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Recent Amendments to the Arbitration Act and the New Mediation Law concerning the Enforcement of International Mediation – Part II[1]

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I. New Mediation Law on the Enforcement of International Mediation

1. The Singapore Convention

In December 2018, the United Nations General Assembly adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "**Singapore Convention**") and authorized its signing ceremony in Singapore on August 7, 2019. This convention offers a uniform and efficient framework for the enforcement and invocation of international settlement agreements resulting from mediation. Forty-six (46) countries signed it and it entered into force on September 12, 2020 when the third instrument of ratification was deposited on March 12, 2020. As of November 8, 2023, fifty-six (56) countries have signed the Singapore Convention and twelve (12) of those countries, including Japan, have ratified it.

On June 9, 2023, the Diet of Japan approved the conclusion of the Singapore Convention and on October 1, 2023, Japan acceded to it, subject to the reservation that Japan would only apply the convention to the extent that the parties to the settlement agreement have agreed to its application under Article 8 of the Singapore Convention as explained further below in part 2(2) of this article. The Singapore Convention will take effect in Japan on April 1, 2024,[2] six (6) months after the date of the deposit of Japan's instrument of accession.[3]

2. New Act Implementing the Singapore Convention

(1) To implement the Singapore Convention, the Cabinet of Japan submitted Act No. 16 of 2023 (Act for Implementation of United Nations Convention on International Settlement Agreements Resulting from Mediation) (the "**Act Implementing the Singapore Convention**") to the Diet, which passed it on April 21, 2023. This new law will also take effect on April 1, 2024, the day the Singapore Convention takes effect in Japan.[4]

(2) Consistent with Japan's reservation under the Singapore Convention, Article 3 of the Act Implementing the Singapore Convention limits the scope of application of the Singapore Convention to cases where the parties to the settlement agreement have agreed that it can be enforced through civil execution based on the Singapore

1. Part I of this article is available at https://www.ohebashi.com/jp/newsletter/NL_en_2023autumn_Kobayashi.pdf.
2. Status: United Nations Convention on International Settlement Agreements Resulting from Mediation, available at: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.
3. The Singapore Convention, art. 14(2).
4. Supplementary Provisions of the Act Implementing the Singapore Convention, art. 1.

Convention or laws and regulations implementing the said convention, including the Act Implementing the Singapore Convention itself. Thus, if a non-Japanese company would like to enforce a settlement agreement with a Japanese company, it should stipulate therein that the parties may enforce it under the Singapore Convention.

(3) The Act Implementing the Singapore Convention, however, provides for a broader scope of application than the Singapore Convention. The Singapore Convention applies to settlement agreements where: (i) some or all of the parties have their addresses, offices or places of business in different States,[5] and (ii) the State in which some or all of the parties have their addresses, offices or places of business is different from the State in which either the place where a substantial part of the obligations under the agreement is performed, or the place with which the subject matter of the agreement is most closely connected.[6] The Act Implementing the Singapore Convention, however, will apply even to settlement agreements where some or all of the parties are persons with an address, main office or place of business outside of Japan.[7] Therefore, a settlement agreement between parties who have their places of business in the same country or in countries other than Japan would still be enforceable in Japan.

Further, the Act Implementing the Singapore Convention would apply to a settlement agreement where more than fifty percent (50%) of the issued voting shares, etc., in some or all of the parties are held by persons with an address, main office or place of business outside Japan. Accordingly, a subsidiary of a non-Japanese company in Japan may enforce a settlement agreement with a Japanese company in Japan under the Act Implementing the Singapore Convention. The presence of such foreign element would also make this an international mediation case under Article 2 (xiv) of the Act on the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986), which now permits party representation in international mediation cases by registered foreign lawyers in Japan and foreign lawyers based abroad.

