OH-EBASHI
大江橋法律事務所

OH-EBASHI LPC & PARTNERS NEWSLETTER

2023 Autumn Issue

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[To be published in two parts]

Recent Amendments to the Arbitration Act and the New Mediation Law concerning the Enforcement of International Mediation – Part I

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I. Introduction

Japan is promoting international alternative dispute resolution in the country. In 2003, the Arbitration Act of Japan (Act No. 138 of 2003) (the "**Arbitration Act**") was enacted. It adopted the UNCITRAL Model Law on International Commercial Arbitration (1985) (the "**1985 Model Law**"). On May 22, 2020, the Act on the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986) was amended to expand the scope of party representation in international arbitration and provide for party representation in international mediation by registered foreign lawyers in Japan and foreign lawyers from abroad. Recently, to be in line with the latest international standards, on April 21, 2023, the Arbitration Act was amended to adopt the 1985 Model Law, as amended in 2006 (the "**2006 Model Law**"), and the Act for Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (Act No. 15 of 2023) (the "**Act Implementing the Singapore Convention**") was passed.

This article is divided into two parts. This Part I will explain the amendments to the Arbitration Act while the new mediation law concerning the enforcement of international mediation will be covered in Part II, which will be featured in the next newsletter.

II. Recent Amendments to the Arbitration Act

1. The amended Arbitration Act

The Act partially amending the Arbitration Act (Act No. 15 of 2023) (the "**Amended Arbitration Act**") was promulgated on April 28, 2023, and will take effect on a date to be specified by a cabinet order, which should be a date within one year from the date of its promulgation,[1] or by April 27, 2024. Although the cabinet order has not yet been enacted, the Amended Arbitration Act will likely take effect on April 1, 2024.

2. Interim measures

(1) Article 24 of the current Arbitration Act provides for the interim measures that may be issued by the arbitral tribunal. It mirrors Article 17 of the 1985 Model Law. Except for certain matters specifically provided therein, the Arbitration Act generally applies to cases where the seat of arbitration is in Japan.[2] Thus, it authorizes the arbitral tribunal to order interim measures only where the seat of arbitration is in Japan.

1. Supplementary Provisions of Act No.15 of 2023, art. 1.
2. Arbitration Act, art. 3.

Article 24(1) of the Amended Arbitration Act now lists the following types of interim measures and their respective requirements, which are based on Articles 17 and 17A of the 2006 Model Law:

(i) First, in the case of a claim for payment of money, the disposal of or any other change to a property that is necessary for the payment can be prohibited. The requirement for this is (a) that compulsory execution is likely to be impossible, or (b) that significant difficulties are likely to arise in implementing such compulsory execution.

(ii) Second, in the case of a claim seeking the provision of property, except for a claim for payment of money as mentioned in item (i) above, the disposal of or any other change to such property can be prohibited. The requirement for this is that the exercise of such claim is likely to be impossible or extremely difficult.

(iii) Third, to avoid any substantial loss or imminent danger that would occur to the petitioner with regard to the property or relationship of rights that is the subject matter of the dispute, (a) such loss or danger can be prevented from arising or the necessary measures for such prevention can be taken, or (b) the status quo of such property or relationship of rights can be restored if it has already been changed.

(iv) Fourth, the taking of actions that would obstruct the proceedings in the arbitration proceeding can be prohibited (except for the act described in item (v) below).

(v) Fifth, the taking of actions, such as disposing, erasing or altering evidence necessary for the arbitration proceedings, can be prohibited. For a petition under this fifth measure, the petitioner does not have to make a *prima facie* showing of the existence of the rights or relationship of rights to be preserved and the fact(s) constituting the ground(s) for such petition. This corresponds to Article 17A(2) of the 2006 Model Law.

(2) Under Article 24(3) of the Amended Arbitration Act, an arbitral tribunal may only order the petitioner to provide appropriate security. This corresponds to Article 17E(1) of the 2006 Model Law. Prior to this amendment, either the respondent or the petitioner may be ordered by the arbitral tribunal to provide such security.

(3) If it is found that any ground necessary for the petition is lacking or if there is any change in the circumstances, such as when any such ground has ceased to exist, the arbitral tribunal may, upon petition, revoke, change or suspend the order for interim measures. Furthermore, in special circumstances and upon prior notice to the parties, the arbitral tribunal may revoke, change or suspend such order *sua sponte*.[3] These provisions correspond to Article 17D of the 2006 Model Law.

When it considers a change in circumstances, the arbitral tribunal may order the parties to promptly disclose whether there has been such change and, if so, the details thereof.[4] This corresponds to Article 17F(1) of the 2006 Model Law. If the petitioner does not comply with such order, then a change shall be deemed to have taken place satisfying the requirement to revoke, change or suspend the order for interim measures.[5]

(4) If the arbitral tribunal revokes, changes or suspends an order for interim measures and it finds that such order was issued due to grounds attributable to the petitioner, then upon petition of the respondent, it may order the petitioner to compensate the respondent for any damages that it may have suffered and such order for compensation shall have the effect of an arbitral award.[6] These provisions correspond to Article 17G of the 2006 Model Law.

