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Historic Agreement on Upper Overtime Limits

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1. Introduction

On March 13, 2017, the Japan Business Federation or "Keidanren," which is a powerful business lobby group in Japan, and the Japanese Trade Union Confederation or "Rengo," which is the largest national trade union center, reached an agreement on upper overtime limits (the "Agreement").¹ This is one of the biggest achievements of the "work-style" reforms being promoted by Prime Minister Shinzo Abe and his Cabinet, and will be the most significant reform to have taken place in the 70-year history of the Labor Standards Act ("LSA").

2. Regulatory framework of working hours in Japan

Generally speaking, the maximum regular working hours under Japanese law is forty (40) hours per week and eight (8) hours per day. At least one day per week must be provided as a statutory rest day.² The LSA prohibits employers from requiring employees to work in excess of the legally prescribed working hours and on rest days. Since the LSA works not only as a civil law but also as a penal law,³ employers and its officers in charge of the management of human resources can be subject to fines for violations of this overtime regulation.⁴

However, pursuant to Article 36, paragraph 1 of the LSA, employers can remove this ceiling on overtime and the restriction on rest-day work by entering into a labor-management agreement, known as an "Article 36 agreement," with the representative of the majority of the employees, and filing such agreement with the labor standards inspection office.⁵ While the Minister of Health, Labor and Welfare

may and does establish standards for administrative guidance regarding the extension of overtime hours pursuant to paragraph 2 of the said article (the "Overtime Standards"), such Overtime Standards do not constitute an alternative and absolute ceiling for overtime work.⁶ In other words, to date, no specific legal upper overtime limits have been imposed on companies that have concluded Article 36 agreements.

3. Dangers of overtime culture

According to a research by the Ministry of Health, Labor and Welfare,⁷ although full-time Japanese employees still work more than two thousand hours per year, Japan's per capita productivity is lower than other major countries including the United States ("U.S."). Long working hours leave workers little time to spend with their families or friends, and harm their work-life balance. Furthermore, it is broadly understood that longtime work might cause brain, heart and/or mental diseases, and sometimes lead to a worker's death by overwork or "karoushi."

From the legal perspective, these work-related issues are basically covered by the worker's accident compensation insurance. However, unlike the U.S. worker's compensation system in which an employee's recovery is limited to the benefits specified in the relevant statutes,⁸ an employer in Japan is not exempt from responsibility for the portion of the loss that exceeds the amount of the insurance benefit.⁹ In this field, many decisions of the Supreme Court and other lower courts in favor of employees or their heirs have accumulated for more than twenty years. Reducing employees' long working hours has been recognized as a priority in Japan.

4. The historic agreement

The Agreement states that the upper limit on overtime should be 45 hours a month and 360 hours a year, which originated from the recent Overtime Standards. The Agreement also points out that an upper limit of 100 hours a month may be allowed in exceptional circumstances. This framework for reform will be incorporated into law in due course.¹⁰ In pursuing their businesses, companies in Japan will be required to review employees' work styles and the companies' working hours' management systems to ensure compliance with the new overtime regulatory requirements.

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1. See the press release of Keidanren at <http://www.keidanren.or.jp/policy/2017/018.html> (in Japanese).
 2. Rodo kijyun ho [Labor Standards Act], Law No. 49 of April 7, 1947, art. 32, para. 1 and art. 35, as last amended by Law No. 31 of May 29, 2017.
 3. Ibid., art. 119.
 4. Daisuke Mure and Ryotaro Yamamoto, Japan, Global Legal Insights Employment & Labour Law, 5th Edition, Global Legal Group, 2017, 139 p.
 5. Rodo kijyun ho [Labor Standards Act], art. 36, para. 1.
 6. Kazuo Sugeno, Rodoho [Employment Law], Kobundo, 11th rev. ed., 2017, 489 p.
 7. The website of the Cabinet at http://www.kantei.go.jp/jp/singi/hatarakikata/pdf/sankou_h290328.pdf.
 8. Jeffery M. Hirsch, et al., Understanding Employment Law, 2nd Edition, Lexis Nexis, 2013, 2 p.
 9. Kazuo Sugeno, Rodoho [Employment Law], Kobundo, 11th rev. ed., 2017, 630 p.
 10. Statements and comments of Mr. Sadayuki Sakakibara, Chairman of the Keidanren at <http://www.keidanren.or.jp/en/speech/kaiken/2017/0321.html>. He also stated that Keidanren and Rengo do not represent all business organizations and trade unions. Therefore, the circumstances of enterprises and organizations not belonging to both of them must be taken into consideration in dealing with upper overtime limits.

