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NEWSLETTER

2018 Autumn issue

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The Newly Published Sample Investment Limited Partnership Agreement: An Amendment of the Former Model Agreement for Venture Capital Funds

Kayoko Naito
naito@ohebashi.com

Ⅰ. Introduction

An investment limited partnership ("LPS") is a partnership established under the Investment Limited Partnership Act (the "LPS Act"),[1] which is mainly used as a vehicle for private equity funds (whose objective is to invest in unlisted equities) ("PE Funds"), including venture capital funds (whose objective is to invest in venture capital) ("VC Funds").

With respect to the investment limited partnership agreement, which is an agreement to establish an LPS ("LPS Agreement"), the Ministry of Economy, Trade and Industry ("METI") previously published a model agreement in November, 2010 (the "2010 Model Agreement"). Since then, the 2010 Model Agreement has been widely used in establishing domestic PE Funds in the form of an LPS.

Nevertheless, while the 2010 Model Agreement covered the entire range of PE Funds, the practices and other matters specific to VC Funds were not reflected therein. Furthermore, after the announcement of the 2010 Model Agreement, updates to laws inside and outside Japan, including amendments to the Financial Instruments and Exchange Act in Japan (the "FIEA"), as well as changes in economic circumstances, took place.

Under the foregoing circumstances, on April 2, 2018, METI published the "Sample of the Investment Limited Partnership Agreement and the Commentary Thereon" (the "Sample Agreement") after a thorough consultation with venture capitalists, institutional investors, legal advisors, auditing firms, etc. This was a new project of METI to update the 2010 Model Agreement. Our firm was involved in this project as the sole supporting law firm.

The Sample Agreement was prepared mainly for VC Funds, but it was also made to correspond with the laws that were updated after the 2010 Model Agreement was announced. In this sense, the Sample

Agreement is expected to have a large influence on all types of PE Funds.

Ⅱ. LPS

An LPS is established through an LPS Agreement concluded between a general partner, which is the entity that will manage the fund ("General Partner"), and one or more limited partners, who will make contributions to the fund ("Limited Partners").[2] The business objectives of an LPS are limited to those prescribed in Article 3, paragraph 1 of the LPS Act (e.g., investment in securities, etc.). To conduct such business, the partners (General Partner and Limited Partners) will make capital contributions, and the profits therefrom are then distributed among them.

Ⅲ. Commentary on the Sample Agreement (Major Differences with the 2010 Model Agreement)

We introduce below some of the major amendments that were made in the Sample Agreement.

(1) Method of Making Capital Calls

Under the LPS scheme, each partner makes its contributions to the LPS, and the proceeds thereof are then used for the business. An LPS generally employs the capital call method to collect capital contributions whereby when a request for contribution is made by the General Partner, each partner will make a capital contribution to the LPS up to the amount committed by such partner ("Capital Commitment").

Under the 2010 Model Agreement, capital calls may only be made if the use of the proceeds (namely, the purpose of investing in a specific project, etc.) is designated. However, in the case of a VC Fund, the amount to be invested in one target is not necessarily large and, in some situations, investments are made in a short time. Therefore, the Sample Agreement employs the method of making calls for capital contributions of up to the amount of the Capital Commitment, at the discretion of the General Partner, without designating any specific investment project as a purpose.

(2) Incorporation of the Amendments to the FIEA (Concerning Specially Permitted Businesses for Qualified Institutional Investors, etc.)

The General Partner's act of soliciting potential investors to invest in its LPS as a Limited Partner (self-offering) as well as its act of

managing the assets of an LPS by investing mainly in securities (self-management) fall under the category of Financial Instruments Business as defined in the FIEA. Accordingly, a General Partner is, in general, required to be a registered Financial Instruments Business operator (Type Ⅱ Financial Instruments Business operator and Investment Management Business operator).[3] However, at this point, if Limited Partners, i.e., the counterparties of the self-offering and self-managing General Partner, are limited to Qualified Institutional Investors, etc. only ("QII, etc."),[4] and if the General Partner has filed a notification to conduct Specially Permitted Businesses for Qualified Institutional Investors ("SPBQII"; and the person who made such filing, the "SPBQII Operator"), then such General Partner may engage in the above-described acts without filing an application to register as a Financial Instruments Business operator.[5]

In terms of the regulations concerning SPBQII, the amendments to the FIEA in 2015, which came into force in March, 2016, changed such regulations by making them stricter. Among such amendments, the following three are the most important points reflected in the Sample Agreement:

(a) First, the scope of "QII, etc.," who are eligible to invest in the funds solicited and managed through an SPBQII, was redefined to (i) one or more Qualified Institutional Investors, and (ii) 49 or less specific investors who are not Qualified Institutional Investors but are able to invest in an SPBQII ("SPBQII Investors"). Prior to the amendment, item (ii) was not required.
(b) Second, the restrictions on the activities of an SPBQII Operator were increased.
(c) With respect to funds that satisfy the requirements of VC Funds (to be discussed below), the scope of SPBQII Investors was enlarged and certain restrictions on their activities were reduced.