(4) The Act Implementing the Singapore Convention also excludes the application of the Singapore Convention to international settlement agreements involving the following:

(i) disputes relating to a civil contract or transaction where some or all of the parties are individuals (except those who became parties to the contract or transaction as a business or for business purposes);[8]

(ii) individual labor-related disputes;[9]

(iii) disputes concerning personal status and family affairs;[10]

(iv) international settlement agreements that are approved by the courts of a foreign country or concluded in the course of proceedings before the Japanese courts or courts of a foreign country and are enforceable in the State of such courts;[11] and

(v) international settlement agreements that have the effect of an arbitral award and are enforceable.[12]

(5) To enforce an international settlement agreement, a party must petition the court for an execution order allowing civil execution based on such

5. The Act Implementing the Singapore Convention, art. 2(3)(ii) (which corresponds to the Singapore Convention, art. 1(1)(a)).
6. *Id.*, art. 2(3)(iii) (which corresponds to the Singapore Convention, art. 1(1)(b)).
7. *Id.*, art. 2(3)(i).
8. *Id.*, art. 4(i) (which corresponds to the Singapore Convention, art. 1(2)(a)).
9. *Id.*, art. 4(ii) (which corresponds to the Singapore Convention, art. 1(2)(b)).
10. *Id.*, art. 4(iii) (which corresponds to the Singapore Convention, art. 1(2)(a) and (b)).
11. *Id.*, art. 4(iv) (which corresponds to the Singapore Convention, art. 1(3)(a)).
12. *Id.*, art. 4(v) (which corresponds to the Singapore Convention, art. 1(3)(b)).

international settlement agreement (the "**Execution Order**"), and indicate therein the obligor as the respondent.[13] The court shall issue the Execution Order, unless it decides instead to dismiss the petition on one of the grounds refusing execution set forth in the Act Implementing the Singapore Convention[14] as mentioned below in part (6) of this article.

The petitioner must submit (i) a document prepared by the parties containing the content of the international settlement agreement and (ii) a document prepared by the mediator or any other person who prepared, preserved and performed any other managerial work concerning the records, to certify that the international settlement agreement resulted from mediation. Alternatively, the petitioner may submit a recording medium of an electronic or magnetic record recording the content that is required for such documents. If the subject document or recording medium is prepared in a foreign language, the petitioner must also submit a Japanese translation thereof;[15] provided that if the court finds it appropriate, after hearing the opinion of the respondent, the court may decide not to require such translation. The Act Implementing the Singapore Convention also grants to the Tokyo District Court and the Osaka District Court jurisdiction over such petitions in addition to other competent courts.[16] Compared to other regular courts, the judges of the Tokyo District Court and the Osaka District Court who would be in charge of such petitions would presumably be familiar with English documents, so, the parties would not be required to submit a Japanese translation of such documents.

The court may suspend the proceedings concerning the petition if another petition relating to the international settlement agreement is filed, and in such case, upon the petition of the petitioner, the court may order the respondent to provide security.[17]

(6) The following are grounds for refusing civil execution of an international settlement agreement:

(i) that the international settlement agreement is not valid due to a limitation on the legal capacity of a party;[18]

(ii) that the international settlement agreement is not valid on grounds other than a limitation on the legal capacity of a party pursuant to the laws and regulations designated by the agreement of the parties to apply to the international settlement agreement (if no designation has been made, the laws and regulations determined to be applicable to the international settlement agreement by the court);[19]

(iii) that the details of the obligations in the international settlement agreement cannot be specified;[20]

(iv) that the obligations in the international settlement agreement have been extinguished in their entirety due to performance or any other reason;[21]

(v) that the mediator has breached the laws, regulations or any other rules applicable to the mediator or the mediation conducted by the mediator pursuant to an agreement

13. *Id.*, art. 5(1).
14. *Id.*, art. 5(11).
15. *Id.*, art. 5(2)-(4) (which correspond to the Singapore Convention, art. 4(1)-(3)).
16. *Id.*, art. 5(6).
17. *Id.*, art. 5(5). This corresponds to the parallel application or claim under Article 6 of the Singapore Convention.
18. *Id.*, art. 5(12)(i) (which correspond to the Singapore Convention, art. 5(1)(a)).
19. *Id.*, art. 5(12)(ii) (which corresponds to the Singapore Convention, art. 5(1)(b)(i)).
20. *Id.*, art. 5(12)(iii) (which corresponds to the Singapore Convention, art. 5(1)(c)(ii).
21. *Id.*, art. 5(12)(iv) (which corresponds to the Singapore Convention, art. 5(1)(c)(i).

between the parties (limited to breaches that are not related to public order), and that the fact constituting the breach is serious and affects the conclusion of the international settlement agreement;[22]

(vi) that the mediator failed to disclose to the parties a fact that may raise doubts as to the mediator's impartiality or independence, and that the fact is serious and affects the conclusion of the international settlement agreement;[23]