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Recent Tightening of Enforcement of the Subcontract Act



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Overview of the Subcontract Act

The authorities recently strengthened the enforcement of the "Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors"¹ (the "Subcontract Act"). The purpose of the Subcontract Act is to protect subcontractors from unfair conduct by "main subcontracting entrepreneurs," who are counterparties to such subcontractors and have a strong bargaining position against them. The Subcontract Act provides four obligations and 11 prohibitions for

main subcontracting entrepreneurs. The Subcontract Act is considered supplemental to the regulation of the "abuse of dominant bargaining position" under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade² (the "Japanese Antitrust Act"). The Japan Fair Trade Commission ("JFTC") and the Small and Medium Enterprise Agency ("SMEA") are the government authorities that enforce the Subcontract Act and regularly conduct investigations into violations thereof. The Subcontract Act is certainly applicable to Japanese subsidiaries of foreign companies. On the other hand, its applicability to the foreign companies themselves is controversial. It may not be theoretically impossible, but according to the SMEA, the authorities do not currently enforce the Subcontract Act against foreign companies.³

Contracts subject to the Subcontract Act

The application of the Subcontract Act is determined by two factors: (i) type of contract, and (ii) capital or total contributions ("Capital") of the parties to the contract. There are four types of contracts to which the Subcontract Act applies: "manufacturing contract," "repair contract," "information-based product creation contract" and "service contract." A typical manufacturing contract is a contract under which a main subcontracting entrepreneur outsources the manufacturing of its products to a subcontractor. In a manufacturing contract, for example, the Subcontract Act applies when the main subcontracting entrepreneur's Capital is more than 300 million yen and the subcontractor's Capital is no more than 300 million yen (or the subcontractor is an individual business owner), or when the main subcontracting entrepreneur's Capital is more than 10 million yen and not more than 300 million yen, and the subcontractor's Capital is not more than 10 million yen (or the subcontractor is an individual business owner).

Obligations of main subcontracting entrepreneurs

There are four obligations of main subcontracting entrepreneurs under the Subcontract Act. One of the most important obligations is to issue an order in writing containing the details of the work under the contract, the amount of payment, the date of payment, the method of payment and other matters ("Obligation to issue written orders"). This means that verbal orders are not allowed in contracts to which the Subcontract Act applies. This is because verbal orders frequently cause disputes between the parties over the terms and conditions of

the contract, and in such a case, subcontractors are more likely to be disadvantaged due to their weaker bargaining position. Another important obligation is to prepare records from the stage of ordering to the completion of a contract, and to keep them for two years ("Obligation to prepare and keep records"). Such records are intended to prevent disputes over contracts between the parties and enable authorities to conduct prompt and accurate investigations.

Prohibitions for main subcontracting entrepreneurs

There are 11 prohibitions for main subcontracting entrepreneurs under the Subcontract Act. The top three violations found by the JFTC in 2016 were (i) failing to make a payment to a subcontractor by the due date ("Delay in payment"), (ii) unjustly setting the price significantly lower than the ordinary price ("Setting a significantly low price"), and (iii) reducing the amount of payment without the subcontractor being at fault ("Reducing payment").⁴ Delay in payment means that a main subcontracting entrepreneur does not make a payment to a subcontractor by the due date, which must be set within 60 days after the main subcontracting entrepreneur receives the subcontractor's work. Setting a significantly low price is when, for example, a main subcontracting entrepreneur decides to significantly lower existing prices without sufficient consultation with the subcontractor. As another example, it may also be considered as Setting a significantly low price if a subcontractor requests a raise in the price due to a hike in materials and/or energy costs but the main subcontracting entrepreneur rejects it without sufficient consultation with such subcontractor. Reducing payment is when, for example, a main subcontracting entrepreneur plans discount sales for its products and deducts all or part of the discounted amount from the amount of the payment to the subcontractor. It should be noted that it does not matter whether the subcontractor agrees to such deduction or not. Generally speaking, in the context of the prohibitions under the Subcontract Act, the subcontractor's consent or agreement will not be a defense to a violation.