3. Amended Arbitration Act, art. 24(4) and (5).
4. *Id.*, art. 24(6).
5. *Id.*, art. 24(7).
6. *Id.*, art. 24(8) and (9).

(5) The Amended Arbitration Act also provides for the enforcement of an order for interim measures, irrespective of whether the seat of arbitration is in Japan.

(a) For an order for interim measures that orders the taking of measures set forth in Article 24(1)(iii) (the "**Preventive or Restorative Order**"), the petitioner may file a petition with the court for the issuance of an order allowing a civil execution based on such Preventive or Restorative Order (the "**Execution Approval Order**"). The court may dismiss such petition, without prejudice, only if it finds that any of the grounds to refuse execution is present; otherwise, the court is required to issue the Execution Approval Order, unless it dismisses the petition.[7]

The grounds for refusing execution include that the arbitration agreement is not valid, that a party was unable to put up a defense in the arbitration proceeding, or that the content of the order for interim measures is contrary to public policy in Japan.[8] These provisions correspond to Article 17I of the 2006 Model Law. A civil execution based on a Preventive or Restorative Order may only be carried out if an Execution Approval Order is issued.[9]

(b) For an order for an interim measure that orders the taking of the measures set forth in Article 24(1)(i), (ii), (iv) or (v) of the Amended Arbitration Act (the "**Prohibitive Order**"), the petitioner may file a petition with the court for the issuance of an order directing the payment of money (the "**Order for Payment of Penalty**"). Any issuance of an Order for Payment of Penalty must also undergo the procedure for an Execution Approval Order and the grounds for refusing the execution are the same as mentioned above in the case of the Preventive or Restorative Order. If such Execution Approval Order becomes final and binding and the court finds that the respondent violated or is likely to violate such Prohibitive Order, then the court may issue an Order for Payment of Penalty and the petitioner may carry out a civil execution based on such Order for Payment of Penalty. The court shall decide the reasonable amount of the penalty, taking into consideration the content and nature of the interest that would be harmed by the violation of the order for interim measures as well as in what manner and to what extent that interest would be harmed.[10]

(6) The Arbitration Act did not adopt Article 17J or the court-ordered interim measures under the 2006 Model Law. Nevertheless, Article 15 of the current Arbitration Act provides that an arbitration agreement shall not preclude the parties from filing a petition for a provisional order with a court, nor does it prevent the court from issuing a provisional order, as stated in Article 9 of the 2006 Model Law.[11] The Japanese courts may issue an order for a civil provisional remedy under the Civil Provisional Remedies Act (Act No. 91 of 1989).

3. Arbitration agreement

The 2006 Model Law amended Article 7 (Definition and form of arbitration agreement) of the 1985 Model Law and provided two options: one is to broaden the requirement that the arbitration agreement should be in writing and the other is to remove such requirement. The Amended Arbitration Act adopted the former option. Article 13(4) of the current Arbitration Act adopted almost the exact same provision as Article 7(4) of the 2006 Model Law, which states that *"the requirement that an arbitration agreement be in writing is met by an electronic communication."* Furthermore, the Amended Arbitration Act has made effective an arbitration agreement written or recorded in a document or an

7. *Id.*, art. 47(1)(i) and (6)-(8).
8. *Id.*, art. 47(7)(i)-(ii), (iv) and (x).
9. *Id.*, art. 48.
10. *Id.*, arts. 47(1)(ii) and 49(1).
11. This was originally provided in the 1985 Model Law and not amended in the 2006 Model Law.

electromagnetic record, which is quoted in a contract as constituting part of it, even if such contract itself is not concluded in writing.[12]

4. Court proceedings

The current Arbitration Act limits the cases where a Japanese court may exercise its authority to those expressly set forth therein.[13] This is the same as Article 5 of the 2006 Model Law.[14] In such cases where a Japanese court may exercise its authority, the Amended Arbitration Act enables the parties to file the petitions with the Tokyo District Court and the Osaka District Court, in addition to the district court that has jurisdiction under the current Arbitration Act,[15] including a petition to issue an Execution Approval Order as mentioned above in section 2(5) of this article.

Proceedings in Japanese courts must be conducted in Japanese;[16] nevertheless, in filing a petition to issue an Execution Approval Order as well as a petition for an execution order of an arbitral award, the court may opt not to require the submission of the Japanese translation of the written order for interim measures or the written arbitral award.[17] Therefore, in the Tokyo District Court and the Osaka District Court, judges who are capable of reading English documents would be in charge of such filings and the parties would not have to submit a Japanese translation of such documents.

Parties who are considering arbitration in Japan or enforcing arbitral awards in Japan should note the developments discussed in this article.

12. Amended Arbitration Act, art. 13(6).
13. Arbitration Act, art. 4.
14. This was originally provided in the 1985 Model Law and not amended in the 2006 Model Law.
15. Amended Arbitration Act, arts. 5(2), 8(2)(ii), 35(3)(iv), 46(4)(iii) and 47(4)(iii).
16. Court Act, Act No. 59 of 1947, art 74.
17. Amended Arbitration Act, arts. 46(2) and 47(2).

