalization plan,<sup>48</sup> which must include a targeted reduction in the number of taxis, and which, if approved, operators are bound to execute.<sup>49</sup> Each participating operator must establish and receive approval for a plan to reduce the number of taxis, and a specific method for the reduction.<sup>50</sup> If an operator fails to submit such a plan, the Minister can order the operator to submit a plan for approval, and if an operator fails to execute the approved plan, the Minister can order it to execute the plan.<sup>51</sup>

Operators face further restrictions under the new regulations. For instance, operators may not make changes to business plans which increase the number of taxis in a “specified area.”<sup>52</sup> Additionally, if the Minister has set a fare-range in a “specified area” after consideration of the opinion of the area’s duly established council,<sup>53</sup> then operators must set fare schedules accordingly.<sup>54</sup> If operators fail to set a fare schedule within that range, the Minister can order the operator to revise the schedule.<sup>55</sup> The Minister has done this in order to avoid market disruption resulting from lower fares in a particular area.<sup>56</sup>

According to the MLIT, as of March 31, 2016, there are 6,304 taxi companies, which operate a total of 190,127 taxis and employ 296,461 drivers.<sup>57</sup> There are an additional 35,833 individual independent taxi drivers, each of whom is both an operator and a driver.<sup>58</sup> Overall, 226,010 taxi cars are operating in Japan.<sup>59</sup> While these numbers represent an overall increase since the deregulation had taken place, they further represent a significant decline beginning in 2008 — which is logically attributable to the re-regulation of 2009.<sup>60</sup>

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<sup>48</sup> *Id.* art. 8-2, para. 1.

<sup>49</sup> *Id.* art. 8-2, para. 2; 8-3, para. 1.

<sup>50</sup> *Id.* art. 8-7, para. 1.

<sup>51</sup> *Id.* art. 8-9, paras. 1, 3. The Minister is authorized to restrict the method of business in these areas. *Id.* art. 8-11. Moreover, restriction on new entry is also introduced. *Id.* art. 14-2.

<sup>52</sup> *Id.* art. 14-3.

<sup>53</sup> *Id.* art. 16, para. 1.

<sup>54</sup> *Id.* art. 16-4, para. 2.

<sup>55</sup> *Id.* art. 16-4, para. 3.

<sup>56</sup> If there is a danger of oversupply and a necessity of taking precautionary measures, the Minister can designate an area as “quasi-specified” and take preparatory countermeasures. *Id.* art. 2, para. 6, 3-2, 9, 14-4, 16, 16-4.

<sup>57</sup> MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, TAXI JIGYO NO GENJO NITSUITE [ON THE CURRENT SITUATION OF TAXI BUSINESS] 2 (2017), <http://www.mlit.go.jp/common/001169918.pdf> [<https://perma.cc/WKU8-HMX4>].

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See generally MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, *supra* note 35; Yamagoshi, *supra* note 32.

### C. Uber and Strong Opposition from Taxi Industry

Uber is ride-sharing mobile application (the “app”), headquartered in San Francisco,<sup>61</sup> through which one can request private transport. The app functions as follows: first, the requesting party (“rider”) opens the app — which displays icons representing available registered drivers and their respective locations — and enters a destination, after which the app presents a number of options regarding wait times, car-sizes, and price.<sup>62</sup> Uber uses a dynamic pricing system which automatically adjusting a trip’s fare in accordance with real-time demand.<sup>63</sup> Once the rider selects their options and requests a ride, the app searches for and displays the request to nearby drivers, who may choose to accept the trip.<sup>64</sup> Should a driver accept the trip, the app notifies the rider and each party can see the other’s relevant information, including name, rating, and vehicle model.<sup>65</sup> The driver and rider then meet at the pre-selected pick-up location, and the driver completes the trip.<sup>66</sup> After the trip has ended, the app automatically collects payment online.<sup>67</sup> Further, both driver and rider can “rate” their trip, with past reviews providing useful information which customers, drivers and Uber itself use to promote safety.<sup>68</sup>

Uber is disruptive inasmuch as its drivers use their own vehicle and are not affiliated with a traditional taxi or hire operator — that is to say, it allows private drivers to use personal vehicles to carry passengers while receiving pay.<sup>69</sup> Some

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<sup>61</sup> *Uber Technologies Inc: Company Profile*, BLOOMBERG, <https://www.bloomberg.com/profiles/companies/0084207D:US-uber-technologies-inc> [<https://perma.cc/CS4U-WLPM>] (last visited Jan. 1, 2019).

<sup>62</sup> See HOW UBER WORKS, <https://www.uber.com/en-JP/about/how-does-uber-work/> [<https://perma.cc/S3FW-76G6>] (last visited Jan. 1, 2019).

<sup>63</sup> Tomomi Kikuchi & Yuichiro Kanematsu, *Uber turns over a new leaf in Asia*, NIKKEI ASIAN REV. (Feb. 23, 2018), <https://asia.nikkei.com/Business/Multinationals-in-Asia/Uber-turns-over-a-new-leaf-in-Asia> [<https://perma.cc/7EHN-YUY9>].

<sup>64</sup> See HOW UBER WORKS, *supra* note 62.

<sup>65</sup> See RIDING WITH UBER: DRIVER PROFILES, <https://www.uber.com/en-JP/ride/how-uber-works/driver-profiles/> [<https://perma.cc/E83G-AWLD>] (last visited Jan. 1, 2019).

<sup>66</sup> See HOW UBER WORKS, *supra* note 62.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; Margaret Marshall, *Uber Driver Reviews: How They Work (and How to Use Them Correctly)*, RIDESTER, <https://www.ridester.com/uber-driver-reviews/> [<https://perma.cc/VR6W-YMXB>] (last updated Aug. 30, 2018).

<sup>69</sup> See DRIVING JOBS VS DRIVING WITH UBER, <https://www.uber.com/driver-jobs/> [<https://perma.cc/BM8X-72ZS>] (last visited Jan. 1, 2019). Uber conducts “driver screenings” on all drivers, *Rider Safety*, UBER, <https://www.uber.com/en-JP/ride/safety/> [<https://perma.cc/FK7L-6Q43>] (last visited Jan. 1, 2019), and further mandates that each driver have their vehicle inspected annually. *Does my vehicle need to get inspected?*, UBER, <https://help.uber.com/partners/article/does-my-vehicle-need-to-get-inspected---?no-deId=373c9b72-b09d-4604-876b-d8ce203a9b49> [<https://perma.cc/C99T-8AKD>] (last visited Jan. 1, 2019).

welcome such a service, as they enjoy the ease of requesting a ride from their smartphones, the convenience of real-time updates regarding their driver's arrival time, and the security associated with third-party verifications and driver reviews.<sup>70</sup> Moreover, customers do not have to worry about providing payment to the driver.<sup>71</sup> Private drivers also value this service since it allows them to set their own work schedules and earn extra money during free time.<sup>72</sup>

The taxi industry is heavily regulated in many countries and, as a result, Uber has faced strong opposition in many places.<sup>73</sup> Particularly in Japan, as outlined above, the taxi industry in Japan has faced substantial tumult. Therefore, it was natural that Japanese taxi operators and drivers would strongly oppose any proposal<sup>74</sup> to legalize Uber-style ride-sharing. Indeed, the National Hire and Taxi Association<sup>75</sup> adopted a resolution at its 105th general assembly vowing to deter the legal operation of "white plate taxis" under the name of ride-sharing.<sup>76</sup> The National Individual Independent Taxi Drivers' Association also issued a strong condemnation of the proposal,<sup>77</sup> and Jiko Souren, a national association of Japan's taxi drivers' unions, also shared their strong opposition towards the legalization of ride-sharing.<sup>78</sup> Some of the reasons which might have formed the basis for the taxi industry's strong opposition to Uber include the following:

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<sup>70</sup> See, e.g., Chris William, *14 Reasons You Should Use Uber Instead Of A Taxi*, THE RICHEST (Aug. 5, 2015), <https://www.therichest.com/business/12-reasons-you-should-use-uber-instead-of-a-taxi/> [<https://perma.cc/9RTC-MAJ8>].

<sup>71</sup> *Id.*

<sup>72</sup> DRIVE WITH UBER – MAKE MONEY ON YOUR SCHEDULE, <https://www.uber.com/us/en/drive/> [<https://perma.cc/K4JD-LRCY>] (last visited Jan. 1, 2019).

<sup>73</sup> Jon Henley, *Uber clashes with regulators in cities around the world*, GUARDIAN (Sept. 29, 2017, 12:37 EDT), <https://www.theguardian.com/business/2017/sep/29/uber-clashes-with-regulators-in-cities-around-the-world> [<https://perma.cc/55MG-W8SN>]; Adam Taylor, *How the Anti-Uber Backlash is Spreading around the World*, WASH. POST (Dec. 9, 2014), [https://www.washingtonpost.com/news/worldviews/wp/2014/12/09/how-the-anti-uber-backlash-is-spreading-around-the-world/?noredirect=on&utm\\_term=.5005adef3e23](https://www.washingtonpost.com/news/worldviews/wp/2014/12/09/how-the-anti-uber-backlash-is-spreading-around-the-world/?noredirect=on&utm_term=.5005adef3e23); Rhodes, *supra* note 2.

<sup>74</sup> See *infra* notes 102-103 and accompanying text.

<sup>75</sup> Note that for the purposes of this article, all entity names containing the term "National" refer to Japanese entities.

<sup>76</sup> *Dai105kai tsujo soukai kaisai: Shirotaiku danko soshi ketsugi [105<sup>th</sup> Assembly Held: It is Resolved Never to Allow White-plate Taxi]*, NIKKAN HI/TAKU JOHO [DAILY HIRE/TAXI INFORMATION] (June 24, 2016), <http://taxi-digi.com/news-detail.php?id=345> [<http://perma.cc/5EXR-EB3F>].

<sup>77</sup> *Heisei29nen jigyou houkoku [2017 Business Plan]*, ZENKOKU KOJIN TAXI KYOUKAI [NAT'L INDIVIDUAL & INDEPENDENT TAXI ASS'N], [http://www.kojin-taxi.or.jp/documents/pdf/06jigyo\\_keikaku.pdf](http://www.kojin-taxi.or.jp/documents/pdf/06jigyo_keikaku.pdf) [<http://perma.cc/5RGU-L3BP>].

<sup>78</sup> *Ride share no gouhouka ni hantaisuru ikensho [Opinion against Legalization of Ride-Sharing]*, JIKOSOREN [AUTO TRANSPORTATION UNIONS FEDERATION] (May 9, 2016), <http://www.jikosoren.jp/seisaku/2016/rideshare.html> [<http://perma.cc/H787-63N5>].

1. Taxi companies must satisfy statutory requirements, apply for a permit, and actually obtain said permit.<sup>79</sup> A proposal which would allow Uber drivers to operate outside of such requirements would therefore be unfair.
2. Taxi drivers likewise must satisfy stringent requirements from which Uber drivers would be exempt.<sup>80</sup> For example, drivers must obtain a “category two” license, which requires more than three years of driving experience.<sup>81</sup> Moreover, in major cities, taxi drivers need to pass a geography examination to understand the places, routes, distances, and fares between their departures and destinations.<sup>82</sup> Uber does not require its drivers to hold such a license or to have special knowledge of the geography.<sup>83</sup>
3. The regulatory requirements that taxi operators and drivers face serve to ensure passenger safety; as Uber drivers are not subject to these requirements, legalization of Uber could put passengers at risk.<sup>84</sup>

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<sup>79</sup> See *supra* text accompanying note 5.

<sup>80</sup> Individual and independent taxi drivers must have more than ten years of professional driving experience, and if aged 40-64, must have worked for taxi and hire companies in at least two years of the prior three years. *Q & A, No traffic law violation or traffic accident during the past three years is also allowed*, TOKYOTO KOJIN TAXI KYOUKAI [TOKYO INDIVIDUAL & INDEP. TAXI ASS'N], <http://www.kojintaxi-tokyo.or.jp/driver/faq.html#a08> [<http://perma.cc/T65Q-VQPP>].

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> DRIVER REQUIREMENTS - HOW TO DRIVE WITH UBER, <https://www.uber.com/drive/requirements/> [<https://perma.cc/V74F-W8E9>] (last visited Jan. 1, 2019).

<sup>84</sup> See *supra* notes 13-14. Especially, strict restrictions on qualifications for taxi drivers are not applicable to Uber drivers. See Associated Press, *Uber Settles Driver Background-Check Case for at Least \$10M*, NBC NEWS (Apr. 8, 2016, 1:13 AM) <https://www.nbcnews.com/news/us-news/uber-settles-driver-background-check-case-least-10m-n552741> [<https://perma.cc/39HD-BBN6>] (reporting that Uber settled with the state of California over allegations that, despite claiming to provide the most comprehensive criminal screenings available, “Uber’s background checks were inferior to what taxi drivers undergo because they did not include fingerprint checks for past convictions.”). Uber has since implemented a new criminal background check system, which still does not include fingerprinting. John Bonazzo, *Uber’s New Background Checks Are Useless Without This Key Component*, OBSERVER (Apr. 12, 2018, 12:30 PM), <https://observer.com/2018/04/uber-background-checks-fingerprinting/> [<https://perma.cc/54V8-P9YL>] (discussing the new system, and explaining that it is in response to “quite a few bad events in recent years” including an instance in which a driver was a convicted sex offender and had been driving without a valid license).