(3) Provisions to Satisfy the Requirements of VC Funds

Since the Sample Agreement was prepared on the condition that an LPS must satisfy the requirements of a VC Fund, the provisions of the latter were incorporated in the Sample Agreement. Among other things, in case of a transaction of assets between funds that satisfy the requirements of VC Funds (which requirements have been reduced), such transaction will be valid only if the following requirements are met: (a) an explanation of such transaction has been made to all Limited Partners, and (b) the approval of the Limited Partners holding at least two thirds of the outstanding interests in the LPS has been obtained.

(4) Response to Revisions to Legal Systems other than the FIEA

The Sample Agreement was also made to correspond with laws and regulations, other than the FIEA, that were revised after the announcement of the 2010 Model Agreement. Accordingly, the following provisions were added or revised:

(a) Additional items for confirmation due to amendments to the Criminal Proceeds Transfer Prevention Act were reflected;

(b) The clause to eliminate anti-social forces was revised based on the anti-social forces sample clause released by the Japanese Bankers Association; and

(c) Provisions imposing on the Limited Partners an obligation to cooperate with the General Partner, and to make representations and warranties, were added so that the General Partner can take procedures to comply with FATCA (the Foreign Account Tax Compliance Act for the reporting of information on accounts held by U.S. taxpayers, etc.) and CRS (the Common Reporting Standard for the automatic exchange of financial account information of foreign residents among OECD member states).

(5) Valuation Rules for the Market Value of Investment Assets

Pursuant to Article 8 of the LPS Act, an LPS must prepare its financial statements and be audited each fiscal year and, in the supplementary schedule of its financial statements, information on the market prices of the investment assets held by the LPS needs to be stated.

The sample valuation rules for the market value of investment assets, which are attached as an exhibit to the Sample Agreement, describe the following two examples of valuation methods. An LPS must choose the proper method based on its situation.

(a) The same valuation method prescribed in the 2010 Model Agreement; or

(b) The method of obtaining fair value calculated in accordance with the IPEV Guidelines (the International Private Equity and Venture Capital Valuation Guidelines), which are globally used as practical guidelines for the valuation of investment assets of VC Funds.

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1. Act No. 90 of June 3,1998.
2. The LPS Act, art. 2, para. 2.
3. FIEA, art. 29.
4. FIEA, art. 63, para. 1(1).
5. FIEA, art. 63, para. 2.

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Legislation for the Promotion of Work Style Reform

Akiko Ishida
a-ishida@ohebashi.com

Ⅰ. Introduction

The "work style" reform bill was enacted on June 29, 2018, and promulgated on July 6, 2018. In Japan, there has been a culture to regard working long hours as a virtue, but it is now considered a major challenge for the country to ensure work-life balance by correcting the prevailing practice of working long hours.

The work style reform legislation comprises of amendments to several laws. This article outlines the amendments to the Labor Standards Act (the "Current LSA"),[1] focusing especially on the revised rules on working hours.[2]

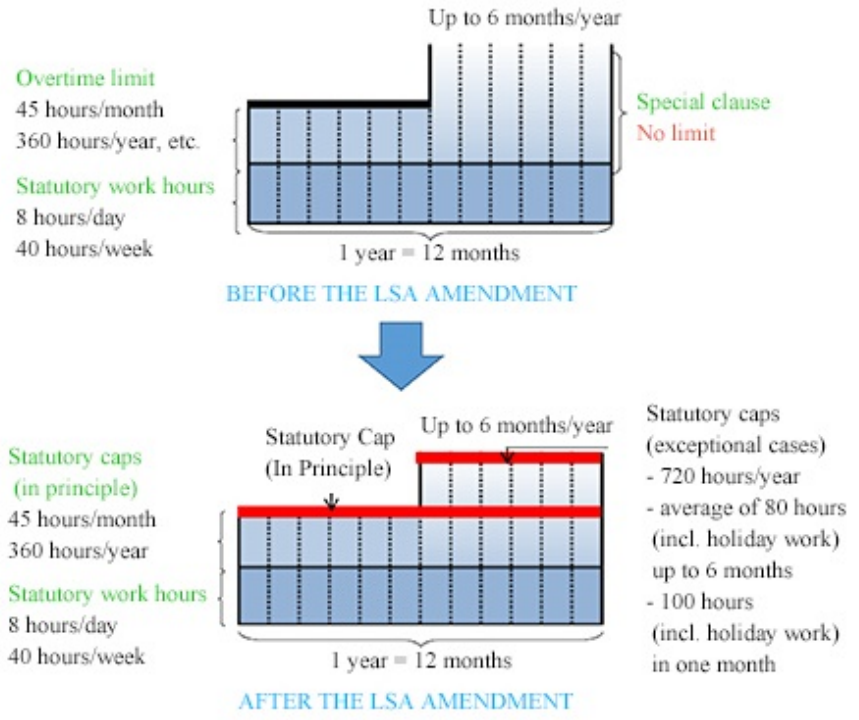
Ⅱ. Correction of the Practice of Working Long Hours