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Overview of Revitalization Support for SMEs in Japan

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A. Introduction

99.7% of companies in Japan are small and medium enterprises ("**SMEs**").[1] In 2003, the Small and Medium Enterprise Agency of Japan's Ministry of Economy, Trade and Industry ("**METI**") established a public organization called the "Small and Medium Enterprise Revitalization Council" (the "**Council**") to help revitalize SMEs.

In recent years, Japanese SMEs have been severely affected by Covid-19, making it more essential that they be revitalized through the efforts of the Council. This article provides an overview of the workout options available to Japanese SMEs.[2]

B. Consultation Services

The Council provides a wide range of advisory services to SMEs concerning all stages of their business, and works with financial institutions, private experts, and various support organizations.

The Council is staffed by a project manager and several assistant managers. Its staff members come from local banks and government financial institutions, and include lawyers, certified public accountants ("**CPAs**"), certified tax accountants, SME management consultants, and other professionals.

For the consultation services, SME owners are asked to bring their financial statements, cash flow statements, etc., and the staff of the Council will consult with them for one to two hours. The key features of such consultation services are that they are free of charge and may be availed of as many times as needed, and the Council's staff is required to maintain confidentiality.

C. Revitalization Program

(1) Overview

If the Council deems it appropriate for an SME that has availed of its consultation services, the Council will initiate steps to provide specific rehabilitation support after obtaining the consent of the SME and considering the objectives of the main financial institution and other relevant parties. The benefits of receiving rehabilitation assistance from the Council include: (a) financial adjustment assistance support from the Council as a fair and neutral party in the rehabilitation assistance process, and (b) partial subsidization of the costs of expert consultants appointed by the Council in the preparation

1. These companies are considered SMEs: (a) for the manufacturing industry, companies with a capital of 300 million yen or less and 300 employees or less; (b) for the wholesale business, companies with a capital of 100 million yen or less and 100 employees or less; (c) for the service industry, companies with a capital of 50 million yen or less and 100 or less employees on a regular basis; and (d) for the retail business, companies with a capital of 50 million yen or less and 50 or less employees on a regular basis.
2. The author was on secondment to the Tokyo SMEs Revitalization Support Council from September 2018 to June 2021.

of the rehabilitation plan.

The plan prepared under this rehabilitation program includes financial assistance. There are various methods of providing financial assistance to the SME, including debt waivers for part of the loans, refinancing into capital loans (so-called debt-debt swap), and rescheduling. The main methods are (a) debt waivers through company splits or business transfers, and (b) rescheduling.

For each financial assistance program, the Council selects outside experts (CPAs, SME management consultants and lawyers). The CPAs and SME management consultants will conduct a financial and business due diligence to understand the actual status of the company, and then assist in the preparation of a business plan and a rehabilitation plan for the company. This plan must include requests for financial assistance from financial institutions. The lawyers will also prepare an investigative report on the requirements of the rehabilitation plan. The costs of such external experts may be partially subsidized by the Council.

Consent must also be obtained from all the financial institutions to a rehabilitation plan that requires their financial support. The Council will assist in coordinating with such financial institutions by holding meetings with them as may be needed. The Council's staff consists of professionals from local regional banks and other financial institutions, as well as professional experts with extensive experience in coordinating with financial institutions and can often facilitate the process of coordinating with such financial institutions more smoothly.

(2) Debt waivers through company splits or business transfers

Obtaining a debt waiver is the technique generally used when the damage to the company's business and finances is relatively significant. Through a business transfer or business split, a profitable business can be separated and transferred to a new company, leaving a portion of the loans in the old company, which would then be liquidated. The loans remaining in the old company would be finally discharged through special liquidation or other means. To obtain debt waivers from financial institutions, the guarantee obligations of the individual managers must also be liquidated. Therefore, it is common to include in the rehabilitation plan a plan for liquidating the guarantee obligations based on the "Guidelines on Management Guarantee" and to obtain the approval of all of the relevant financial institutions.

(3) Rescheduling

Rescheduling is the process of revising the repayment terms of a loan to match the actual profitability of a company. The general details of rescheduling are to first prepare a business plan and calculate the amount of annual free cash flow, and then allocate a certain percentage of that amount to repay each financial institution by prorating the balance of the loan. There are variations depending on the situation of the company. For example, if a company has barely enough working capital on hand, then the plan may be to make no principal repayments in the first year, or if essential capital investments are being planned, then the plan may take into account the funds needed for those investments.

D. Conclusion

In Japan, the government is supporting the revitalization of SMEs through the Council and by subsidizing the cost of experts.

In addition, guidelines for the early closure of a business without bankruptcy took effect in April 2022, and a framework was established for applying for subsidies for such closure. Even now, the government is developing measures to support SMEs. SMEs may want to explore their workout options with the help of the Council as well as these other measures.

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