4. Taxi operators incur structural costs associated with MLIT regulations that Uber drivers do not.<sup>85</sup>
5. Unlike taxi drivers, for whom taxi operators must carry additional automobile liability insurance for their drivers,<sup>86</sup> private drivers (including many Uber drivers) hold automobile liability insurance which may not cover accidents which occur during the course of work the driver's work.<sup>87</sup> As a result, an Uber driver may not be able to fully cover the damage they cause.<sup>88</sup> Further, unlike taxi drivers — who are employed by the taxi companies which can be vicariously liable for their conduct<sup>89</sup> — Uber categorizes drivers “independent contractors” rather than employees.<sup>90</sup> As a result, if an Uber driver is not able to pay tort damages, the party who suffered such damage would not be able to seek redress from Uber.

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<sup>85</sup> Individual and independent taxi drivers are said to require at least two million JPY (approximately \$18,000 USD) to start a business. TOKYO INDIVIDUAL & INDEP. TAXI ASS'N, *supra* note 80. They also have to cover the cost of running the business, including the costs associated with maintaining the office, parking space/garage, telephone lines, advertisement, maintaining safety and safety check, local business tax and so forth.

<sup>86</sup> MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, KOKUDO KOUTSUSHO KOKUI DAI503GOU [MINISTRY OF LAND, INFRASTRUCTURE, TRANSPORTATION AND TOURISM NOTICE NO. 503 OF 2005] (2005), <https://www.mlit.go.jp/common/000210691.pdf>.

<sup>87</sup> The mandatory auto insurance necessary for registration of all motor vehicles covers only 30 million JPY (approximately \$278,000 USD) towards third-party damages. Many drivers in Japan subscribe to optional auto insurance with no limit on third-party liability. Since the optional auto insurance to which most drivers are subscribed may not cover accidents caused during work, however, there is a possibility that there is no insurance coverage beyond the amount covered by the mandatory auto insurance. *Jidoushahoken no shiyo mokuteki no erabikata [How to Choose the Purpose of the Use for Auto Insurance]*, SBI SONPO, <https://www.sbsonpo.co.jp/car/column/column17.html> [<https://perma.cc/4QTZ-YUJ3>] (last visited Jan. 21, 2019) (discussing the importance of choosing whether the purpose of the use is primarily for business, or for commuting, or for leisure as it affects one's insurance premium and may preclude insurance claim payments resulting from a false declaration).

<sup>88</sup> *Id.*

<sup>89</sup> Minpō [Civil Code], Act No. 89 of 1896, art 715, *translated at* <http://www.moj.go.jp/content/000056024.pdf> [<https://perma.cc/3H25-JH3Q>] (“A person who employs others for a certain business shall be liable for damages inflicted on a third party by his/her employees with respect to the execution of that business; provided, however, that this shall not apply if the employer exercised reasonable care in appointing the employee or in supervising the business, or if the damages could not have been avoided even if he/she had exercised reasonable care.”).

<sup>90</sup> See Daniel Wiessner, *U.S. judge says Uber drivers are not company's employees*, REUTERS (Apr. 12, 2018, 2:14 PM), <https://www.reuters.com/article/us-uber-lawsuit/u-s-judge-says-uber-drivers-are-not-companys-employees-idUSKBN1HJ31I> [<https://perma.cc/N3BT-4X3S>] (discussing a number of cases which are illustrative of Uber's intent to so classify its drivers).

6. As Japanese labor law categorizes taxi drivers — who are employees of the taxi company — as “workers,” it regulates their working conditions and treatment. According to Uber’s interpretation, drivers are not “workers” but rather “independent contractors,”<sup>91</sup> and thus not subject to Japanese labor law. Uber thus would claim that it has no obligation to pay the employer’s share of social insurance contributions,<sup>92</sup> and Uber drivers would thus not get the benefit of social insurance or workmen’s compensation, which would otherwise cover injuries that drivers suffer during work.<sup>93</sup>
7. Uber and Uber drivers would not be common carriers under Japanese law, and thus would not be subject to the same anti-discrimination policies as taxi operators and taxi drivers.<sup>94</sup> Therefore, there would be no law prohibiting Uber and Uber drivers from engaging in unreasonable private discrimination.
8. By increasing supply, legal ride-sharing could exacerbate the problems that the taxi industry faced in the wake of the deregulation of the early 2000s.<sup>95</sup> If this were the case, Uber might wipe out the traditional taxi industry. Were the company to then cease its operation in Japan, passengers would not have access to taxi service — which would cause them undue harm.

In short, Uber’s drivers would have an unfair advantage over taxi drivers, would subject customers to the risk of unsafe transportation, and would destroy the livelihoods of many taxi drivers.

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<sup>91</sup> *See id.*

<sup>92</sup> In Japan, most companies must force their employees to join the social insurance — which includes health insurance and pension — and work insurance — which includes unemployment insurance and workmen’s compensation. *Hito wo yatou toki no rule [Rules to Follow When Employing Someone]*, MINISTRY OF HEALTH, LAB. & WELFARE, [https://www.mhlw.go.jp/seisakunitsuite/bunya/koyou\\_roudou/roudouseisaku/chushoukigyoku/koyou\\_rule.html](https://www.mhlw.go.jp/seisakunitsuite/bunya/koyou_roudou/roudouseisaku/chushoukigyoku/koyou_rule.html) [<https://perma.cc/2M6Q-TXCP>] (last visited Jan. 21, 2019) (explaining that employers deduct the premiums associated with this mandate from their employees’ salaries, and pay those premiums along with their personal premium payments).

<sup>93</sup> Akira Hamamura, *Platform economy to roudouhōjō no kadai [Platform Economy and Agenda for Labor Law]*, ROUDOU CHOUSHA 2018.8 at 4, 11, <http://www.rochokyo.gr.jp/articles/1808.pdf> [<https://perma.cc/V6SU-TURE>] (discussing the necessity of clarifying and re-considering the definition of “workers” in the context of platform economies and labor law). The legal employment status of Uber drivers in the U.S. has been a subject of substantial debate. *See, e.g.,* Sarah McBride & Dan Levine, *In California, Uber Driver Is Employee, Not Contractor*, REUTERS (June 17, 2015), <http://www.reuters.com/article/us-uber-california-idUSKBN0OX1TE20150617> [<https://perma.cc/N37L-LPN2>].

<sup>94</sup> *See supra* note 15 and accompanying text. There is no general civil rights legislation in Japan which would otherwise prohibit private discrimination in business.

<sup>95</sup> *See supra* text accompanying notes 34-60.

*D. The Japanese Government Response*

Uber first announced its plan to launch in Japan in August of 2014.<sup>96</sup> Unlike Uber's typical business model, its initial embodiment in Japan essentially functioned as a middle-man between riders and the existing taxi industry, permitting riders to use the app to request traditional taxis and to pay the standard fare for such service.<sup>97</sup> At that point, Uber did not permit private drivers to use personal vehicles to offer an alternative to the existing taxi industry.<sup>98</sup>

Uber has since been unsuccessful in introducing traditional ride-sharing in Japan. For example, in 2015, Uber Japan began experimental operations in the city of Fukuoka, allowing private drivers to carry passengers in private vehicles. The MLIT soon shut this operation down, determining that while Uber compensated drivers per hour and did not charge passengers a fee, its drivers were still operating illegal white plate taxis in violation of the Road Transportation Act.<sup>99</sup> Further, in February 2016, following strong opposition from its taxi industry, the city of Nanto in Toyama Prefecture abandoned a plan to allow Uber to operate on an experimental basis.<sup>100</sup>

There are, however, some signs that might be favorable for Uber. Some business groups have actively voiced the necessity of promoting the sharing economy,<sup>101</sup> and the Cabinet adopted the "Japan Revival Strategy" on June 30, 2015, calling for the adoption of the legal measures necessary for the "new activation of market such as sharing economy," implying the forthcoming introduction of ride-sharing services.<sup>102</sup> During discussions on national strategic special districts, Japanese Prime Minister Shinzo Abe proposed lifting the ban on private

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<sup>96</sup> *Uber, Nihon de takushī haisha sabisu 'uberTAXI' o sutāto* [Uber, Taxi Dispatch Service "UberTAXI" Started in Japan], KEITAI WATCH (Aug. 5, 2014), <http://k-tai.watch.impress.co.jp/docs/news/660930.html> [<https://perma.cc/FX52-4V7J>].

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Ride share kenshou jikken chushi, bei Uber: Kokkousyou shidou ukete* [Experimental Operation of Uber Suspended based upon the Guidance from Ministry of Land, Infrastructure, Transport and Tourism], NIHON KEIZAI SHIMBUN (Mar. 6, 2016), [http://www.nikkei.com/article/DGXLASDG06H5S\\_W5A300C1CR8000/](http://www.nikkei.com/article/DGXLASDG06H5S_W5A300C1CR8000/) [<https://perma.cc/4QLM-JYUT>].

<sup>100</sup> *Uber shibaridarake no nihon san-nyu: Taxi gyokai teikou* [Uber's Entry into Japan's Market so Inhibitive: Strong Opposition from the Taxi Industry], NIHON KEIZAI SHIMBUN (May 26, 2016), [https://www.nikkei.com/article/DGXLASDZ2611Y\\_W6A520C1TH1000/](https://www.nikkei.com/article/DGXLASDZ2611Y_W6A520C1TH1000/) [<https://perma.cc/3TUV-K267>].

<sup>101</sup> SHINKEIZAI RENMEI [JAPAN ASS'N OF NEW ECONOMY], SHARING ECONOMY KASSEIKA NIHITSUYONA HOUTEKI SOCHI NIKAKAWARU GUTAITEKI TEIAN [SPECIFIC PROPOSALS ON LEGAL MEASURES TO ACTIVATE THE SHARING ECONOMY] (Oct. 30, 2015), [http://jane.or.jp/pdf/detail\\_share20151030.pdf](http://jane.or.jp/pdf/detail_share20151030.pdf) [<https://perma.cc/G6EV-H3E6>].

<sup>102</sup> CABINET OFFICE, NIHON SAIKO SENRYAKU 2015 [JAPAN REVIVAL STRATEGY 2015] 103 (June 30, 2015), [http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/dai2\\_3jp.pdf](http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/dai2_3jp.pdf) [<https://perma.cc/UB4V-H6X6>].

vehicles used to carry sightseeing guests in depopulated areas.<sup>103</sup> The Diet<sup>104</sup> passed an amendment to the National Strategic Special District Act<sup>105</sup> allowing certain approved municipalities and NPOs to operate a “national strategic special district private vehicle sightseeing visitors and others passenger auto transportation business receiving pay,” which primarily permits private vehicles to receive pay for carrying foreign sightseeing visitors and others within districts that the prime minister has certified.<sup>106</sup>

This amendment, however, was filled with reservations. Prior to passing the amendment, the Japanese House of Representatives attached a resolution which restricted the permitted operation of such private vehicle auto transportation businesses.<sup>107</sup> The resolution further opposed the national expansion or acceptance of ride-sharing — which it conceptualized as the liberalization of “white plate taxi” operations — mandating the promotion of public transportation systems in these districts, the denial of ride-sharing when the existing public transportation systems could meet demand, and consultation with existing public transportation business operators before approval.<sup>108</sup> Despite numerous cities having received designation as national strategic special districts, so far only Yabu City, the mountainside location of which makes public transportation very

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<sup>103</sup> KOKKA SENRYAKU TOKKU SHIMON KAIGI [STATE STRATEGIC SPECIAL DISTRICT COUNCIL] 6 (Oct. 20, 2015), <http://www.kantei.go.jp/jp/singi/tiiki/kokusentoc/dai16/gijiyoushi.pdf> [<https://perma.cc/4Q39-6UYK>] (statement of Prime Minister Abe). He also suggested making it possible for private houses to allow short-term stays. *See id.*

<sup>104</sup> The National Diet refers to Japan’s bicameral legislature. *The National Diet*, HOUSE OF REPRESENTATIVES, JAPAN, [http://www.shugiin.go.jp/internet/itdb\\_english.nsf/html/statistics/guide/dietfun.htm](http://www.shugiin.go.jp/internet/itdb_english.nsf/html/statistics/guide/dietfun.htm) [<https://perma.cc/HFZ3-4L6Z>] (last visited Jan. 5, 2019).

<sup>105</sup> Kokka senryaku tokubetsu kuikihō no ichibuwo kaiseisuru hōritsu [Act to Amend the Parts of the National Strategic Special District Act], Act No. 55 of 2016.

<sup>106</sup> Kokka senryaku tokubestu kuikihō [National Strategic Special District Act], Act No. 107 of 2013, art. 16-2. The Road Transportation Act defines such businesses as “private vehicle passenger auto transportation businesses receiving pay”. Road Transportation Act, art. 9-2. This would mean that the requirements in the Road Transportation Act do not have to be satisfied: the registration of this new business in a designated national strategic special district does not need consensus support of the management committee, including support of existing public transportation business operators and their unions. *Id.* *See supra* note 19 and accompanying text.

<sup>107</sup> The resolution limited operation to depopulated areas with very scant public transportation systems where it would facilitate tourism. SHUGIIN [HOUSE OF REPRESENTATIVES], KOKKA SENRYAKU TOKUBETSU KUIKIHŌ NO ICHIBU WO KAISEISURU HŌRITSUAN NITAI SURU HUTAI KETSUGI [RESOLUTION ATTACHED TO THE BILL OF THE ACT TO AMEND THE PART OF THE NATIONAL STRATEGIC SPECIAL DISTRICT ACT] 5 (2016), [http://www.shugiin.go.jp/internet/itdb\\_rchome.nsf/html/rchome/Futai/tisou9052D15ADD1A3F2749257FAF002982C1.htm](http://www.shugiin.go.jp/internet/itdb_rchome.nsf/html/rchome/Futai/tisou9052D15ADD1A3F2749257FAF002982C1.htm) [<https://perma.cc/8P5K-2GEY>]. It further mandated that that the drivers have the same driver’s licenses as taxi drivers, and adopt sufficient safety measures to prevent crimes against passengers. *Id.*

<sup>108</sup> *Id.* at 7.

difficult, has received approval to create a national strategic special district so as to allow for the operation of private vehicle passenger auto transportation businesses which receive pay.<sup>109</sup> In light of this resolution's limitations, expansion of this approval beyond like districts seems unlikely.