1. Introduction of Overtime Caps

Under the Japanese system, for an employer to have its employees work overtime or on holidays, it must first conclude a management-labor agreement known as an "Article 36 Agreement" (*saburoku kyotei* in Japanese) concerning working overtime and/or on holidays at the relevant workplace, and then file the said agreement with the government authority.[3]

Formerly, the standards established by the Ministry of Health, Labour and Welfare ("MHLW") regulated the upper limit of overtime. However, the standards were often criticized for effectively tolerating unlimited overtime because, unlike laws, the standards are not legally binding *per se*, and permit an Article 36 Agreement to include a special clause that allows the employer to require employees to work overtime in excess of the limit in special circumstances.

For these reasons, the amended LSA (the "Amended LSA") introduced legal caps on overtime of 45 hours a month and 360 hours a year, in principle, which are applicable to all industries with certain exceptions. If there are special circumstances, then the caps would be 720 hours a year, 100 hours (including work on holidays) for one month, and an average of 80 hours (including work on holidays) per month for two to six months a year.[4] These overtime limits reflect the results of the historic agreement between the Japan Business Federation or "*Keidanren*," a powerful business lobby group in Japan, and the Japanese Trade Union Confederation or "*Rengo*," the largest national trade union center.[5]



Source: Ministry of Health, Labour and Welfare, "Outline of the Act for Revising Related Acts for the Promotion of Work Style Reform (Act No. 71 of 2018)."

If an employer violates the limits of 100 hours (including work on holidays) for one month, and an average of 80 hours (including work on holidays) per month for two to six months, then the employer may be issued a corrective instruction by the labor standards office, or subjected to a penalty (up to six months in prison or a fine of up to JPY300,000).[6]

These new rules will take effect from April 4, 2019 (except that for small and medium-sized enterprises ("SMEs"), the amendment on the legal caps on overtime will take effect on April 1, 2020).

2. Revision of the Rule on Extra Wages for Overtime Exceeding 60 Hours a Month for SMEs

Under the Current LSA, if the total hours of overtime exceed 60 hours a month, then the employer must pay extra wages at the rate of 150% or more for the hours exceeding 60 hours.[7] Although the rule took effect on April 1, 2010, SMEs were exempted from its application for the time being.[8] The Amended LSA revised this rule and abolished the exemption.

This revision, together with the introduction of overtime caps (see Part 1 above), will have a major impact on the labor management of SMEs, which make up a majority of the enterprises in Japan. The amended rule will take effect on April 1, 2023. The relevant enterprises are expected to make efforts to reduce overtime work during the period allowed before the effective date.

3. Ensuring that Employees Take a Certain Number of Days of Paid Annual Leave

Under the Japanese system of annual paid leave, employees are entitled to decide whether or not, and when to take their annual leave.[9] This is a unique system under the labor law of Japan, which is different from the system in European countries where employers are entitled to decide such matters.

However, according to the General Survey of Working Conditions in 2017 of the MHLW, the number of days of annual paid leave taken in Japan was an average of only nine days per employee and the rate of annual paid leave taken was only 49.4% for private companies with 30 or more regular employees (and an average of 10.6 days or 55.3% for companies with 1,000 or more employees). These figures are lower than those of other countries.

In view of such situation, for employees entitled to 10 days or more of annual paid leave, the Amended LSA obliges employers to specify when such employees should take their leave (up to five days) every year, unless the relevant employee specifies such dates.[10]

The foregoing rule will take effect on April 1, 2019.