Sanctions in case of violation

The Subcontract Act provides a fine of up to 500,000 yen for a violation of the Obligation to issue written orders or the Obligation to prepare and keep records. On the other hand, the sanction for a violation of a prohibition is an instruction (kankoku). Fines and instructions, in practice, apply only to severe violations⁵ where, for

example, subcontractors suffer great losses. In less severe cases, the authorities may provide guidance (shidou) to correct a violation. An instruction is a serious sanction for main subcontracting entrepreneurs because it is publicly disclosed on the JFTC's website, which damages their reputation. In addition, although an instruction is not binding in itself, if the main subcontracting entrepreneurs do not voluntarily follow it, then the JFTC may issue more serious and binding orders under the Japanese Antitrust Act such as cease and desist orders and/or surcharge payment orders.

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1. Act No. 120 of June 1, 1956.
 2. Act No. 54 of April 14, 1947.
 3. Questions & Answers for Small and Medium Businesses, SMEA. Retrieved on May 1, 2017 from http://www.chusho.meti.go.jp/keiei/torihiki/shitauke/110/1_1.htm#q13.
 4. Enforcement of the Subcontract Act and Actions for Fair Corporate Transactions in 2016, JFTC, May 24, 2017. Retrieved on May 26, 2017 from <http://www.jftc.go.jp/houdou/pressrelease/h29/may/170524.files/290524.pdf>.
 5. The number of cases of instructions in 2014, 2015 and 2016 are 7, 4 and 11, respectively. See List of Instructions in 2014, 2015 and 2016, JFTC. Retrieved on May 1, 2017 from <http://www.jftc.go.jp/shitauke/shitaukekankoku/index.html>.

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Liability for Damages from Automated Vehicle Accidents in Japan



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1. Advent of automated vehicles

There is increasing competition in the automobile industry, which has extended to information technology ("IT") companies, to develop more convenient, better and safer automated vehicles. There is also competition among Europe, United States ("U.S."), China, Japan and

other countries concerning the infrastructure for automated vehicles. Each country is trying to invite innovation in automated vehicles by deregulating public road laws or lowering legal risks for manufacturers. In Japan, the government made a policy called "ITS (Intelligent Transport Systems) Framework by Public and Private Sectors" in 2014, revised it in 2015, and announced the latest "ITS Framework by Public and Private Sectors: Road Map 2016" in May 2016. This road map reveals Japan's goal to allow automated vehicles in highways and automated vehicles without drivers in limited places by 2020 when the Tokyo Olympic Games are scheduled to be held. Discussions on the legal issues related to automated vehicles have started.

2. Who pays for the damages from traffic accidents involving automated vehicles?

(1) In Japan, damages resulting from a traffic accident are paid by the driver in accordance with the general rules of tort law. As a requirement, the tortfeasor (driver) must be at fault, i.e., he/she acted either with intent or negligence. At Level 2 or Level 3 of automation,¹ the driver may be responsible for the damages resulting from a traffic accident because the driver has a duty to monitor the driving environment. On the other hand, the driver may not be held responsible if the driver is allowed to rely on the automated system. At these levels, the extent to which the driver is allowed to rely on the automated system depends on its technical credibility. The more credibility the system has, the less responsible the drivers will be for damages. Technical credibility will be enhanced gradually but, perhaps, rapidly. At more than Level 4, the person who is in the automobile, but who is not expected to drive, shall not be responsible for damages because he/she no longer has any duty to monitor, etc.

(2) In the U.S., it is being argued that the risk of payment of damages from traffic accidents will shift from drivers to manufacturers of the automated systems, i.e., the liability for damages from traffic accidents will shift from the drivers under the tort theory to manufacturers under the product liability theory. Generally speaking, Japan has the same legal structure as in the U.S. Under the Product Liability Act of Japan,² a person in an automobile is allowed to rely on the automated system thereof, thus, he/she is not responsible for the accident. If the system has a defect that caused the accident, then the manufacturer of the automated vehicle will be responsible for the damages resulting from the traffic accident. However, in Japan, the victim (plaintiff) has

difficulty in meeting the burden of proof of the existence of the defect. Since there is no discovery in the civil procedure of Japan, it is difficult for victims to collect good evidence of the defect. It is also difficult for victims to discover what the defect is in a complicated automated system that uses a highly developed quality of technique. The precedents show that it is very difficult for consumers to win product liability cases. In Japan, although the legal structure is the same and the risk shift is theoretically possible as in the U.S., it is not likely that such risk shift from drivers to manufacturers will happen in Japan.