#### *E. The Future of Uber in Japan*

Based on the taxi industry and government response, it is unlikely that ride-sharing, and thus Uber, will legally enter major Japanese markets, at least in the near future. Nevertheless, Uber has not given up, and is now trying to find loopholes in the Japanese legal system. In 2016, it started an operation allowing private vehicles to carry passengers in Tango-cho, Kyotango City, Kyoto Prefecture.<sup>110</sup> This service partners with a local NPO, which has the authority to operate a private vehicle passenger auto transportation service which receives pay because Tango-cho is a rural town of merely several thousand residents, more than 40% of whom are older than 65, and is without a well-developed public transportation system.<sup>111</sup> In so operating, Uber provides its vehicle dispatch system to the NPO, and in order to drive for Uber in Tango-cho, both drivers and their motor vehicles must register.<sup>112</sup> Uber also announced the

<sup>109</sup> *Kokka senryaku tokku [National Strategic Special Districts]*, CABINET OFFICE, <http://www.kantei.go.jp/jp/singi/tiiki/kokusentoc/index.html> [<https://perma.cc/UMK2-MZVV>] (last visited Feb. 20, 2019); *Jikayousha yusho unten OK: Kyu-sekinomiya to kyo-Ohya de juuminra no idoushudan ni, kunino tokku kaigi ga shounin [Private Vehicle Passenger Auto Transportation Was Approved, to Provide the Measures to Move for Residents of Former-Sekinomiya and Former-Ohya: National Strategic Special District Council Gave an Approval]*, MAINICHI SHIMBUN (Dec. 19, 2017), <https://mainichi.jp/articles/20171219/dtl/k28/010/453000c> [<https://perma.cc/8ED3-MJ2G>].

<sup>110</sup> *Ride share kansai de hirogaru: Hyogo Yabu de 26nichi kara [Ride Share Expanding in the West: Starts Service from 26 in the Yabu City, Hyogo Prefecture]*, NIHON KEIZAI SHIMBUN (2018), <https://www.nikkei.com/article/DGXMZO30941200U8A520C1LKA000/> [<https://perma.cc/M2QX-BTBK>].

<sup>111</sup> Junko Fujita, *Two to Tango, please: Uber finally makes inroads in aging Japan*, REUTERS (June 2, 2016, 7:10 PM), <https://www.reuters.com/article/us-uber-japan/two-to-tango-please-uber-finally-makes-inroads-in-aging-japan-idUSKCN0Y02Y7> [<https://perma.cc/A2S7-JNPC>]. See also *supra* text accompanying note 19 (explaining that operation in rural and depopulated areas is one of limited exceptions to Japan's prohibition on private vehicle passenger auto transportation).

<sup>112</sup> See NIHON KEIZAI SHINBUN, *supra* note 110. Uber has also experimented with the service, introducing secure, charge-free, rides for seniors living in Nakatonbetsu-cho, Hokkaido, another depopulated rural town, with the support of the rural area revitalization acceleration grant from the government. *Bei Uber to Ride-share jikken: Kasochi no nichijo no ashi ni sodatsuka [Experiment on Ride-Share with Uber: Could it Grow into the Essential Transportation Method]*, NIKKEI GLOBAL 311 2017, at 48, 48, <http://www.nikkei.co.jp/rim/glweb/kiji/311kiji.pdf> [<https://perma.cc/NP2J-XJ8F>]. The drivers are all registered volunteers. *Nakatonbetsu ride-share (ainori) jigyou jisshou jikken [Experimental*

launch of its UberEats service in Tokyo, which allows individuals who register with Uber in a given city to deliver food from restaurants in that city.<sup>113</sup> Those individuals must use a bicycle or small motorbike rather than a car.<sup>114</sup> If those cases, and Uber's current interest in the Japanese market,<sup>115</sup> are any indication, Uber will continue to look for any opportunity to crack the Japanese market.

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*Service of Nakatonbetsu Ride-share*], NAMATONBETSU-CHO, <http://www.town.nakatonbetsu.hokkaido.jp/bunya/5299> [<https://perma.cc/7XHR-3X26>] (last visited Feb. 24, 2019).

<sup>113</sup> *Uber, Nihon de demae service, shimin ga ashini [UBER Starts Food Delivery Service: Regular Citizen Is a Carrier]*, NIHON KEIZAI SHIMBUN (Sept. 28, 2016, 20:43), [http://www.nikkei.com/article/DGXLASDZ28HZE\\_Y6A920C1T15000/](http://www.nikkei.com/article/DGXLASDZ28HZE_Y6A920C1T15000/) [<https://perma.cc/46K8-N5QM>].

<sup>114</sup> *UberEATS, Service kaishi Ishunen [UberEATS: The First Year Anniversary]*, UBER NEWSROOM (Sept. 29, 2017), <https://www.ubereats.com/blog/ja-JP/tokyo/japan-1year-anniversary> [<https://perma.cc/N8YW-TKE9>]. The engine of the motor bikes must be less than 125cc. Kamotsu jidousha unso jigiyohō [Motor Vehicle Package Delivery Business Act], Act No. 83 of 1989, art. 2, para. 4; art. 36. Otherwise the motor bike is regarded as a motor vehicle and transporting a package based on the demand of others while receiving pay is a "light vehicle transporting package delivery business," which needs to be notified and is subject to further regulation. *Id.* There are many legal uncertainties with respect to such service. For instance, were an UberEats driver to suffer an injury on the job, the company health insurance that most workers carry would not cover medical costs associated with the injury because it occurred during work and would otherwise be covered by the workmen's compensation system. *Kyoukai kenpo, Shigotochu/tukinchi nikega wo shitatoki [When you Suffered Injury during your Work or on your Way to Work]*, ZENKOKU KENKOHOKEN KYOKAI [JAPAN HEALTH INS. ASS'N] (Feb. 15, 2008) <https://www.kyoukaikenpo.or.jp/shibu/aichi/cat080/seido/1674-31869> [<https://perma.cc/BMS6-UH36>]. As the workmen's compensation system would not cover Uber drivers, they would go without compensation for their workplace injuries. See Hamamura, *supra* note 93. Delivery persons may, of their own accord, obtain independent contractor liability insurance so as to cover potential liability to third persons which might result from accidents during deliveries. Uber began offering such liability insurance for UberEats drivers who use bicycles. *Uber Eats no Haitatsuni hoken ga tsukuyouni narimashitanarimasita [Now Uber Eats Drivers Are Covered by Insurance]*, NOSHIIFT.WORK: UBER EATS (Mar. 8, 2018), <https://www.noshift.work/ubereats/news/insurance> [<https://perma.cc/WXT5-KJX3>].

<sup>115</sup> Uber now plans to expand the taxi dispatch service into other areas. *Uber wa, 2020-nen made ni haken sabisu o zenkoku-teki ni kakudai suru keikaku: Jimoto no takushi kaisha to no kyoryoku [Uber Plans to Expand Dispatch Service Nation-wide by 2020: Cooperation with Local Taxi Companies]*, MAINICHI SHIMBUN (Feb. 20, 2018), <https://mainichi.jp/articles/20180221/k00/00m/020/067000c> [<https://perma.cc/3P4X-DAPY>].

## II. AIRBNB IN JAPAN

A. *Hotels and Rental Houses*

The Ryokan Business Act (hereinafter the “Hotel Business Act”) regulates the Japanese hotel industry.<sup>116</sup> Much like the Japanese taxi industry, hotel businesses — services (including both hotels and businesses operated thereby) which charge a fee, allow lodging, and engage in business<sup>117</sup> — face substantial regulation by the Ministry of Health, Labor and Welfare (MHLW). For example, hotels must satisfy certain structural requirements, including seismic and fire safety standards,<sup>118</sup> and must further be located in areas appropriate in light of public health standards.<sup>119</sup> The hotel business operator further must adopt certain measures with respect to sanitary conditions,<sup>120</sup> and fulfill common carrier obligations.<sup>121</sup> Further regulations obligate a hotel operator to prepare a guest list, which the operator must submit at the request of a regulator.<sup>122</sup> Perhaps most

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<sup>116</sup> Ryokangyohō [Ryokan Business Act], Act No. 138 of 1948 [hereinafter Hotel Business Act].

<sup>117</sup> *Id.* art. 2. “Fees” include fees for the use of rooms, furniture, or beds, as well as cleaning fees. *Ryokangyohō gaiyo [Summary of the Hotel Business Act]*, MINISTRY OF HEALTH, LAB. & WELFARE, <https://www.mhlw.go.jp/bunya/kenkou/seikatsu-eisei04/03.html> [<https://perma.cc/MZX6-55HA>] (last visited Jan. 24, 2019). “Lodging” means any conduct which allows guests to sleep in a bed using the facilities. Hotel Business Act, art. 2, para 5. “Engages in business” refers to the operators’ repeated and continuous offering of a service.

<sup>118</sup> *Id.* art. 3, para. 2. In order to obtain a hotel permit, the applicant needs to submit certificates of compliance with both zoning regulations under the Kenchiku kijunhō [Construction Standard Act], Act No. 201 of 1950, as well as structural and fire safety regulations under the Construction Standard Act and Shoubouhō [Fire Prevention Act], Act No. 186 of 1948. For instance, the fire safety regulation includes a facility that receives pay in exchange for allowing guests to stay for less than one month within its definition of “lodging facility,” subjecting those facilities to heightened fire safety regulation. *Id.* Specific safety requirements for a hotel vary depending upon the size of the facility, but all “lodging facilities” need to have a fire alarm, flash-light, and an emergency evacuation light, must use inflammable materials, and must display an evacuation route. *Shukuhaku shisetsu nikakawaru shoubouhō jou no kijuntō [Fire Safety Standards for Lodging Facilities]*, KYOTO CITY, <http://www.city.kyoto.lg.jp/shobo/cmsfiles/contents/0000185/185126/kijun10.pdf>.

<sup>119</sup> Hotel Business Act, art. 3, para. 2. For example, they cannot be located near schools or nurseries for fear that they might harm a clean healthy educational environment. *Id.* art. 3, para. 3

<sup>120</sup> *Id.* art. 4, para. 1 (setting out regulations relating to, *inter alia*, ventilation, sunlight intake, lighting, and cleanliness).

<sup>121</sup> *Id.* art. 5. Hotel operators may only refuse lodging where a guest is apparently suffering from a contagious disease, when there is a danger that the guest will engage in gambling or other illegal or immoral conduct, when there are no available rooms, or when local ordinances specify other legitimate reasons. *See id.*

<sup>122</sup> *Id.* art. 6, para. 1.

importantly, like the taxi industry, individuals seeking to operate a “hotel business” must secure a “hotel business permit” from the governor of the local prefecture.<sup>123</sup> Any person who operates a “hotel business” without a permit may face criminal charges resulting in a term of imprisonment for no more than six months, or a fine of no more than 1 million JPY (approximately \$9,000 USD).<sup>124</sup> There are four categories of hotel businesses under the Hotel Business Act: western-style hotels, ryokan (Japanese-style hotels), kan-i shukusho (budget inns) and geshuku (dormitory-style inns).<sup>125</sup> “Travel agencies” which have registered with the head of the Tourism Agency can broker deals and conclude lodging contracts between hotels and guests.<sup>126</sup>

There are some types of accommodations which have presented the complicated issue on whether they fall into the definition of “hotel.” The operators of one such kind of accommodation — “weekly mansions” or “monthly mansions”<sup>127</sup> — largely claim that their rooms are “rentals” in which individuals stay for an extended period of time, rather than “lodgings,”<sup>128</sup> and as a result, that they do not have to satisfy hotel business regulations.

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<sup>123</sup> *Id.* art. 3, para. 1.

<sup>124</sup> *Id.* art. 10, item 1.

<sup>125</sup> *Id.* art. 2, para. 1. A “dormitory-style inn” refers to a facility in which guests stay for a fixed term of more than a month (*e.g.*, a landlord providing student accommodations). *Id.* art. 2, para. 4. A “budget inn” refers to a facility where multiple guests share certain amenities, such as a bathroom. *Id.* art. 2, para. 3. There are various types of budget inns, including minshuku (private inns which are typically operated by farmers or fisherman and offer Japanese-style service), pension (family operated inns offering bed and breakfast-style western service), kichin-yado (daily-charge inns, which are often used by day-to-day workers and homeless individuals due to their low cost). *See* Ryokangyōhō sekōrei [Hotel Business Act Enforcement Order], Cabinet Order No. 152 of 1957 (specifying details of requirements for each type of hotel).

<sup>126</sup> Ryokouguyōhō [Travel Agency Act], Act No. 239 of 1952, art. 2-3.

<sup>127</sup> “Weekly mansion” allows the guest to stay in the room on weekly basis and “monthly mansion” allows a guest to stay in the room on the monthly basis. *See* BEGINNER’S GUIDE, <https://www.weekly-mansion.com/beginner/> [<https://perma.cc/PZN7-TQRP>] (last visited Jan. 19, 2019) (explaining the concept of weekly mansions). Although they are called “mansions,” they are normally just apartments. Only some of the operators of these weekly mansions or monthly mansions have hotel business permits.