Ⅲ. Achievement of Diverse and Flexible Working Styles (Creation of a "Highly Professional" Work System)

The amendments described above concern the restrictions on ordinary employees whose work practices fit within the working hour rules,

including the restriction on overtime. However, some employees have wide discretion over their work, and therefore, their work practices do not fit within such rules. The Current LSA provides for a "discretionary work system"[11] of working hours for the latter employees.[12] However, this discretionary work system is a "deemed working hours system," and does not exempt such employees from the restrictions on overtime. Therefore, it was sometimes argued that there was no working hours system suitable for employees who preferred to be appraised based on their results rather than their hours worked.

In response to the above argument, the Amended LSA created the so-called "highly professional" work system. Under the new system, when employees, whose job descriptions are set out clearly and earn more than a certain annual income (at least JPY10 million), perform duties that satisfy certain requirements, such as those requiring high-level expertise, then such employees are exempted from the working hours rules, holidays, extra wages for work during night hours and the like, on the condition that the relevant employers take certain health measures, such as ensuring that the employees have 104 non-working days a year, that each of them consent to working under this system, and that the management-labor committee adopts certain resolutions, among other things.

Employees have persistently and strongly criticized this "highly professional" work system as a "zero overtime pay system." Thus, employers are expected to carefully and properly confirm each employee's willingness to work under this system, and ensure the implementation of health measures for the employees as required by the law.

Ⅳ. Conclusion

In the amendment process, a proposal to expand the scope of the discretionary working system was dropped, but the arguments concerning such expansion persist. The employment and labor laws of Japan will continue to undergo major reforms. We will write about these relevant issues at another time.

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1. Rodo kijyun ho [Labor Standards Act], Law No. 49 of April 7, 1947, as amended by Law No. 31 of May 29, 2017.
2. Another major issue of the new legislation is the improvement of employment conditions for non-regular employees, which will also have a large impact on employment practices.
3. Current LSA, art. 36(1).
4. Amended LSA, art. 36(4) to (6).

5. *See* S. Takada, Historic Agreement on Upper Overtime Limits, Newsletter, Oh-Ebashi LPC & Partners, 2017 Summer Issue.
6. Amended LSA, arts. 36(6) and 119.
7. Current LSA, art. 37(1).
8. Current LSA, art. 138.
9. Current LSA, art. 39(5).
10. Amended LSA, art. 39(7).
11. Under the discretionary working system, employees engaging in certain specialist or discretionary jobs are deemed to have worked a predetermined number of hours regardless of the actual number of hours worked, as established in the management-labor agreement of the relevant workplace (Kazuo Sugeno, Labor Law,11th ed., rev., p. 519).
12. Current LSA, art. 38-4.

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The New Law on Integrated Resorts in Japan

Yoichiro Ono
y-ono@ohebashi.com

Ⅰ. Introduction

Integrated resorts ("IRs") established and operated with originality and ingenuity by private business operators ("IR Operators") have become quite successful in Singapore and other countries. Seeking to achieve similar success, the Act on Promotion of Development of Specified Complex Tourist Facilities Areas (the "Act")[1] was passed in Japan in July, 2018. This article outlines the Act that aims to promote the IR business in Japan.

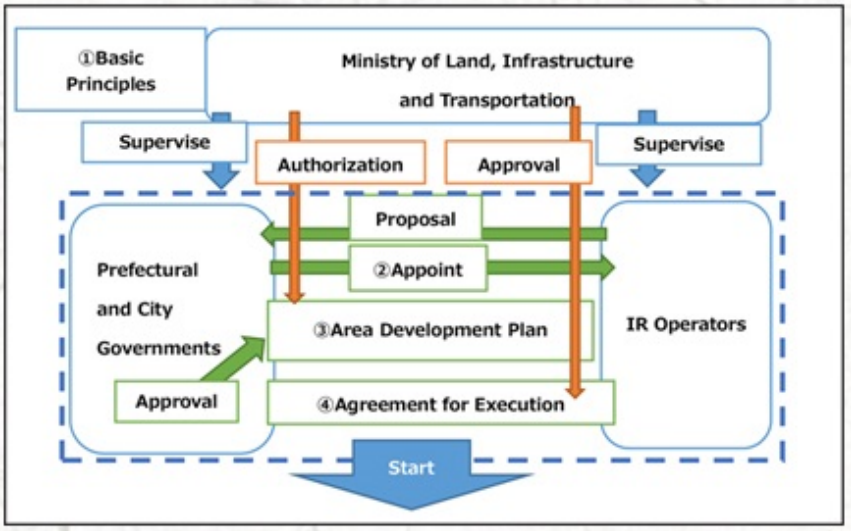
Ⅱ. Overview of the Act

1. The process of starting an IR business

The complex tourist facilities ("IR Facilities") specifically allowed to be established under the Act are complex facilities integrating and consisting of casino facilities, hotel facilities, convention and conference facilities, and recreation facilities, established and operated as a unit by an IR Operator.[2] IR Facilities may be established in up to three areas in Japan.[3]