(3) The weakness of the enforcement of product liability laws in Japan does not necessarily mean that traffic accident victims involving automated vehicles are left without a relief. Japan has had a mandatory automobile liability insurance system since 1955. The Automobile Liability Security Act³ was enacted to provide relief to traffic accident victims by securing for them payment from the mandatory automobile liability insurance fund for damages resulting from a death or injury. Every automobile operated in Japan should be covered by this insurance paid for by the owner. Under the said Act, a person who "operates" an automobile shall, if he/she causes death or injury to another person while operating the automobile, be liable to compensate for the damages arising from operating the automobile, except where it is proven that such person or driver exercised due care in operating the automobile and that there was no defect in the structure or function of the automobile. The automobile owner is almost always construed to "operate" the automobile for his/her use. Under precedents, it is very unusual for a person who operated the automobile to succeed in proving that the driver exercised due care in operating the automobile. Also, it is much more difficult to prove the existence of a defect in an automobile under this Act compared to product liability cases. Thus, it is highly possible that even if a driver is not liable under tort theory and the defect in the automated system is not discovered, the automobile owner will still be liable and the damages will be paid by the insurance under this Act.

(4) The current mandatory automobile liability insurance may not be a perfect solution for automated vehicle accidents. There are problems, i.e., the coverage of damages is limited to a certain amount, only for death or injury, etc. If necessary, in order to enhance the legal infrastructure to encourage the automated vehicle industry and accommodate the new situation of automated vehicle accidents, it would be relatively easier to amend the Act.

1. According to SAE International, there are four levels of automation, namely: "Level 0 (the human driver does everything); Level 1 (an automated system on the vehicle can sometimes assist the human driver conduct some parts of the driving task); Level 2 (an automated system on the vehicle can actually conduct some parts of the driving task, while the human continues to monitor the driving environment and performs the rest of the driving task); Level 3 (an automated system can both actually conduct some parts of the driving task and monitor the driving environment in some instances, but the human driver must be ready to take back control when the automated system requests); Level 4 (an automated system can conduct the driving task and monitor the driving environment, and the human need not take back control, but the automated system can operate only in certain environments and under certain conditions; and Level 5 (the automated system can perform all driving tasks, under all conditions that a human driver could perform them)."

2. Act No. 85 of July 1, 1994.

3. Act No. 97 of July 29, 1955.

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Supreme Court Decision on the Fifth Requirement of the Doctrine of Equivalents - DKSH Japan K.K. et al. v. Chugai Pharmaceutical Co. Ltd. (the "Maxacalcitol Case")¹



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1. Background

Chugai Pharmaceutical Co. Ltd., the appellee (plaintiff in the first instance), who holds the patent in question (the "Patent") for an invention titled "intermediates for the synthesis of vitamin D and steroid derivatives and process for preparation thereof," alleged that (i) the manufacturing process of DKSH Japan K.K., et al., the appellants (defendants in the first instance) (the "Appellants'

Process"), of the maxacalcitol preparations, etc. (the "Appellants' Products"), imported and sold by them is equivalent to the invention claimed in Claim 13 of the Patent (the "Invention"), and (ii) the sale, etc., of the Appellants' Products infringes the Patent. Based on this allegation, the appellee filed the original action against the appellants to seek an injunction against the import, assignment, etc., of the Appellants' Products and the disposal thereof.

The Invention is a process for preparing a compound wherein an intermediate is prepared by having the starting material react with a specific reagent, and the objective substance is prepared by treating the intermediate with a reducing agent. The Appellants' Process fulfills the elements of Claim 13 pertaining to the reagent and the objective substance of the Invention, but does not satisfy the ones pertaining to the starting material and the intermediate of the Invention in that Claim 13 specifies the carbon skeletons of the starting material and the intermediate as a cis-form vitamin D structure, but the Appellants' Products have trans-form vitamin D structures that are geometric isomers thereof. Therefore, the appellee alleged that the Appellants' Process infringes the Patent under the doctrine of equivalents. In the current case, the Supreme Court decided based on the fifth requirement of the doctrine of equivalents (the "Fifth Requirement"). The Fifth Requirement articulated by the Supreme Court decision in the "ball spline bearing case" (introduced in part 3 of this article) is that there are no "special circumstances" such as the fact that the subject product or method had been intentionally excluded from the scope of claims during the patent application procedure for the patented invention.

2. Supreme Court decision on the Fifth Requirement of the doctrine of equivalents

The appellants alleged that the Appellants' Process does not fulfill the Fifth Requirement for the following reasons:

- (i) in cases where an alternative structure, which is outside the scope of the claims, and which a person with ordinary skill in the art can easily conceive as of the filing date of a patent as a structure that is substantially identical with the structure within the scope of the patent claims, and the applicant could thus have also easily conceived of such alternative structure as of the filing date, then it should be considered that he/she purposefully excluded such alternative structure from the scope of the claims;
- (ii) in this case, the appellee could have easily conceived of trans-

form vitamin D structures as an alternative to the cis-form vitamin D structures as of the filing date of the Patent at issue;
(iii) therefore, in cases where the starting material has a vitamin D structure in the Invention, it should be considered that the starting material was purposefully limited to cis-form materials.