<sup>128</sup> When a guest stays in a hotel, the guest and the hotel must conclude a “lodging contract.” MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, MODEL SHUKUHAKU YAKKAN [MODEL LODGING STIPULATION] (2012), <https://www.mlit.go.jp/common/000164600.pdf> [<https://perma.cc/H5JU-VYHG>]. If it is a rental, landlord and tenant must conclude a “rental contract” prior to engaging in the rental of a building or room therein, at which point the Landlord and Tenant Act, rather than the Hotel Business Act, is applicable. Shakuchi chak-kahō [Landlord and Tenant Act], Act No 90 of 2001. Although there are no enhanced seismic or fire safety requirements for rental houses, under the Landlord and Tenant Act, the landlord’s right to terminate the contract is severely limited, and tenants have significant protection against forced move-out or eviction. *Id.* arts. 26, 28, 30. Moreover, if it is a rental, only a

But their claim is subject to debate<sup>129</sup> and the MHLW treats at least “weekly mansions” as “hotels”.<sup>130</sup> The distinction between hotel lodging and rentals generally turns on a consideration of whether (1) the guests have a primary residence elsewhere; (2) the responsibility to maintain the room remains with the operator; and (3) the length of stay is shorter than one month.<sup>131</sup> In some cases, however, it is not that simple. Those factors are case specific, and as a result, there have been some ambiguities in their application.<sup>132</sup> Moreover, the one-month “requirement” is arguably less a requirement than an accepted norm, derived from the MHLW’s having affirmed that businesses permitting stays shorter than a month, but longer than a week are “hotel businesses.”<sup>133</sup> Thus, it is not clear that stays in excess of one month automatically qualify as “rentals.” If it is a hotel and if the operator is operating the hotel business, then the operator needs to have a permit and the hotel needs to satisfy all associated requirements.

Moreover, it is not only the Hotel Business Act that is relevant to whether guests are allowed to stay in the facilities. For instance, if a property is rental property, the building owner may impose additional restrictions on a tenant’s

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licensed “real estate broker business operator” can broker a deal between homeowners (landlords) and renters (tenants). Takuchi tatemono torihikigyohō [Real Estate Broker Business Act], Act No. 176 of 1952, art 3.

<sup>129</sup> Some weekly and monthly mansion operators argue that monthly mansions (and even weekly mansions) qualify as “fixed-term house rentals” which, while subject to Landlord and Tenant Act, are exempt from its regulation as “temporary use” rental houses. Landlord and Tenant Act, art. 40. However, so long as the responsibility of maintenance remains with the operator and not the guests, and so long as guests have other primary residences, it is doubtful that the room could be viewed as a “rental” house. *Ryokangyohō un-youjou no gigi nitsuite [Doubts about the Operation of Hotel Business Law]*, YACHIDA OFFICE (May 16, 2017), <https://yachida-office.info/2017/05/16/post-156/> [<https://perma.cc/J6H2-QDLN>].

<sup>130</sup> MINISTRY OF HEALTH, LAB. & WELFARE, RYOKANGYO NIKANSURU KISEI NITSUITE [HOTEL BUSINESS ACT REGULATION] 3 (2015), <http://www.mlit.go.jp/common/001111877.pdf> [<https://perma.cc/SQ6J-ETEU>].

<sup>131</sup> YACHIDA OFFICE, *supra* note 129. In other words, if the person staying in the room intends to use it as a primary residence, has a responsibility to maintain the room, and is staying for a period longer than one month, then the facility is not, and cannot be, a hotel. Otherwise, Japanese law will generally regard the business operator as engaging in the “hotel business,” for which the operator needs a permit and must observe all hotel regulations. *See id.*

<sup>132</sup> *Id.* For instance, some might stay in a hotel room for an extended period of time, for all intents and purposes treating that room as their primary residence, while leaving the management of the room to the hotel. Since the hotel must have a permit and the hotel must satisfy all hotel requirements, however, it does not matter whether it is a rental or lodging as far as the Hotel Business Act is concerned.

<sup>133</sup> *Id.*; compare KYOTO CITY, *supra* note 118 (including businesses which permit stays of less than a month within the scope of “lodging facilities” subject to heightened regulations).

ability to have overnight guests in their rooms.<sup>134</sup> Indeed, many residential tenancy contracts include clauses prohibiting third-party guests from staying in the rented property for a lengthy period of time, and prohibit rental to a third-party without the consent of the landlord.<sup>135</sup> In some circumstances, violation of such restrictions could affect a termination of the tenant's lease and could further result in that tenant's eviction.<sup>136</sup> Similarly, many condominiums have regulations which require property owners to use rooms solely for residential purposes and prohibit renting for commercial use, which a condominium owner might violate by receiving pay in exchange for allowing an unspecified number of guests to stay in their condominium.<sup>137</sup>

### B. Airbnb and Japan

Airbnb is an Internet platform, headquartered in San Francisco, which allows homeowners (hosts) to accept and charge customers (guests) who wish to stay in their homes for a period of time.<sup>138</sup> Homeowners register with Airbnb and verify their identity by scanning and sending a government issued ID to Airbnb.<sup>139</sup> Once registered and verified, hosts create a "listing" on Airbnb's platform, which includes a description of the listed space, pictures and other relevant information.<sup>140</sup> Guests can then search the platform for available houses or rooms in their desired city and, if they find an available house or room that is to

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<sup>134</sup> MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, CHINTAIJUUTAKU HYOUJUN KEIYAKUSHO [STANDARD RENTAL AGREEMENT FOR PRIVATE HOUSE] (2013), <http://www.mlit.go.jp/common/000991359.pdf> [<https://perma.cc/YBR7-GZ58>].

<sup>135</sup> *See, e.g., id.* art. 8.

<sup>136</sup> *Id.* art. 10, para. 2.

<sup>137</sup> MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, MANSION HYOUJUN KANNRIKIYAKU [STANDARD MANAGEMENT AGREEMENT FOR CONDOMINIUM] (2017), <http://www.mlit.go.jp/common/001202416.pdf> [<https://perma.cc/4SHA-66V3>]. According to *Tatemono no kubun shoyutō nikansuru hōritsu* [Condominium Act], all the owners belong to the management association to manage the condominium. Act No. 69 of 1962, art. 3. Regulation of the condominium and its property should be stipulated in an agreement decided by the assembly of all owners. *Id.* art. 30, para. 1 & art. 31, para. 1. The assembly also selects the manager to whom it entrusts the management of the condominium. *Id.* art. 25. Individual owners are prohibited from conduct against the general interest of all the owners, *id.* art. 6, para. 1, and the owners can seek an injunction ordering the violator to stop the violation. *Id.* art. 57.

<sup>138</sup> *Airbnb no shikumi* [How Airbnb Works], AIRBNB, <https://www.airbnb.jp/help/getting-started/how-it-works> [<https://perma.cc/US5T-GUAN>] (last visited Oct. 12, 2019).

<sup>139</sup> *Airbnb ID Verification FAQ: How It Works for Hosts and Guests*, AIRGMS (Aug. 17, 2018), <https://www.airgms.com/airbnb-id-verification/> [<https://perma.cc/B24F-KMSG>].

<sup>140</sup> *Setup: How to start hosting*, AIRBNB, <https://www.airbnb.com/b/setup> [<https://perma.cc/UM5Q-7WUX>] (last visited Jan. 6, 2019).

their liking, request a reservation.<sup>141</sup> The host can view the personal profile of the guest applicant and decide whether or not to accept and confirm the reservation.<sup>142</sup> If the host accepts, the guest will be able to stay in the listed accommodation. Listings are free, but Airbnb receives 6-12% of all charges from guests, as well as 3% of all charges from hosts.<sup>143</sup> Guests pay the fee at the time of the reservation's confirmation, and hosts receive their payment 24 hours thereafter.<sup>144</sup>

There are several benefits of staying in private homes or rooms. First, private homes or rooms may be more comfortable than other accommodations. Second, guests may be able to spend time with the homeowners or their family members. Finally, staying in a private home or room can be much cheaper than staying in a hotel.<sup>145</sup> Airbnb collects payment on behalf of hosts.<sup>146</sup> Guests and hosts can upload reviews and read past reviews of other hosts and guests, which provide useful information about the service offered by hosts and about the conduct of guests.<sup>147</sup> Hosts can request a security deposit in case the guests destroy or damage property<sup>148</sup> and Airbnb has an insurance system to cover costs not covered by the deposit.<sup>149</sup>

Though its listings might be residential, Airbnb still faces extremely strict hotel business regulations. In Japan, there used to be no custom of allowing room or house sharing, or room or house exchanges. Therefore, if homeowners wanted to leave their property for a period of time, they likely had to leave it vacant or lease it to a tenant by concluding a residential tenancy contract. With the rising popularity of Airbnb, the Japanese public gradually came to embrace the idea of

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<sup>141</sup> See Jean Folger, *The Pros and Cons of Using Airbnb*, INVESTOPEDIA (Dec. 10, 2018), <https://www.investopedia.com/articles/personal-finance/032814/pros-and-cons-using-airbnb.asp> [<https://perma.cc/A3Y3-BGZ9>].

<sup>142</sup> AIRBNB, *supra* note 140 (“What should I do if I’m uncomfortable hosting someone? . . . [Y]ou can decline an individual reservation request and it won’t negatively impact your listing’s placement in search results.”).

<sup>143</sup> Folger, *supra* note 141.

<sup>144</sup> *Id.*

<sup>145</sup> See, e.g., Megan Leonhardt, *10 Cities Where Airbnb Will Save You the Most Money*, TIME (Mar. 29, 2018), <http://time.com/money/5209426/travel-airbnb-hotel-places/> [<https://perma.cc/N674-VCBP>].

<sup>146</sup> *Hosting help: Getting paid*, AIRBNB, <https://www.airbnb.com/help/article/425/when-will-i-get-my-payout> [<https://perma.cc/6SGT-NMKK>] (last visited Jan. 27, 2019) (“Airbnb typically releases your payout about 24 hours after your guest’s scheduled check-in time.”).

<sup>147</sup> *How do reviews work?*, AIRBNB, <https://www.airbnb.com/help/article/13/how-do-reviews-work> [<https://perma.cc/UM96-874C>] (last visited Jan. 6, 2019).

<sup>148</sup> *Security Deposits*, AIRBNB, <https://www.airbnb.com/help/topic/1143/security-deposits> [<https://perma.cc/4P5J-BGJ8>] (last visited Jan. 6, 2019).

<sup>149</sup> *Host Protection Insurance*, AIRBNB, <https://www.airbnb.com/host-protection-insurance> [<https://perma.cc/Q2NY-9WXL>] (last visited Jan. 6, 2019).

charging guests to stay in their homes or rooms and in recent years, Airbnb registrations in Japan have skyrocketed, at one point reaching more than 62,000 houses/rooms.<sup>150</sup>

It is likely that an Airbnb guests' use of the property would not be considered a rental, as most of the properties available on Airbnb are not intended for use as a guest's primary residence, the owners have the responsibility to maintain the room and most guests stay for less than one month.<sup>151</sup> So long as a host occasionally allows the listed accommodation to be used by friends, even if they are charging fees, their conduct would probably not constitute a "business" and would not be a violation of the Hotel Business Act.<sup>152</sup> If, however, they own properties solely for the purpose of letting paying guests stay there, and repeatedly allow an unspecified number of guests to stay, then their conduct is likely to be seen as a "hotel business," which requires a permit and compliance with all hotel regulations.<sup>153</sup> Were a host to operate a hotel without a permit, they would likely face criminal sanctions and might face further sanctions if they are not compliant with zoning regulations, as well as construction and fire safety standards.<sup>154</sup>

There certainly is a legitimate reason for some to be concerned by the prospect of private house lodging and Airbnb remaining unregulated. Some hosts allow entire buildings or houses to be used for short-term stays without obtaining a permit.<sup>155</sup> It is dubious that such a practice amounts to private house lodging. Moreover, since such hosts have already demonstrated a willingness to skirt regulations, there are questions as to the seismic safety, fire safety, and sanitation standards of these facilities as well.<sup>156</sup> Furthermore, the increase in short-term

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<sup>150</sup> 2gatsu no Airbnb riyō shukuhakukyaku wa 5.8 million wo toppa, bukkensu wa yaku 62,000ken ni [The Number of Guests of Airbnb in February Exceeded 5.8 Millions and the Number of Registered Houses/Rooms Reached to 62,000], AIRSTAIR (Mar. 22, 2018), <https://airstair.jp/airbnb-japan-data/> [http://perma.cc/3PY9-EFUM].

<sup>151</sup> See YACHIDA OFFICE, *supra* note 129 and accompanying text.

<sup>152</sup> MINISTRY OF HEALTH, LAB. & WELFARE, *supra* note 129 (explaining that whether provision of the room is "business" turns on whether it is open to public and service provided continuously and repeatedly). The owner likely must satisfy the requirements for a "budget inn" to qualify as a hotel seeking a permit. Note that so long as the host in question accepts less than ten guests, they are exempt from the general facility requirement. See Hotel Business Act Enforcement Order, art. 1, para. 2.

<sup>153</sup> Hotel Business Act, art. 3; see also *supra* text accompanying note 123.

<sup>154</sup> Hotel Business Act, art. 10, item 1; see also *supra* text accompanying note 124.