(vii) that the subject matter of the international settlement agreement concerns a dispute that may not be subject to a settlement agreement pursuant to the provisions of Japanese laws and regulations;[24] and

(viii) a civil execution based on the international settlement agreement would be contrary to a public policy in Japan.[25]

3. Amendments to the Current ADR Act

In addition to making international settlement agreements enforceable through the Act Implementing the Singapore Convention, Japan amended the Act on Promotion of Use of Alternative Dispute Resolution (Act No. 151 of 2004) (as amended, the "**ADR Act**") on April 21, 2023 to make certain domestic settlement agreements enforceable. The ADR Act was passed on April 28, 2023 and will take effect on April 1, 2024, the same day as the amended Arbitration Act.

Under the ADR Act, upon application, the Minister of Justice may certify private dispute resolution services if the Minister is satisfied that such services meet the certification standards and the applicant has the necessary knowledge and skills as well as the financial base to carry out the services.[26] The ADR Act provides special rules on the use of the private dispute resolution procedures to be carried out for such certified services (the "**Certified Dispute Resolution Procedures**"), such as suspension of the prescriptive period, and at the court's discretion, suspension of the related legal proceedings as well.[27] The ADR Act also makes enforceable certain settlement agreements resulting from such Certified Dispute Resolution Procedures if the parties have agreed that they could be enforced through civil execution.[28]

The following settlement agreements, however, are unenforceable:

(i) those made between consumers and enterprises;

(ii) those involving individual labor-related disputes;

(iii) those involving disputes concerning personal status and family affairs, except claims for periodic payments that relate to an obligation to support, etc.; and

(iv) international settlement agreements under the Act Implementing the Singapore Convention.[29]

As mentioned earlier in part 2(4), the Act Implementing the Singapore Convention shall not apply to international settlement

22. *Id.*, art. 5(12)(v) (which corresponds to the Singapore Convention, art. 5(1)(e)).
23. *Id.*, art. 5(12)(vi) (which corresponds to the Singapore Convention, art. 5(1)(f)).
24. *Id.*, art. 5(12)(vii) (which corresponds to the Singapore Convention, art. 5(2)(b)).
25. *Id.*, art. 5(12)(viii) (which corresponds to the Singapore Convention, art. 5(2)(a)).
26. The ADR Act, arts. 5 and 6.
27. *Id.*, Chapter III.
28. *Id.*, art. 2(v). This corresponds to Article 3 of the Act Implementing the Singapore Convention and the reservation made by Japan under the Singapore Convention.
29. *Id.*, art. 27-3.

agreements on disputes involving civil contracts or transactions, where some or all of the parties to the agreement are individuals. The ADR Act, however, makes enforceable not only certain commercial settlement agreements but also certain civil ones.

Further, under the ADR Act, non-Japanese individuals may enforce their settlement agreements with Japanese individuals. Although most settlement agreements involving disputes concerning personal status and family affairs are unenforceable, those involving claims for periodic payments relating to an obligation to support, etc., may be enforceable by non-Japanese individuals against Japanese individuals.

As discussed in Parts I and II of this article, the amended Arbitration Act, the Act Implementing the Singapore Convention and the amended ADR Act will take effect in Japan on April 1, 2024. Parties interested in the arbitration and mediation practice in Japan should be aware of these recent developments taking effect next year.

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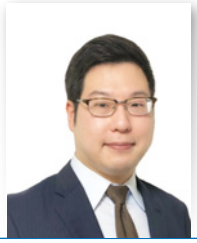
Overview of Guidelines for Corporate Takeovers: Enhancing Corporate Value and Securing Shareholders' Interests – Part I



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I. Introduction

On August 31, 2023, the Ministry of Economy, Trade and Industry formulated and announced the Guidelines for Corporate Takeovers (the "**Guidelines**").[1] The Guidelines clearly state that the economy of Japan is aiming to have a soundly functioning market in acquisitions involving the transfer of corporate control and welcomes active acquisitions that contribute both in enhancing corporate value and securing the interests of shareholders. The Guidelines also aim to meet the expectations of domestic and foreign stakeholders, including investors active in international markets. The purpose of the Guidelines is to present principles and best practices that should be shared in the economy to develop fair rules for acquisitions, with a focus on how parties should behave in the context of acquiring corporate control of a listed company. While the Guidelines are not legally binding, referring to and taking action based on the best practices presented therein would likely reduce the risk of directors breaching their duties of care and loyalty, and courts will likely respect the transaction terms agreed upon between the parties more.