The process of starting an IR business, including the opening of IR

Facilities, consists of the following steps: (a) compliance with the basic principles published by the Ministry of Land, Infrastructure and Transportation ("MLIT"), (b) soliciting and appointment of a potential IR Operator by each prefectural government, city government and government-designated city (the "Prefectural and City Governments"), and the compiling and joint application of an area development plan (i.e., the plan for the development of an IR Facility area) thereafter by the Prefectural and City Governments, and the appointed IR Operator, (c) approval of the area development plan by the MLIT, and (d) the signing of an agreement by the Prefectural and City Governments, and the IR Operator to start the IR business.



Before starting the IR business, the IR Operator must prepare a business plan, obtain the consent thereto of the Prefectural and City Governments, submit it to the MLIT, and publish it.[4] The same procedure applies to changes to the said business plan. Also, IR Operators are prohibited from starting the part of the IR Facilities that relates to the casino business in advance.[5]

2. Operation of the IR Business

(1) Overview of the IR Business

The national government, and the Prefectural and City Governments will supervise the whole IR business, and the Casino Administration Committee will specifically supervise the casino business. While the entire IR business and casino business must be conducted by the IR Operator itself, the hotel and recreation businesses may be subcontracted under certain conditions. The IR Facilities and the limited proprietary rights over the land thereof may be owned by the IR Operator itself or leased by a third party, in which case the latter will be regulated as a certified facility service operator and facility landowner. Moreover, manufacturers of casino-related machines and equipment serving the casino business are controlled under certain

regulations.

(2) The IR Operator

The IR business is composed of complex businesses such as the casino business and the hotel business. The IR Operator must process the accounting separately for casino services, casino-related services and hotel services. Such accounting information and important matters related to each business must be reported to the MLIT.[6]

a. Casino business regulations

An IR Operator can engage in the casino business only if it obtains a license from the Casino Administration Committee. Such license is valid for 3 years.

The Act defines the casino business as being composed of (i) casino services, and (ii) designated financial services (e.g., currency trading through a banking institution, accepting deposits from customers, offering loans to customers and foreign exchange services). The IR Operator must obtain approval from the Casino Administration Committee whenever it changes the casino facility/division, types of casino activities, management, as well as availability and content of the designated financial services.

Subcontracting the casino business to a third party, other than the management of the maintenance and repair of casino-related machines and equipment, is prohibited.

b. Shareholders

As mentioned in note 2 below, the IR Operator will most likely be set up as an SPC, which is a form of joint venture. Any party holding more than 5% of the shares of the IR Operator must obtain approval as a major shareholder from the Casino Administration Committee. Moreover, shares in the IR Operator must be subject to conditions such as restrictions on the transfer thereof.[7]

3. Leasing of IR Facilities and limited proprietary rights to the land thereof

If the IR Operator leases the IR Facilities or casino facilities, or the limited proprietary rights over the land thereof, then the tenant must obtain a license or be regulated under the approval system as an IR Facilities service operator, casino facilities service operator or certified facility landowner. Furthermore, the IR Facilities service operator must sign a business agreement with the IR Operator to ensure the unity of the IR business. The casino facilities service operator will be subject

to similar restrictions as the casino operator, such as having to obtain the consent of the Casino Administration Committee before it may sign certain agreements.

4. Manufacturers of casino-related machines and equipment
A person who manufactures, imports, distributes or repairs casino-related machines and equipment must obtain a license from the Casino Administration Committee for each type of these activities. Moreover, manufacturers of such machines and equipment must obtain a license for each manufacturing site, not just for each legal entity.

The Act will be a big influence not only on the enterprises involved in the IR business, but also on the tourism industry and other related industries.

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1. Act No. 115 of December 26, 2016.
2. For this reason, IR Operators are forbidden from doing any business other than the establishment and operation of IR Facilities (Act, art. 18). Thus, it is envisaged that several entities will invest in and form a special purpose company ("SPC"), which will become the IR Operator that will establish and operate the IR Facilities as a unit.
3. Act, art. 9.11.7.
4. Act, arts. 16.1 and 16.3.
5. Act, art. 17.2.
6. Act, art. 28.
7. Act, art. 64.1.
8. Act, art. 143.

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