<sup>155</sup> Emily Alpert Reyes, *L.A. lawmakers back new regulations on Airbnb and similar rentals*, L.A. TIMES (Apr. 10, 2018, 8:50 PM) <http://www.latimes.com/local/lanow/la-me-ln-rental-rules-20180406-story.html> [https://perma.cc/J954-7BPL]

<sup>156</sup> Ko Tin-yau, *Japan home-sharing business confronts new regulation*, EJINSIGHT (June 7, 2018, 4:55 PM), <http://www.ejinsight.com/20180607-japan-home-sharing-business-confronts-new-regulation/> [https://perma.cc/9LCY-XEDF]

private house lodging has led to a decline in long-term room rentals,<sup>157</sup> which might have the effect of squeezing out long-term rentals and pushing away local residents, particularly low-income local residents, from the rental market.<sup>158</sup> Furthermore, as guests of different cultural and customary backgrounds frequent some short-term accommodations, those cultural differences can cause disturbances, such as noise at night, or improper placement of garbage for collection.<sup>159</sup> Lastly, as these host's would not face the Hotel Business Act's common carrier obligations,<sup>160</sup> there may be unreasonable discrimination against guests.

Indeed, some cities have responded to these concerns, and have even chosen to hold Airbnb liable as a hotel business operator for its publication of listings and its facilitation of hosts' illegal conduct.<sup>161</sup> Airbnb has argued that rather than a response to legitimate concerns, regulation of short-term stays in private houses is the result of influence from special interests, specifically the hotel industry.<sup>162</sup> Such regulation, it argues, unfairly deprives homeowners who wish to profit by allowing short-term guests to stay in their properties, of the value in their homes.<sup>163</sup> Essentially, Airbnb argues that it is not operating a hotel business, but rather that it is merely a platform for the public to offer places to stay.<sup>164</sup> Nevertheless, if Airbnb hosts an illegal hotel business to list accommodations

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<sup>157</sup> Aly Yale, *Putting Your House On Airbnb? What To Know Before Hosting As A Homeowner*, FORBES (May 1, 2018), <https://www.forbes.com/sites/alyyale/2018/05/01/putting-your-house-on-airbnb-what-to-know-before-hosting-as-a-homeowner/#6864fa85e6e8> [https://perma.cc/W22X-NCS3].

<sup>158</sup> *Id.*

<sup>159</sup> See generally, NIHON HOTEL KYOUKAI [JAPAN HOTEL ASS'N], IWAYURU MINPAKU NITAIURU IKEN NITSUITE [ON THE SO-CALLED PRIVATE LODGING] (2016), <http://www8.cao.go.jp/kisei-kaikaku/kaigi/meeting/2013/discussion/160314/gidai/item4.pdf> [https://perma.cc/32PP-ATQA].

<sup>160</sup> See *supra* note 121 and accompanying text.

<sup>161</sup> San Francisco and Santa Monica, California, have both moved to fine Airbnb for illegal listings. Katie Benner, *Airbnb Sues Over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html> [https://perma.cc/U4WK-DSUY]. New York allows authorities to fine hosts rather than Airbnb up to \$7,500 if hosts are caught listing a property on a rental platform such as Airbnb. *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Yale, *supra* note 157.

<sup>164</sup> DAN CIURIAK & MARIA PTASHKINA, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV. & INTER-AM. DEV. BANK, THE DIGITAL TRANSFORMATION AND THE TRANSFORMATION OF INTERNATIONAL TRADE 12 (2018), [https://www.ictsd.org/sites/default/files/research/rta\\_exchange-the-digital-transformation-and-trade-ciuriak-and-ptashkina.pdf](https://www.ictsd.org/sites/default/files/research/rta_exchange-the-digital-transformation-and-trade-ciuriak-and-ptashkina.pdf) [https://perma.cc/8KYS-MYGR] ("Electronic platforms . . . and firms in the "sharing" economy, such as Uber and AirBnB, consider themselves merely platform providers, whereas the employee-users of those platforms are, according to them, "self-employed.").

on its platform, it may be accused of facilitating such illegal conduct.<sup>165</sup> What's more, it might even be accused of actively soliciting and abetting this illegal action by offering a platform and circulating illegal information.<sup>166</sup> There are already some cases in which the operators or managers of Internet platforms which displayed child pornography, or even the URL of a child pornography website, were charged for distribution of child pornography.<sup>167</sup> Therefore, it is possible that the police could arrest the operators or managers of Airbnb to face criminal charges in Japan.<sup>168</sup>

### C. The Road to the Enactment of New Regulation

It seems as though Airbnb may be following the same path as Uber in Japan. Much like the taxi industry's opposition to Uber, the hotel industry has been outspoken against Airbnb and called for strict enforcement of the Hotel Business Act.<sup>169</sup> The National Association of Small and Medium Size Hotels published a strong condemnation of any plan to allow private house lodging.<sup>170</sup> It claimed

<sup>165</sup> See text accompanying *supra* note 161.

<sup>166</sup> See Saikō Saibansho [Sup. Ct.], July 16, 2001, Hei 11(a) no. 1221, 55:5 SAIKŌ SAIBANSHO HANREISHU KEIJI [KEISHU] 317 (3rd petty bench) (finding that the manager of a host computer that allowed users to upload obscene pictures had violated the ban on publicly displaying obscene materials).

<sup>167</sup> See Saikō Saibansho [Sup. Ct.], July 9, 2012, Hei 21(a) no. 2082, 308 SAIKŌ SAIBANSHO HANREISHU KEIJI [SHUKEI] 53 (3rd petty bench), [http://www.courts.go.jp/app/files/hanrei\\_jp/565/082565\\_hanrei.pdf](http://www.courts.go.jp/app/files/hanrei_jp/565/082565_hanrei.pdf) [<https://perma.cc/TQ5J-9F9B>] (dismissing a defendant's appeal where that defendant had been convicted for public display of child pornography after uploading the URLs of child pornography sites with minor modification).

<sup>168</sup> Shuichi Narukawa, *Naze Airbnb wa nihonde mukyoka no bukken wo keisaishitemo houritsuihan ninaranainoka* [Why It Is Not Possible to Charge Airbnb for Statute Violation by Listing All Properties without Permit] MINPAKU NET (Nov. 1, 2016), <https://minpakukyoka.com/airbnb-rule/> [<https://perma.cc/2E3G-ZE57>] (suggesting that there is a slim possibility that Airbnb might be liable as an accessory).

<sup>169</sup> Cannix Yau & Kanis Leung, *With crackdowns on Uber and Airbnb, does the sharing economy have a future in Hong Kong?*, S. CHINA MORNING POST (Aug. 27, 2018, 11:51 AM), <https://www.scmp.com/news/hong-kong/hong-kong-economy/article/2156033/crackdowns-uber-and-airbnb-does-sharing-economy> [<https://perma.cc/8AMY-U3AY>].

<sup>170</sup> NIHON CHUSHOU HOTEL RYOKANGYO KYOUDOKUMIAI [NAT'L ASS'N OF SMALL & MEDIUM SIZE HOTELS] (2016), <http://www.nchrk.or.jp> [<https://perma.cc/E9F2-X9XJ>]. See also DAI193KAI KOKKAI, SANGIIN KOKUDOKOUTSUIINKAI KAIGIROKU DAI21GOU [193TH DIET, HOUSE OF COUNCILORS, LAND, INFRASTRUCTURE AND TRANSPORT COMMITTEE, MEETING RECORD NO. 21] 5 (2017), <http://kokkai.ndl.go.jp/SENTAKU/sangiin/193/0064/19306080064021.pdf> [<https://perma.cc/KT23-A6UH>] (statement of Takaaki Kanazawa, president of National Association of Small and Medium Size Hotels) (expressing a deep disappointment on the failure of the government to strictly enforce the Hotel Business Act to private lodging and opposition to the legalization

that there are over 46,000 illegal private house lodging operations, and it opposed the government's attempt to legalize these private lodgings, which would allow them to operate without a hotel business permit and without complying with hotel business regulations — putting guests' lives and the Japanese small and medium size hotel industry at risk.<sup>171</sup> It also pointed out that, contrary to some who have argued that permitting Airbnb's operation is necessary to solve a critical shortage of available rooms, Airbnb is not necessary to meet demand.<sup>172</sup> The Japan Hotel Association similarly expressed concerns about possible safety issues with private house lodging, and possible issues with neighbors, but did not go so far as to call for a total ban.<sup>173</sup> While accepting the critical shortage of available rooms, especially for foreign guests in metropolitan areas, it highlighted the necessity of ensuring the safety of customers and good relationships with neighbors.<sup>174</sup>

Nonetheless, hotel charges in Japan are rather expensive, and there is a critical shortage of available rooms in major cities, especially during the high season.<sup>175</sup> There are certain benefits to staying in private homes or rooms for short periods of time, especially when staying with the homeowners.<sup>176</sup> But, in order to capture the existing demand stemming from tourists' willingness to stay in private homes, homeowner's must be able to charge for their service.<sup>177</sup> As a result,

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of private lodging, pointing out that all of the hotel regulation is necessary and that the actual occupancy rate of all hotels are below 50% and there are plenty of rooms for foreign visitors).

<sup>171</sup> NAT'L ASS'N OF SMALL & MEDIUM SIZE HOTELS, *supra* note 170. The National Association of Small and Medium Size Hotels took issue with, *inter alia*, Airbnb's avoidance of the requirement that each building face building inspections and have certificates of satisfactory compliance with seismic safety and fire regulations standards (including having secure escape routes in case of fire), as well as the requirement that each hotel have a manager available at all time to guide customers in case of emergency. *Id.*

<sup>172</sup> *Id.* (claiming that the occupancy rate of rooms in small and medium size hotels in urban areas is just 50% during weekdays and 80% on holidays and weekends and that in rural areas, the figures are 10% lower).

<sup>173</sup> JAPAN HOTEL ASS'N, *supra* note 159. The Japan Tourism Business Association took a similar stance. NIHON RYOKOUGYO KYOUKAI [JAPAN TOURISM BUS. ASS'N], MINPAKU NO KISEIKANWA NITAI SURU KANGAEKATA NITSUITE [THE IDEA FOR THE DEREGULATION OF GUEST HOUSES] (Nov. 12, 2015), [https://www.jata-net.or.jp/membership/topics/2015/pdf/151112\\_mnpakurepo.pdf](https://www.jata-net.or.jp/membership/topics/2015/pdf/151112_mnpakurepo.pdf) [<https://perma.cc/2YDD-RVLX>].

<sup>174</sup> JAPAN HOTEL ASS'N, *supra* note 159.

<sup>175</sup> The national average occupancy ratio of guest rooms of hotels was 59.9% in April 2016 and Osaka was the highest, with 87.2%. *Shukuhaku ryokou toukei chousa [Accommodation Travel Statistical Survey]*, MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM (June 30, 2017), [http://www.mlit.go.jp/kankochou/news02\\_000316.html](http://www.mlit.go.jp/kankochou/news02_000316.html) [<https://perma.cc/WL3V-KW4F>].

<sup>176</sup> See Brian X. Chen, *Booking With Airbnb? Here's Your Survival Guide*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/technology/personaltech/booking-with-airbnb-heres-your-survival-guide.html> [<https://perma.cc/97JV-CHFJ>].

<sup>177</sup> Yale, *supra* note 157.

some Japanese homeowners and real estate industry actors who seek to promote efficient use of empty rooms in private houses have advocated strongly on behalf of liberalizing private house lodging.<sup>178</sup>

Airbnb in Japan got a bit of luck. With Tokyo set to host the 2020 Summer Olympic Games, the Japanese government was faced with the prospect of welcoming hundreds of thousands of foreign visitors amidst the aforementioned critical shortage of available hotel rooms.<sup>179</sup> The government decided that rather than undertake the arduous and impractical task of shutting down all private house lodging and building numerous new hotels, it would enact special legislation allowing private house lodging and creating national strategic special districts exempted from the Hotel Business Act.<sup>180</sup>

#### D. Private House Lodging Business Act

In 2017, the government enacted the Private House Lodging Business Act which allows homeowners receive pay in exchange for hosting guests at their private houses, without satisfying all hotel business regulations.<sup>181</sup> The Private House Lodging Business Act requires individuals who want to engage in a “private house lodging business” — *i.e.*, the business of allowing guests to stay at their private homes for less than 180 days per year in exchange for a fee without satisfying the regulations stipulated in the Hotel Business Act — to notify the

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<sup>178</sup> *Jimintou chintai giren, minpaku hukyu nimuketa heisei28nen soukaiketsugian motomeru [Rental Property Related LDP Members Supported the 2016 Resolution to Facilitate the Private Lodging]*, MINPAKU.BIZ (Nov. 18, 2016), <https://min-paku.biz/news/chintaigiren-ketsugian-h28.html> [<https://perma.cc/25YP-4VCG>] (reporting that the Japanese Liberal Democratic Party’s (“LDP”) leadership aligned itself with the real estate industry and expressed support for the legalization of private lodging). Further, the tourism industry, while concerned about guest safety, appears to be increasingly willing to accept the liberalization of private house lodging in anticipation of an increase in foreign tourism. *See* JAPAN TOURISM BUS. ASS’N, *supra* note 173.

<sup>179</sup> *See* Editorial, *Expanding tourist accommodations*, JAPAN TIMES (Jan. 4, 2016), <https://www.japantimes.co.jp/opinion/2016/01/04/editorials/expanding-tourist-accommodations/#.XDJ5EM9KhTZ> [<https://perma.cc/TS85-GNQA>] (“A think tank estimate shows if 25 million people visit Japan in 2020, there will be a shortfall of some 4,000 hotel rooms in Tokyo and some 20,000 in the Kansai region — even when hotel development plans are taken into account.”).

<sup>180</sup> *See generally* MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, MINPAKU JUKYU NO JOUKYO NITSUITE [ABOUT THE SITUATION OF THE ACCOMMODATION SUPPLY AND DEMAND] (2016), <https://www.mlit.go.jp/common/001115559.pdf> [<https://perma.cc/8J7X-7GGU>]; *see also* State Strategic Special District Council, *supra* note 103, at 6 (statement of Prime minister Abe proposing the liberalization of short-term stays at private houses).