This article has been divided into two parts. Part I discusses the scope, basic principles, and perspectives of the Guidelines as well as the code of conduct that directors and the board of directors must observe concerning acquisitions. Part II in the next newsletter will cover increased transparency of acquisitions and takeover response policies and countermeasures.

II. Scope of the Guidelines

The Guidelines primarily address transactions where the purchaser obtains corporate control of a listed company by acquiring its shares, regardless of whether the offer or bid is solicited or unsolicited. Concerning the structure of the acquisition, the Guidelines focus on cases where the shares of the target company are acquired through tender offers, open-market purchases, or negotiated transactions, in each case, for cash consideration. However, the Guidelines may also apply to cases where corporate control is acquired through stock for stock acquisitions or through organizational restructurings, such as mergers, share exchanges, and share deliveries.

1. Available at https://www.meti.go.jp/shingikai/economy/kosei_baishu/pdf/20230831_3.pdf.

III. Principles and Basic Perspectives

The Guidelines present the following three principles that should generally be respected in acquisitions of corporate control of listed companies:

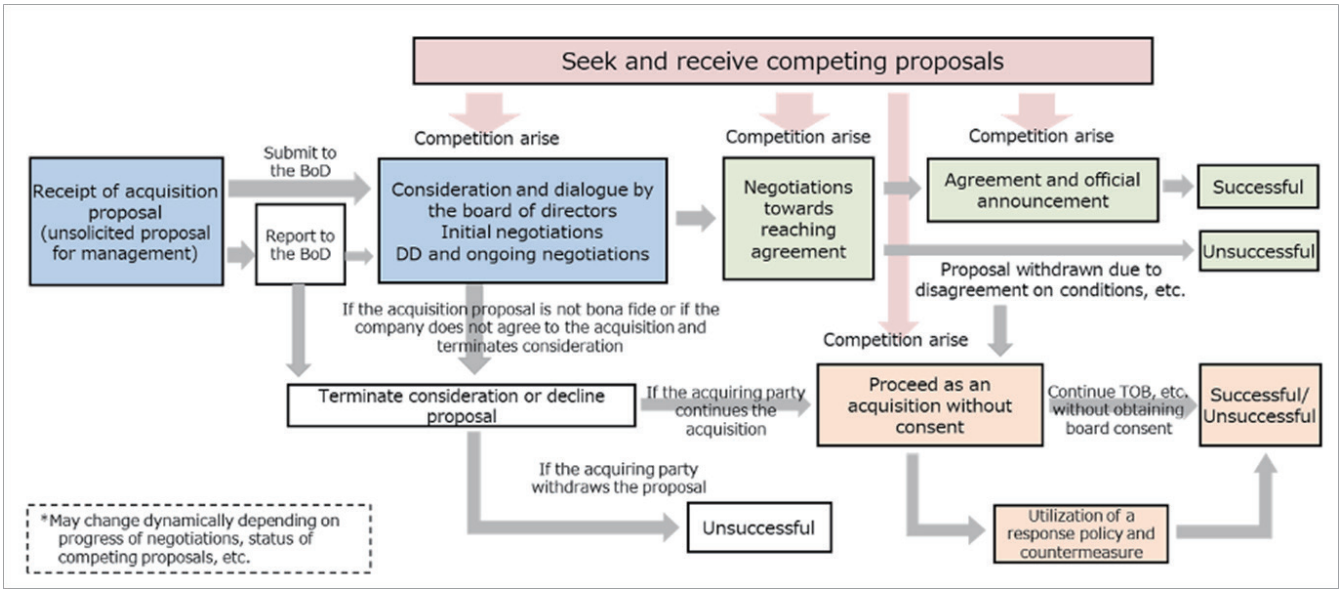
Principle 1: Principle of Corporate Value and Shareholders' Common Interests
Whether or not an acquisition is desirable should be determined on the basis of whether it will secure or enhance corporate value and the shareholders' common interests.
Principle 2: Principle of Shareholders' Intent
The rational intent of shareholders should be relied upon in matters involving the corporate control of the company.
Principle 3: Principle of Transparency
Information that is useful in the decision-making of the shareholders should be provided appropriately and proactively by the acquiring party and the target company. To this end, the acquiring party and the target company should ensure transparency in the acquisition through compliance with acquisition-related laws and regulations.