The Supreme Court rejected the above allegations of the appellants, and affirmed the Intellectual Property High Court's decision that the Appellants' Process satisfies all the requirements of the doctrine of equivalents, including the Fifth Requirement, and, therefore, it infringes the Patent. The Supreme Court decided as follows:

- (i) even if the applicant could have, as of the filing date of the patent, easily conceived of a structure of the subject product that is outside the scope of the patent claims, and he/she did not include such structure within such scope, such fact alone cannot constitute as a "special circumstance" that the subject product had been intentionally excluded from the scope of the patent claims during the patent application procedure;
- (ii) in cases where the applicant could have, as of the filing date of the patent, easily conceived of a structure of the subject product that is outside the scope of the patent claims, and he/she did not include such structure within such scope, a "special circumstance" would be considered to exist only if it is objectively and externally found that the applicant indicated that he/she chose not to describe the structure in the subject product within the scope of the patent claims despite knowing that such structure is an alternative to the one described in the patent claims;
- (iii) under the relevant facts of this case, the Supreme Court did not find the circumstance that the applicant of the Patent objectively and externally indicated that it chose not to describe the difference in the Appellants' Process within the scope of the patent claims despite knowing that the trans-form vitamin D structures are an alternative to the cis-form vitamin D structures described in Claim 13.

3. Discussion

In Japan, the Supreme Court applied for the first time the doctrine of equivalents in the "ball spline bearing case."² According to the decision in the ball spline bearing case, even if the structure stated in the scope of claims partially differs from the subject product or method (the "Subject Product or Method"), the Subject Product or Method would fall within the scope of the patented invention as an equivalent to the structure stated in the scope of claims if:

- (i) the different part is not an essential part of the patented invention;
- (ii) the purpose of the patented invention can be achieved, and the same function and effect can be produced, even if the different part is substituted with the corresponding part of the Subject Product or Method;
- (iii) a person ordinarily skilled in the art to which the invention pertains could have easily conceived of the aforementioned substitution as of the time the Subject Product or Method was manufactured, etc.;
- (iv) the Subject Product or Method is neither identical with publicly known art as of the filing of the patent application for the patented invention, nor could it have been easily and presumptively conceived by a person ordinarily skilled in the art based on said publicly known art as of said filing date; and
- (v) there are no special circumstances such as the fact that the Subject Product or Method was intentionally excluded from the scope of the claims during the patent application procedures for the patented invention.

The Fifth Requirement, item (v) above, is understood as an "intentional exclusion" and "prosecution history estoppel," which estops a patentee from asserting infringement of his/her patent based on allegations that contradict his/her previous behavior. In this regard, there have been discussions whether the Fifth Requirement can be met if a patent claim is not described in such a way as to include an alternative structure that was known to a person ordinarily skilled in the art at the time of the filing date of the patent (the "Alternative Structure") when the applicant could have easily included such Alternative Structure in the scope of the claims. In this Maxacalcitol Case, the Supreme Court decided that "special circumstances," which inhibit the fulfillment of the Fifth Requirement, cannot be found based on the mere fact that the applicant did not include the Alternative Structure in the scope of the patent claims; however, "special circumstances" exist when it is objectively and externally found that the applicant indicated that he/she chose not to describe the Alternative Structure of the subject product within the scope of the patent claims despite recognizing such structure as an alternative to the one described in the patent claims ("Objective and External Circumstances").

It is commonly understood that the burden of proof for the Fifth Requirement should be on the alleged infringer. Based on the decision in the Maxacalcitol Case, therefore, the alleged infringer has to prove

the Objective and External Circumstances. Theoretically, the decision in the Maxacalcitol Case makes it more difficult for an alleged infringer to prove "special circumstances" in order to preclude the fulfillment of the Fifth Requirement. Note, however, that it remains to be seen on what grounds the courts can find the existence of such Objective and External Circumstances.

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1. Supreme Court, March 24, 2017, unreported but available at http://www.courts.go.jp/app/files/hanrei_jp/634/086634_hanrei.pdf (in Japanese).
 2. Supreme Court, February 24, 1998, 52 Minshu, No. 1, 133.

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