<sup>181</sup> Juutaku shukuhaku jigyoohō [Private House Lodging Business Act], Act No. 65 of 2017.

local governor.<sup>182</sup> Once their notifications are accepted and the lawful notification number is issued, these homeowners, called “private house lodging business operators,” can provide lodging service to guests.<sup>183</sup> Private house lodging business operators can delegate the management of their property to MLIT-registered “private house lodging management operators.”<sup>184</sup> Companies that broker deals and conclude contracts for the provision of private house lodging services are considered “private house lodging service broker operators” and are required to register with the head of the Tourism Agency.<sup>185</sup> These requirements are far less onerous than those imposed on hotel business operators, which must obtain a permit from the local governor.

Private house lodging business operators must limit the number of persons they can accept depending upon their available spaces, and implement measures to ensure sanitary conditions, such as regular cleanings.<sup>186</sup> They must further implement measures to ensure the safety of guests in the event of a fire, such as installing emergency lighting and displaying emergency exit routes.<sup>187</sup> They are required to provide information on the facility and transportation in foreign languages, keep a guest list and provide that list to the governor upon request,<sup>188</sup> explain to guests certain measures to prevent noise and other disturbances to neighbors,<sup>189</sup> and respond to complaints from neighbors.<sup>190</sup> Private house lodging business operators must delegate management of the property when the number of rooms available exceeds the limit set by the government, or when the operator is absent while guests are present.<sup>191</sup> Furthermore, the local government can restrict the operation of private house lodging businesses, where reasonable to avoid the environmental deterioration resultant from noise and other disturbances, by specifying the period when such businesses are permitted.<sup>192</sup>

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<sup>182</sup> *Id.* art. 2, para. 3; art. 3, para. 1. If the notice failed to satisfy all the legal requirements or failed to provide all the necessary documents, the notification will not be accepted; it is only when it is lawfully accepted that the notification number will be issued. *Private Lodging Business Operators*, MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM: MINPAKU, [https://www.mlit.go.jp/kankocho/minpaku/business/host/index\\_en.html](https://www.mlit.go.jp/kankocho/minpaku/business/host/index_en.html) [<https://perma.cc/FL35-UW8M>] (last visited Feb. 5, 2019).

<sup>183</sup> Private House Lodging Business Act, art. 2, para. 4. The operators will therefore conclude the “lodging service provision contract” with the guests. *Id.* art. 12, para. 1.

<sup>184</sup> *Id.* art. 2, item 7, art. 22, para. 1.

<sup>185</sup> *Id.* art. 2, item 10, art. 46, para. 1.

<sup>186</sup> *Id.* art. 5.

<sup>187</sup> *Id.* art. 6.

<sup>188</sup> *Id.* art. 7.

<sup>189</sup> *Id.* art. 9.

<sup>190</sup> *Id.* art. 10.

<sup>191</sup> *Id.* art. 11.

<sup>192</sup> *Id.* art. 18.

The Private House Lodging Business Act additionally imposes several important duties on private house lodging broker business operators. Upon registration, a broker business operator must act in good-faith<sup>193</sup> and cannot allow others to offer brokerage services under his or her name.<sup>194</sup> Additionally, the broker business operator must establish and submit broker contract stipulations to the head of the Tourism Agency, which they must further display.<sup>195</sup> Broker business operators must also establish and display a fee schedule for brokerage services,<sup>196</sup> and must provide a written statement of the broker contract's content to all clients.<sup>197</sup> The Private House Lodging Business Act additionally prohibits brokers from making false representations, intentionally failing to disclose important considerations that could affect guests' decisions,<sup>198</sup> and offering or brokering illegal services for guests.<sup>199</sup> The head of the Tourism Agency can supervise broker business operators and order them to revise or otherwise improve the management of the business<sup>200</sup> as well as suspend a broker's registration for a period of a year from that broker's violation of either the statute or a revision order, or revoke a broker's registration altogether.<sup>201</sup>

#### *E. National Strategic Special District*

The government also amended the National Strategic Special District Act, removing government regulation so as to promote economic growth and creating a national strategic special district for private house lodging.<sup>202</sup> Under the National Strategic Special District Act, a national strategic special district council must submit a special district plan to the Prime Minister in order to create a national strategic special district for lodging businesses catering to foreign tourists, that is, "foreigner lodging facility management business[es]."<sup>203</sup> If the Prime Minister approves such a plan, the local governor can approve the national strategic special district for foreigner lodging facility management business operators,<sup>204</sup> excluding these operators from the regulatory requirements of the Hotel Business Act.<sup>205</sup>

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<sup>193</sup> *Id.* art. 53.

<sup>194</sup> *Id.* art. 54.

<sup>195</sup> *Id.* art. 55.

<sup>196</sup> *Id.* art. 56.

<sup>197</sup> *Id.* art. 59.

<sup>198</sup> *Id.* art. 57.

<sup>199</sup> *Id.* art. 58.

<sup>200</sup> *Id.* art. 61.

<sup>201</sup> *Id.* art. 62.

<sup>202</sup> Act No. 107 of 2013.

<sup>203</sup> *Id.* art. 13, para. 1.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* art. 13, para. 4. Note that these operators are supposed to offer a room based on a rental contract rather than a lodging contract. *Id.* art. 13, para. 1.

The National Strategic Special District Act Enforcement Order specifies the requirements for approval, limiting the operation to facilities within the special district, and mandating guests to stay longer than the statutory minimum of three to ten days, depending upon the local government ordinance.<sup>206</sup> It also requires a minimum room size, locks, adequate ventilation, sunlight, room light, air-conditioning, and basic room components, including a bathroom, bed, table, chair, and closet.<sup>207</sup> It further requires the operator to maintain room cleanliness and provide instructional information in foreign languages, a sign-in book, adequate explanation beforehand to neighbors, and adequate response to the complaints from neighbors, as well as other requirements.<sup>208</sup> But these requirements are less demanding compared with the requirements for hotels.

#### *F. Future of Airbnb in Japan*

The Private House Lodging Business Act took effect on June 15, 2018 and made it lawful for homeowners who notified the local governor to allow paying guests to stay in their private homes for a maximum of 180 days per year.<sup>209</sup> Under this Act, private house lodging business operators must implement safety and sanitary standards similar to those of budget inns.<sup>210</sup> As an entity, Airbnb has to register with the head of the Tourism Agency, and is required to obey all the requirements of a private house lodging broker business operator.<sup>211</sup> Most importantly, Airbnb may not offer illegal services, or broker contracts for guests with respect to illegal services.<sup>212</sup> As a result, Airbnb will not be able to lawfully

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<sup>206</sup> Kokka senryaku tokubetsu kuikihō sekourei [National Strategic Special District Act Enforcement Order], Cabinet Order No. 99 of 2014, art. 12.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Juutaku shukuhaku jigyohō no sekoukijitsuwo sadameru seirei [Cabinet Order to Stipulate on the Enforcement Date of the Private House Lodging Business Act], Cabinet Order No. 272 of 2017.

<sup>210</sup> Private House Lodging Act, art. 5 & 6. They are also obligated to secure comfortable and convenient stays for foreign visitors. *Id.* art. 7.

<sup>211</sup> *See supra* notes 193-199.

<sup>212</sup> *See supra* note 199 and accompanying text. Airbnb thus now requires the notification number for hosts to list their properties. *See* Kaori Kitagawa, *How to legally host on Airbnb in Japan: A mini guide*, RETHINK TOKYO (Jun. 13, 2018) <https://www.rethinktokyo.com/2018/06/13/how-legally-host-airbnb-japan-guide> [<https://perma.cc/A47X-QGDL>], *citing Tokku minpaku to wa? Nintei yōken ya meritto. demeritto o kaisetsu [What is special zone national accommodation? Explanation of certification requirements and merits / demerits]*, MINPAKU.BIZ, <https://min-paku.biz/tokku> [<https://perma.cc/H8NS-AVJD>] (last visited Feb. 5, 2019); *Private Lodging Business Operators*, MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM: MINPAKU, [https://www.mlit.go.jp/kankocho/minpaku/business/host/index\\_en.html](https://www.mlit.go.jp/kankocho/minpaku/business/host/index_en.html) [<https://perma.cc/FL35-UW8M>] (last visited Feb. 5, 2019).

accepting registration of private homeowners who had not lawfully notified as private house lodging business operators.

The legalization of the private house lodging industry is a breakthrough for Airbnb and similar — and similarly controversial — platforms. It also benefits homeowners, who can legally profit from renting their properties for short-term stays. On the other hand, the notification and regulatory requirements that homeowners who hope to become private house lodging business operators face are somewhat burdensome, and the 180-day annual limitation could amount to a serious restriction for individuals who want to capture the value of their homes. Furthermore, it is also possible that local ordinances could serve as a bar to operation.<sup>213</sup> As a result, the new regulations may potentially preclude private house lodging altogether. We cannot know whether this in fact is the case until we have seen how the government actually interprets the new Act, nor can we fully understand the interaction between other Japanese laws and the Act until it has truly come into force.<sup>214</sup>

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<sup>213</sup> The City of Kyoto, for example, introduced much stricter requirements, including: a special restriction in residential areas to only allow rentals between January 15 and March 16; a requirement that private houses be used residences for at least three months; a requirement that managers and/or landlords conduct in-person interviews of guests and either live in the property or within 10 minutes thereof so as to respond to emergencies; and a requirement to that the applicant report that he or she has not offered an illegal hotel service in the 3 months prior to notification. CITY OF KYOTO, MINPAKU NIKAKAKAWARU KYOTOSHI NO DOKUJI RULE [UNIQUE RULES OF KYOTO CITY TOWARD THE PRIVATE HOUSE LODGING] (2018), <http://www.city.kyoto.lg.jp/hokenfukushi/cmsfiles/contents/0000233/233773/shiryou2.pdf> [<https://perma.cc/DW7Y-9L8V>]; see generally Kyoto, Japan, Kyotoshi juutaku shukuhaku jigyou no tekiseina un-ei wo kakuhosuru tameno sochi nikansuru jourei [Ordinance to Ensure the Adequate Operation of Private House Lodging Business], <http://www.city.kyoto.lg.jp/hokenfukushi/cmsfiles/contents/0000233/233644/zyuhaku-zyorei.pdf> [<https://perma.cc/F2ZN-FFUB>].

<sup>214</sup> Hotels may not unreasonably refuse service to customers, but, whether private house lodging business operators face similar common carrier obligations is unclear. While the United States provides for federal and state means of enforcing civil rights violations which might also apply to Airbnb, there is no generally applicable Japanese civil rights legislation banning unreasonable private discrimination and the Private House Lodging Business Act contains no ban on discrimination. See Madison Park, *Former Airbnb Host Fined \$5,000 for Refusing Asian American Guest*, CNN (July 14, 2017, 5:55 AM), <http://www.cnn.com/2017/07/14/us/airbnb-host-fine-asian-comment/index.html> [<https://perma.cc/XY8J-5ZBP>] (discussing U.S. legal protections against unreasonable discrimination in the Airbnb context). In the absence of an explicit ban, therefore, whether such unreasonable discrimination is illegal is of some doubt. There are also uncertainties as to whether and what insurance coverage a private house lodging operator may need. Where a guest causes a fire and destroys a house, for example, we know that the guest will only be liable for damages if they were grossly negligent, but we cannot be sure that traditional fire insurance will cover non-negligent guests' damages, especially where the legal status of the

As of July 13, 2018, there were 5,867 private house lodging business notification applications were pending and 4,410 accepted applications,<sup>215</sup> which is far fewer than one may have expected given the number of Airbnb registrations before the Private House Lodging Business Act took effect.<sup>216</sup> Some have speculated that the Private House Lodging Business Act's numerous restrictions have left many homeowners reluctant to file applications.<sup>217</sup> Some even claim that the new Act is likely to "stifle Airbnb . . . and other home-sharing business . . . and force many homeowners to stop offering their services."<sup>218</sup> On the other hand, some certain hosts still list accommodations on Airbnb illegally, with

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homeowner's rental operation is unclear. Shikka no sekinin nikansuru hōritsu [Act on Negligent Fire Liability], Act No. 40 of 1899. Most of the hotels have hotel liability insurance in order to be registered as hotels fit to accept foreign guests, Kokusai kankō hotel seibihō [Act to Facilitate Hotels to Accept Foreign Guests], Act No. 279 of 1949, art. 4, para. 2, art. 18, para. 2; Kokusai kankō hotel seibihō sekoukisoku [Regulation to Enforce the Act to Facilitate Hotels to Accept Foreign Guests], Ministry of Land, Infrastructure, Transp. & Tourism Regulation No. 3 of 1993, art. 2, para. 2 (mandating the copy of the hotel liability insurance policy as a requirement for registration), but as Airbnb listings are not hotels, it is possible that they may not qualify for such insurance. Moreover, not many Japanese people carry private liability insurance, though such liability insurance is offered as additional coverage of fire insurance or automobile insurance. Press Release, Value Press, Shougaihoken/ kojimbaishousekinin hoken no kanyu joukyo nikansuru anke-to [Survey on the Injury Insurance and Liability Insurance] (Feb. 4, 2015), <https://www.value-press.com/pressrelease/137188/> [<https://perma.cc/NCE8-JGZQ>] (reporting the results of a survey into Japanese trends in liability insurance coverage, including the fact that only 33.8% of respondents carried liability insurance coverage). While some Japanese insurance companies offer policies geared specifically to private homeowners who rent their homes for private house lodging, e.g., Minpaku senyo hoken [Private House Lodging Insurance], BRIGHT REACH, <https://minpaku-hoken.jp> [<https://perma.cc/GJN9-DZEU>] (last visited Jan. 27, 2019), the specific protections of such policies are unclear, as is the degree to which individual owners have subscribed to such coverage since there is no mandate to carry such insurance coverage to operate the private house lodging. As a result, operators might incur significant liability to their guests, whose damages might not be fully covered.