To facilitate desirable acquisitions that enhance corporate value and secure the shareholders' common interests, a code of conduct is required, and the parties and other participants involved in an acquisition must respect and abide by it. Although, in principle, the rational intent of the shareholders should be relied upon in matters involving the corporate control of a company, there are often information asymmetries between the acquiring party and the target company's board of directors on the one hand, and its shareholders on the other. Sufficient information must therefore be provided so that the shareholders can make a correct decision on the merits of the acquisition and the transaction terms (informed judgment).

IV. Code of Conduct for the Directors and Board of Directors on Acquisition Proposals

The Guidelines provide a phase-based approach to the code of conduct for each director and the board of directors for proposals that seek to acquire corporate control.

An example of the flow of issues to be considered in connection with an acquisition proposal is illustrated below:



Source: The Guidelines, p. 17.

1. Reporting upon Receipt of an Acquisition Proposal

In principle, upon receipt of an acquisition proposal to acquire corporate control, the management or directors should promptly submit or report this to the board of directors.

Whether or not an acquisition proposal should be submitted to the board of directors should be judged formally and objectively, and one of the important factors in determining this is whether the proposal is sufficiently specific, such as when the proposal is in written rather than in oral form, identifies the acquiring party rather than being anonymous, and includes the purchase price and timing of the acquisition.

The board of directors to which the matter is submitted shall in general give "sincere consideration" to a "bona fide offer" – an acquisition proposal that is specific, has a rationale purpose, and is feasible. The board of directors should consider the appropriateness of the acquisition from the perspective of whether the acquisition will contribute to enhancing the corporate value, with a focus on the post-acquisition management strategy; the appropriateness of the purchase price and other transaction terms; the acquiring party's financial resources, track record and management capabilities; and the feasibility of successful completion of the acquisition.

2. When the Board of Directors Decides on a Direction toward Reaching an Agreement on an Acquisition

What is important for shareholders in terms of differences in the acquisition ratio and acquisition consideration?

(a) In case of an all-cash, full acquisition: the appropriateness of the transaction terms in terms of the price;

(b) In case of a partial acquisition: information on post-acquisition measures to enhance corporate value; and

(c) In cases where all or part of the consideration for the acquisition is shares: information on the corporate value enhancement measures and the appropriateness of the consideration (information on shares to be used as consideration and whether the market valuation thereof is appropriate).

When the board of directors decides on a direction toward reaching an agreement on an acquisition, it should negotiate diligently with the acquiring party with the aim of improving the transaction terms so that the acquisition is conducted on the best available transaction terms for the shareholders.

3. Ensuring Fairness – Supplementary Functions of the Special Committee and Matters to be Noted

The necessity of establishing a special committee should be considered on a case-by-case basis, depending on the degree of conflict of interest, the need to supplement the independence of the board of directors, and the need to provide an explanation to the market. Particularly in companies where the majority of the board of directors is not composed of outside directors, establishing a special committee and respecting its judgment may be beneficial. For example, a special committee is useful in the following scenarios:

(a) When the appropriateness of the transaction terms is considered particularly important to the interest of the shareholders because the proposal includes a cash-out;

(b) When considering takeover response policies or countermeasures; and

(c) Other cases where accountability to the market is considered important (e.g., when there are multiple publicly known acquisition proposals).

The special committee should basically be composed of outside directors, given that outside directors: (a) have legal duties and responsibilities to the company, (b) are expected to be directly involved in management decisions as members of the board of directors, and (c) have a certain level of knowledge of the target company's business. In cases where the outside directors lack expertise in acquisitions, one approach is to retain advisors that will provide professional advice to the outside directors, as well as try to improve their familiarity with acquisitions.

V. Conclusion

The Guidelines present three principles and basic perspectives and state that, through the reasonable actions of acquirers, target companies and shareholders in acquisition transactions, and to generate value through synergy, improve management efficiency, and function as a discipline for the management team, it is necessary to adhere to a code of conduct. Under such framework, the code of conduct for directors and boards of directors for proposals to acquire corporate control outlined in the Guidelines responds to a recognition that legal precedent may not be entirely clear, and there may not necessarily be a sufficient shared understanding in practice about the actions to be taken. Nevertheless, the code of conduct is expected to be refined and clarified through future practice.

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