<sup>215</sup> Interview with Tamura, Tourism Commissioner, Japan Tourism Agency (July 18, 2018, 4:00 PM), [http://www.mlit.go.jp/kankocho/page01\\_000588.html](http://www.mlit.go.jp/kankocho/page01_000588.html) [<https://perma.cc/FK6W-ER75>].

<sup>216</sup> See AIRSTAR, *supra* note 150.

<sup>217</sup> Yasushi Takada, *Minpaku shinpou gamaneita daikonran [Chaos Triggered by the Private House Lodging Business Act]*, SB BUS.+IT (July 6, 2018), <https://www.sbbi.jp/article/cont1/35138> [<https://perma.cc/8E5S-NTNG>] (pointing out the hardship and complexity associated with registration).

<sup>218</sup> Junko Fujita, *In Japan, New Rules May Leave Home-sharing Industry out in the Cold*, REUTERS (Apr. 22, 2018), <https://www.reuters.com/article/us-japan-airbnb/in-japan-new-rules-may-leave-home-sharing-industry-out-in-the-cold-idUSKBN1HU06C> [<https://perma.cc/6ZKY-68AS>].

some, for example, using false notification numbers to list their properties.<sup>219</sup> It is entirely predictable that Airbnb will face pressure to adopt measures to prevent such illegal listings. That said, given the demand for room-sharing services in Japan,<sup>220</sup> and the current enforcement mechanism of the Private House Lodging Business Act,<sup>221</sup> it is unlikely that the government can effectively eliminate room-sharing services. Still, this will cast doubt on both the ability of the new system to significantly contribute to increased private house lodging availability as well as the sustainability of Airbnb in Japan.

Private house lodging in condominiums may pose a further issue. The MLIT published a model condominium management agreement, which gives the condominium's management association the authority to decide whether to allow condominium owners to operate a private house lodging business, even if the operator plans to file notification under the Private House Lodging Business Act.<sup>222</sup> The MLIT recommended that these agreements explicitly allow or prohibit such use.<sup>223</sup> The MLIT further advises that the management association specify certain conditions for the use of condominiums as a private lodging business: whether private lodging is only allowed only when the owner still lives in the condominium, whether the owner is required to notify the management association of such use, and whether advertisements for private lodging are banned

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<sup>219</sup> Hideaki Kitami & Hideaki Ishiyama, *Aibnb site de kaku no todokede bango keisai [Fake Registration Number Is Used in Some of the Airbnb Listings]* ASAHI SHIMBUN (June 21, 2018), <https://www.asahi.com/articles/ASL6N5JLYL6NULFA01V.html> [<https://perma.cc/7RNA-8JRV>].

<sup>220</sup> See *supra* text accompanying note 178.

<sup>221</sup> A private house lodging management business operator who operates without lawful registration is clearly violating the statute and subject to criminal punishment. Private House Lodging Business Act, art. 72, item 1. But it looks like there is no criminal punishment on the private house lodging business operator who operates without lawful notification or private house lodging broker business operator who operates their business without registration (a private house lodging business operator who submits false information for registration and a private house lodging broker business operator who obtained registration by improper methods could be subject to criminal punishment. *Id.* at art. 72-73. However, the private house lodging business operator who provided the private house lodging service without lawful notification may be charged with violating the Hotel Business Act. See *supra* note 124. Moreover, it looks like there is no criminal punishment on private house lodging business operators or broker business operators who ignore an order to revise their business practices (it is only when they ignore a suspension order that they could face criminal punishment. *Id.* at art. 73, item 2; *id.* at art. 74).

<sup>222</sup> See MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, *supra* note 137.

<sup>223</sup> MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, MANSION HYOUJUN KANRI KIYAKU OYOBI DOU COMMENT [COMMENTS TO THE STANDARD CONDOMINIUM MANAGEMENT AGREEMENT] 1 (2017), <http://www.mlit.go.jp/common/001216248.pdf> [<https://perma.cc/LRF9-T89L>].

when use as a house lodging business is prohibited.<sup>224</sup> Those entering into condominium management agreements after the enactment of the Private House Lodging Business Act are encouraged to follow this model agreement form. The extent to which condominium owners will be willing to allow private lodging remains to be seen. For those agreements already signed, any revisions need the approval of three quarters of all owners.<sup>225</sup> Since these existing agreements do not specifically permit or prohibit private lodging, they are bound to raise difficult legal questions on the permissibility of private lodging under the current agreements.<sup>226</sup>

On the other hand, national strategic special district foreigner lodging facility operation businesses may be more promising. The national strategic special districts for private house lodging have started operations quite efficiently. As of March 2018, there were already more than 700 facilities approved, totaling approximately 2,600 rooms.<sup>227</sup> They might owe their popularity to the comparably fewer restrictions on their operation.<sup>228</sup> Although the facilities are also available to Japanese guests, only facilities in these special districts can be used for private house lodging. However, the number of available rooms in these special districts is still far smaller than the number of Airbnb registrations before the new statute took effect.

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<sup>224</sup> *Id.* at 1-2.

<sup>225</sup> Condominium Act, art 31.

<sup>226</sup> One survey of the national association of management association indicated that roughly one-fourth of associations believe that any private house lodging is impermissible under the existing agreements, and only 4.3 percent of management associations are thinking about introducing a clause explicitly permitting private lodging. Nat'l Ass'n of Mgmt. Ass'ns, *Private Accommodation Questionnaire*, ZENKANREN (June 30, 2017), <http://www.zenkanren.org/topics.html#1-20170630> [<https://perma.cc/8VNP-VEZ9>]. Further, 29.9% of such association plan to ban any private lodging. *Id.* After liberalization, condominium owners who wish to apply for private house lodging registration must submit their condominium's management agreement along with their application. *Id.* If the agreement does not contain a ban on such lodging, the local government will treat the application accordingly — *i.e.*, the management association had to ban private house lodging prior to private house lodging's becoming liberalized. *Id.*

<sup>227</sup> Cabinet Office, *Kokka senryaku tokku: Tokku minpaku nitsuite* [*National Strategic Special District: Private Lodging Special District*], KOKKA SENRYAKU TOKKU: TOKKU MINPAKU NITSUITE (May 29, 2018), [https://www.kantei.go.jp/jp/singi/tiiki/kokusentoc/pdf/shiryou\\_tocminpaku.pdf](https://www.kantei.go.jp/jp/singi/tiiki/kokusentoc/pdf/shiryou_tocminpaku.pdf) [<https://perma.cc/6VJK-UJ97>].

<sup>228</sup> See *supra* text accompanying notes 202-208.

## III. LESSONS FROM UBER AND AIRBNB'S EXPERIENCES IN JAPAN

A. *Why Airbnb but not Uber?*

As both Airbnb and Uber are disruptive, platform-based, technologies, that the Japanese government accepted Airbnb while rejecting Uber is interesting. Both brought radical changes to traditional industries. Both technologies are paradigmatic of the “sharing economy” in that they allow individuals to profit by offering services utilizing their private effects. Both have faced strong industry opposition, the grounds of which has centered on customer safety and employee welfare. Nevertheless, the end result in Japan is different.

One difference might be the degree to which the industry in question is already regulated. While hotel regulations are broad, they are still far less strict than taxi regulations, which are comparably intrusive and pervasive. For example, the government is concerned about competition in the taxi industry inasmuch as it can set minimum fares, which it can compel violators to conform to, and further maintains the power to restrict the number of taxis operating in a given area.<sup>229</sup> Further, while the operation of a “white plate taxi” has consistently been subject to criminal punishment, violations of the Hotel Business Act rarely result in criminal sanctions.<sup>230</sup> Given that, it is possible that the government did not want to disrupt the regulatory order of heavily-regulated taxi industry.

Another factor may be that an overwhelming majority of Airbnb users are foreigners, while Japanese and foreign customers alike use Uber.<sup>231</sup> Thus, the

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<sup>229</sup> See *supra* notes 47-51, 53-56 and accompanying text. One important difference is regulatory agency at issue: the MLIT has oversight over the taxi industry and the MHLW has oversight over the hotel industry. Compare text accompanying *supra* note 3 with text accompanying *supra* note 116. Further, operation of a taxi business requires a Minister's permit, whereas operation of a hotel business only requires a permit from local governor. Compare text accompanying *supra* note 5 with text accompanying *supra* note 123. As the Minister is a member of the cabinet and appointed by the Prime Minister, NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 68, it follows that mandating that an operator secure a Minister's permit signals a stronger commitment to regulation than does mandating that an operator secure a local governor's permit. Of course, the punishments available for violation of each are different. Compare text accompanying *supra* note 24 with text accompanying *supra* note 124.

<sup>230</sup> *Shiro taku “rimujin” yōgi , rentakā shachōra yon nin taiho aichi kenkei [Aichi Prefecture Police Arrest Four For Operating a White Plate Taxi “Limousine”]*, SANKEI (Feb. 1, 2018, 14:40), <https://www.sankei.com/west/news/180201/wst1802010063-n1.html> [<https://perma.cc/V4XA-UJTE>]. However, with the increase of illegal private house lodging facilities, the police came to crack down some operators. *Minpaku, tonaide mukyoka de eigyo no utagai: Keishichou ga 6nin shorui souken [Private House Lodging Operators Suspected of Business Operation without Permit: Six Persons Were Sent to Prosecutors from the Police]*, NIHON KEIZAI SHIMBUN (July 13, 2016), [https://www.nikkei.com/article/DGXLASDG13H6H\\_T10C16A7CC0000/](https://www.nikkei.com/article/DGXLASDG13H6H_T10C16A7CC0000/) [<https://perma.cc/7SPU-CNS9>].

<sup>231</sup> Foreigners account for 93% of all Airbnb users, whereas only 30% of Tokyo's Uber users have been foreigners. See *Airbnb*, MINPAKU.NIZ (Oct. 5, 2018), <http://min->

Japanese government's willingness to allow foreign tourists to use Airbnb-type room-sharing services makes sense — and is consistent with its willingness to loosen regulations in order to cater to foreign visitors.<sup>232</sup> The government's strong commitment to increasing the number of foreign tourists could very well lead to further deregulation.

A third factor may be the degree to which each industry opposed the disruptive technology in question. Uber faced strong, organized, opposition from the taxi industry insiders and drivers, whereas Airbnb likewise faced comparably less intense opposition.<sup>233</sup> On the other hand, while no industry actively supported the liberalization of Uber, homeowners and the real estate industry, together with the tourism industry, supported the liberalization of — or at least showed their willingness to accept — private house lodging, along with the associated growth in business opportunities.<sup>234</sup>

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paku.biz/list/airbnb [https://perma.cc/6MH7-QF9Q]; *Ride-sharing no kiseikanwa: Hounichi gaikokujin kankokyaku no kotsu shudan e* [Deregulation on Ride-Sharing: Transportation Method for Foreign Visitors], SHARING ECONOMY LAB (Apr. 28, 2016), <http://sharing-economy-lab.jp/share-ride-law-tourist> [https://perma.cc/A4D4-HUUN].

<sup>232</sup> The Japanese government has set a goal of increasing the number of foreign sight-seeing visitors to 40 million by 2020. *Hounichi gaikokujin ryokousha no ukeire kankyou seibi* [On Increasing the Foreign Sight-seeing Visitors to Japan], MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM (June 11, 2018), <http://www.mlit.go.jp/kankocho/shisaku/kokusai/ukeire.html> [https://perma.cc/B6DA-SS3T]. This is a truly ambitious goal, since the number of foreign visitors in 2015 was about 20 million. MINISTRY OF LAND, INFRASTRUCTURE, TRANSP. & TOURISM, TOURISM VISION SUPPORTING JAPAN TOMORROW (Mar. 30, 2008), <http://www.mlit.go.jp/common/001126601.pdf> [https://perma.cc/R26B-K32D].

<sup>233</sup> Compare DAILY HIRE/TAXI INFORMATION, *supra* note 76 (vowing to oppose any proposal legalizing ride-sharing), with JAPAN HOTEL ASS'N, *supra* note 159 (expressing opposition to the legalization of private house lodging for a fee, but not going so far as to call for a total ban).

<sup>234</sup> See *supra* note 178 and accompanying text. The real estate industry in particular has a strong connection with the ruling LDP, and thus has a very strong influence upon LDP policy-making. See MINPAKI.BIZ, *supra* note 178. Further, the Japan Association of New Economy — an association of e-business companies and Internet platforms, led by Mr. Hiroshi Mikitani, president of the largest Internet shopping mall in Japan, the Rakuten — has strongly supported liberalization of businesses in the sharing economy, see JAPAN ASS'N OF NEW ECONOMY, *supra* note 101, has had influence on matters of regulatory reform, including influence over Prime Minister Abe, though it remains a small voice in the over-all business circle. See, e.g., *Rakuten's Hiroshi Mikitani believes PM Abe's policies are the right direction for Japan*, FOREIGN CORRESPONDENTS' CLUB OF JAPAN (Sept. 30, 2013), <http://www.fccj.or.jp/news-and-views/club-news-multimedia/285-hiroshi-mikitani-representative-director-japan-association-of-new-economy.html> [https://perma.cc/V8SX-T5QA]. Promoters of the sharing economy created the Sharing Economy Association of Japan in 2015 — which many companies joined, but which does not yet have substantial influence over government actors. See generally SHARING ECONOMY ASS'N OF JAPAN, <https://sharing-economy.jp/ja/> [https://perma.cc/Z68B-HWCF] (last visited Jan. 29, 2019).

Fourth, even when there is a very strong industry opposition, acceptance in the general public might win out. Uber and Airbnb both offer convenient and cheap services, but do so without protections attendant to years of government regulation. The difference in the acceptance of deregulation in two new business technologies might thus reflect some hesitance in the Japanese public to tolerate the deregulation, and might further reflect the Japanese public's being more concerned with the safety of ride-sharing than with the safety of private home lodging.

That said, there appears to be no legitimate, principled reason to accept one new business while rejecting the other.

### *B. Development of New Technologies and the Law*

The law has the ability to kill the development of new technologies and business models, but it also has the capacity to accept and facilitate the positive changes that such developments make possible.

The law has shuttered a number of innovative business models, including music-sharing services such as Napster.<sup>235</sup> Under Japanese law, music sharing-services such as File Rogue were found to infringe copyright and were therefore shut down.<sup>236</sup> Similarly, Japanese courts found television program transfer services such as Maneki TV and Rokuraku II to unlawfully infringe copyright. Maneki TV used Sony transmission hardware to allow its customers to stream television programs through the Internet, which the Japanese Supreme Court determined amounted to publicly transmitting, and thereby infringing, copyrighted television programs.<sup>237</sup> Rokuraku II likewise permitted customers to record and watch television online, but in doing so was found to be recording and publicly transmitting copyrighted broadcasts as to infringe the copyright of the broadcasting companies.<sup>238</sup> Additional novel Japanese businesses have faced the same fate, including a service which digitized customers' books at their request.<sup>239</sup> Even private use of photocopy machines in convenience stores or photocopy

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<sup>235</sup> See generally, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001).

<sup>236</sup> Tokyo Kōtō Saibansho [Tokyo High Ct.], Mar. 31, 2005, Hei 16 (ne) no. 446, [http://www.courts.go.jp/app/files/hanrei\\_jp/643/009643\\_hanrei.pdf](http://www.courts.go.jp/app/files/hanrei_jp/643/009643_hanrei.pdf) [<https://perma.cc/G3TN-ZSGY>].

<sup>237</sup> Saikō Saibansho [Sup. Ct.], Jan. 18, 2011, Hei 21 (ju) no. 653, 65:1 Saikō SAIBANSHO MINJI HANREISHU [MINSHŪ] 121 (3rd petty bench).

<sup>238</sup> Saikō Saibansho [Sup. Ct.], Jan. 20, 2011, Hei 21 (ju) no. 788, 65:1 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 399 (1st petty bench).

<sup>239</sup> Tōkyō Kōtō Saibansho [Tokyo High Ct.], Oct. 22, 2014, Hei 25 (ne) no. 10089 (finding copyright infringement), [http://www.courts.go.jp/app/files/hanrei\\_jp/579/084579\\_hanrei.pdf](http://www.courts.go.jp/app/files/hanrei_jp/579/084579_hanrei.pdf) [<https://perma.cc/RA2W-RKZJ>], *dismissing appeal from*, Saikō Saibansho [Sup Ct], Mar. 16, 2016, Hei 27 (ju) no. 167 (2nd petty bench).

shops might constitute copyright infringement and face closure in the future.<sup>240</sup> Moreover, there's some question as to whether providing cloud services is legal under Japan's Copyright Act.<sup>241</sup>

It seems as though the Japanese government and copyright lawyers are not concerned with the law impeding the introduction of new technologies. In such a climate, one needs not wonder why technological development seems to take place in the West, but not in Japan. So long as Japan remains reluctant to change, it is highly unlikely that it will serve as fertile ground for innovative, unprecedented technology.

### *C. Changes Introduced by New Technologies, even when Shut Down*

The development of new business models based on emerging technologies can still bring change, even if dated regulation stifles emerging technologies. For instance, though Uber was unable to operate as it would elsewhere, it still brought application-based taxi dispatch services to Japan — allowing individuals to request a taxi, see that taxi's location, and pay for their ride, all from their smartphone.<sup>242</sup> Now, many major taxi companies incorporate these features in their online dispatch and appointment services.<sup>243</sup> Moreover, in some areas, taxi companies now cooperate to offer joint dispatch services to customers.<sup>244</sup>

Uber brought about these significant changes, even though it was practically excluded from major Japanese markets. It thus contributed to the modernization

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<sup>240</sup> Chosakkukenhō [Copyright Act], Act No. 48 of 1970, art. 30, para. 1, item 1. The Copyright Act permits reproduction for personal use, but excludes reproductions made on public photocopiers. *Id.* This does not extend — at least for the time being — to such devices when used exclusively for reproduction of documents or pictures. *Id.* Addendum, art. 5-2. As a result, right now, convenience stores or photocopy shops can provide photocopy machines for general public use and users can make reproductions using these machines, provided those reproductions are for personal use. However, an increasing number of copyright organizations have called for removal of this addendum provision, and thus, extension of this exception. NIHON SHOSEKI SHUPPAN KYOUKAI /NIHON ZASSHI KYOUKAI [JAPAN BOOK PUBLISHERS ASS'N & JAPAN MAGAZINE ASS'N], CHOSAKUKENHŌ HUSOKU 5-2 NO SAKUJO NITSUITE [REMOVAL OF COPYRIGHT ACT ADDENDUM 5-2] 7 (2011), [http://www.bunka.go.jp/seisaku/bunkashingikai/chosakuken/hosei/h23\\_03/pdf/shiryo\\_4.pdf](http://www.bunka.go.jp/seisaku/bunkashingikai/chosakuken/hosei/h23_03/pdf/shiryo_4.pdf) [<https://perma.cc/9YY6-J54B>]. If this proposal is adopted, neither convenient stores nor copy shops would be able to provide photocopy machines for the general public use. *Id.* at 8.

<sup>241</sup> Shigenori Matsui, *Don't You Want to Watch Television Programs Aired in Your Country While You Are Abroad?: Broadcasting, Reproduction, Public Transmission and Copyright*, 2015 U. ILL. J.L., TECH. & POL'Y 1, 37 (2015).

<sup>242</sup> See KEITAI WATCH, *supra* note 96.

<sup>243</sup> See, e.g., *Kantan sōsa de rakuraku haisha [Easy distribution by easy operation]*, NIHON TAXI, <https://nippon-taxi-grp.co.jp/taxi/sumahai/> [<https://perma.cc/3Z9S-TYP6>] (last visited, Jan. 27, 2019).

<sup>244</sup> *About*, JAPANTAXI, <https://japantaxi.jp> [<https://perma.cc/JNC8-72QV>] (last visited Jan. 27, 2019).

of the industry, and the introduction of more convenient services for customers. Nevertheless, it is doubtful that these are the only benefits that Uber could or might have otherwise brought.

#### *D. Alternatives to Trying to Shut Down New Businesses*

Many welcomed these new technologies and businesses because of the convenience and benefits they offered to users. So long as there is a demand for these new technologies, it will be very difficult to eradicate them. For instance, even though Maneki TV and Rokuraku II were found to be infringing copyright, illegal streaming services are still prevalent on the Internet.<sup>245</sup> Many customers prefer Uber because they have serious dissatisfaction with the existing taxi industry, and the government regulations that support the industry.<sup>246</sup> So long as customers patronize Uber's services, it is unlikely that simply shutting down those services will cure that dissatisfaction.<sup>247</sup> Likewise, Airbnb has clearly popularized the notion that private homeowners might profit by charging guests a fee to staying in their houses or rooms. Even if the introduction of strict regulations might stifle the widespread use of services like Airbnb in Japan, so long as there is demand, individual homeowners might still try to unlawfully offer such services without satisfying the new regulations. As regulation does not address market demand, it will not stem provision of such services.

Therefore, the law will have to face further challenges in the future. The government might attempt to kill these new services, but if they have widespread

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<sup>245</sup> AJ Dellinger, *Illegal Streaming: More Than Half Of Millennials Are Still Watching Content Illegally*, INT'L BUS. TIMES (Apr. 12, 2017, 8:07 PM), <https://www.ibtimes.com/illegal-streaming-more-half-millennials-are-still-watching-content-illegally-2524775> [<https://perma.cc/6JTU-CHGC>].

<sup>246</sup> JAPAN ASS'N OF NEW ECON., RIDE SHARE SHINPO NO TEIAN [PROPOSAL FOR THE RIDE-SHARE NEW LEGISLATION] 8, 16-21(2018), [https://jane.or.jp/assets/img/pdf/ride-sharing\\_proposal\\_2018.pdf](https://jane.or.jp/assets/img/pdf/ride-sharing_proposal_2018.pdf) [<https://perma.cc/F9E7-W9NG>] (arguing for the enactment of new legislation to introduce ride-share and in doing so, pointing out that critical shortages of both taxi drivers and taxis, rapid aging, and public frustration regarding the current state of the Japanese taxi industry).

<sup>247</sup> Indeed, Uber is popular in China and it appears that a significant number of Chinese "white plate taxis" are already offering services at the major airports in Japan for Chinese tourists. *Chuugokushiki Shiro Taku* [*White Number Plate Taxi in Chinese Style*], MAINICHI SHIMBUN (Aug. 27, 2017), <https://mainichi.jp/articles/20170827/ddn/041/040/008000c> [<https://perma.cc/Z3FU-UCSM>]. Recently, the police started cracking down on these business operators. *Chuugokushiki Shiro Taku Tekihatsu: Hounichikyaku Mukeni Unkou Yougi* [*Chinese-style White Plate Taxi Cracked Down: Suspected of Offering Service for Chinese Visitors*], SANKEI WEST (Oct. 31, 2017), <http://www.sankei.com/west/news/171031/wst1710310070-n1.html> [<https://perma.cc/8NVK-XBPS>]. But there is a question of whether the police can wipe out all these white plate taxi operations.

public support, it may be better for the government to acquiesce to the development of new technologies rather than to shut them down. Although the Constitution of Japan guarantees the right to choose one's occupation,<sup>248</sup> thereby protecting economic liberty,<sup>249</sup> the courts should probably use the rationality test — the Japanese variant of rational basis review — to review the constitutionality of the economic regulation.<sup>250</sup> Since there are at least plausible reasons to sustain the taxi regulations and hotel regulations, therefore, the courts should not strike them down as unconstitutional. However, whether the government should stick to traditional regulatory models as a matter of legislative policy when facing the development of the new technologies and new services, is surely open to debate. The “sharing economy” that Uber and Airbnb typify is capable of radically transforming society and stimulating the economy.<sup>251</sup> Were government to regulate such companies as they do traditional industries, it might stifle the potential economic development of this emerging sharing economy. In light of this risk, it is far better to set traditional regulation aside and allow new technologies to develop with close government monitoring, leaving the possibility for the development of sensible regulation tailored to the specific context of the sharing economy.

### CONCLUSION

The development of the Internet has allowed for new companies to offer various new services to customers. Some of these services have brought about radical changes to old business practices, and have had to face strong industry opposition. The government must choose whether to enact laws or apply existing regulations shutting these services down, or to accept them and facilitate further

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<sup>248</sup> NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 22 (setting out one's freedom to choose their occupation).

<sup>249</sup> Saikō Saibansho [Sup. Ct.], Apr. 30, 1975, Shouwa 43 (gyo-tsu) no. 120, 29:4 Saikō SAIBANSHO MINJI HANREISHU [MINSHŪ] 572 (grand bench) (explaining that the freedom to choose one's occupation includes freedom to engage in said chosen occupation).

<sup>250</sup> *Id.* Much like the U.S. constitutional law doctrine of rational basis review, the rationality test demands that an economic regulation amount to a rational means of accomplishing some legitimate governmental end. Todd W. Shaw, *Rationalizing Rational Basis Review*, 112 NW. U. L. REV. 487, 519 (2017). It presumes that the regulation at issue is constitutional, and the party opposing the regulation bears the burden of proving otherwise. *See id.* If the necessity and rationality of the regulation is debatable, courts defer to the judgments of the legislature. *Id.* Despite criticism — some of which calls for a shift to closer scrutiny — this will probably be the test employed in coming years. *See generally* David Bernstein, *The Due Process Right To Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. F. 287 (2016), [www.yalelawjournal.com/forum/the-due-process-right-to-pursue-a-lawful-occupation](http://www.yalelawjournal.com/forum/the-due-process-right-to-pursue-a-lawful-occupation) [<https://perma.cc/2K57-BRST>].

<sup>251</sup> Darcy Allen & Chris Berg, *The Sharing Economy: How Over-Regulation Could Destroy an Economic Revolution*, 25 INST. PUB. AFF. (2014), [https://www.parliament.vic.gov.au/images/stories/committees/SCEI/Ride\\_Sourcing/Submissions/Submission\\_145\\_-\\_Institute\\_of\\_Public\\_Affairs\\_Attachment\\_1.pdf](https://www.parliament.vic.gov.au/images/stories/committees/SCEI/Ride_Sourcing/Submissions/Submission_145_-_Institute_of_Public_Affairs_Attachment_1.pdf) [<https://perma.cc/H3B8-35QM>].

technological changes. So far, the Japanese government has been rather reluctant to accept new changes, apart from allowing Airbnb to operate under tight regulation. The future will tell whether this response was appropriate or not, but one thing is certain: so long as there is a strong demand, it will be very difficult to stem the tide of new technologies and business practices. In order to promote innovation and further development of the Internet and new technologies, it would be much wiser for the government to accept such developments and focus its efforts on allowing these new services to operate in a responsible manner. The law should not be killing the development of new technologies. The lessons that could be learned from Japan would provide an important insight on the possible legal response to the new technologies.