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Japan: Trends & Developments
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Oh-Ebashi LPC & Partners

Trends and Developments

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Oh-Ebashi LPC & Partners is a full-service law firm with over 160 attorneys, and with its main offices in Tokyo and Osaka. It was originally established in Osaka in 1981, and now has an equivalent-sized operation in Tokyo. Oh-Ebashi was the first Japanese law firm to open an office in China, and together with its Nagoya office, the firm currently has offices in four locations. Oh-Ebashi has been providing its clients with the best legal advice and solutions for decades, and is committed to consistently exceeding clients' expectations and serving as their ideal legal partner. The legal practice at Oh-Ebashi covers a broad range of fields, including corporate/M&A, risk management and compliance, intellectual property law, life sciences, restructuring/insolvency, competition and anti-trust/consumer protection, dispute resolution, finance and insurance, employment law, administration/regulatory law, tax law, international practice, China/Asia practice, private practice and pro bono practice.

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M&A

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Key developments in M&A law and regulation

In recent years, actions against listed companies in Japan led by so-called shareholder activists have significantly increased; so much so that, in 2021, several important court decisions were issued regarding the validity of poison pills. In 2022, when a poison pill, which seemed permissible under previous court decisions, was invoked against a takeover technique known as a "wolfpack", its operation was deemed unlawful by the court. In this particular case, a public company called Mitsuboshi introduced a poison pill and allocated stock option rights to all shareholders to respond to in-market bids by an activist, Adage Capital (AC), and several shareholders that Mitsuboshi determined were substantially working together with AC in purchasing Mitsuboshi's shares. In response, AC filed an injunction asking the court to enjoin the allocation of stock options. In light of the 2021 case law on poison pills, it was widely expected that, in principle, if the shareholders were given the opportunity to approve or disapprove the introduction of poison pills and their invocation (ie, the allotment of stock option rights) at a shareholders' meeting, the courts would likely deny the grant of any injunction. However, in the case of Mitsuboshi, the court granted the injunction against the allotment of the stock option rights, stating there was a lack of "reasonableness" in the invocation of the poison pill notwithstanding that Mitsuboshi's shareholders approved the introduction and invocation of such measures at a shareholders' meeting.

As for the root causes of the recent emergence of inappropriate "wolfpacks", it has been pointed out that there are problems with the tender offer regulations and the large-shareholding reporting system in Japan. Under the Companies Act of Japan, for a shareholder to exercise the right to veto a special resolution at a shareholders' meeting, the affirmative vote of one third or more of the voting rights present at the meeting is required. However, in practice, a shareholder holding around 30% of all voting rights would already be able to effectively exercise the veto right. Furthermore, under the tender offer regulations, in principle, an acquirer does not need to commence a tender offer unless it intends to acquire more than one third of all voting rights in a listed company.

Accordingly, it is possible for an investor to acquire only around 30% of all voting rights in

a listed company, which effectively allows it to exercise veto rights, solely through in-market purchases without undertaking a mandatory tender offer process. On the other hand, under Japan's large-shareholding reporting system, if a holder of listed shares ends up holding more than 5% of the voting rights in a listed company, such shareholder needs to file a large-shareholding report to the authorities within five days of the acquisition. This report needs to state the purpose for which the shares were acquired.

However, there have been many instances of companies acquiring more than 5% of voting rights that have not filed the required reports for extended periods. As for the requirement to declare the purpose for holding the shares, there have also been many instances where "pure investment" was stated, even when "acquisition of control" should have been stated instead. Although the imposition of criminal penalties and administrative fines are available as sanctions for these violations, there have only been very few cases where such sanctions have been invoked.

As a result of these institutional problems, several investors are able to secretly acquire, by in-market purchases, and over a short period of time, a large enough volume of shares of a listed company to effectively enjoy veto rights at a shareholders' meeting. A shareholder with a leading role among these investors could then effectively delay the filing of the large-shareholding report or falsely report the purpose of its holdings. In the Mitsuboshi case above, it appears that AC did not file its large-shareholding report in a timely manner. Due to the foregoing reasons, by the time a listed company becomes aware of the presence of investors engaging in a "wolf-pack" takeover, it may already be too late.

Considering the above issues, in March 2023 the Japanese government decided to fundamentally revise the tender offer regulations and large-shareholding reporting system. A full-scale revision process is expected to begin during the year 2023.

Recent trends in the M&A market

Unlike in Europe and (especially) the USA, private equity investments are booming in Japan since the provision of acquisition financing by commercial banks remains active. Notable recent buyout deals include:

- the acquisition of Hitachi Metals led by Bain Capital, which was completed in October 2022;
- the buyout of Hitachi Transport System led by KKR, which was completed in November 2022; and
- the acquisition of the science business of Olympus by Bain Capital, which was completed in April 2023.

The first two were carve-outs from the Hitachi, Ltd group and were going-private deals. Similarly, Olympus had spun off its core scientific business to create a wholly owned subsidiary and then sold its entire stake in said subsidiary to complete the carve-out.

In 2023, the largest topic in M&A in Japan is expected to be the sale of Toshiba led by Japan Industrial Partners, a Japan-based PE firm. Toshiba is expected to be acquired for a total of approximately JPY2 trillion. Toshiba has fallen into financial difficulties following a major accounting fraud that was uncovered in 2015 and has thereafter accepted investments from several shareholder activists. However, the activists and Toshiba executives have ended up in loggerheads over management policy, and the

company has been in a state of limbo ever since. Toshiba is expecting to stabilise its management by going private.

Project Finance

Contributed by: Ryosuke Sogo.

Overview

The Japanese government has declared that it aims to achieve carbon neutrality by 2050 and has formulated the Green Growth Strategy.

In the energy sector, the orientation is towards decarbonisation with the objective of further increasing renewable energy. However, the number of new projects in solar or onshore wind power generation has been declining, as the expansion of renewable energy generation projects over the past decade under the feed-in tariff (FIT) system has resulted in fewer remaining project sites being suitable. Instead, investors are focusing on the existing solar and onshore wind power generation projects due to the long-term and stable cash flow expected under the FIT system. As a result, secondary transactions for these have been increasing.

In place of solar and onshore wind power generation projects, the number of offshore wind power generation projects and corporate power purchase agreement (PPA) projects has been increasing. Below is a brief discussion of the offshore wind power generation and corporate PPA projects in Japan.

Offshore wind power generation business

Although Japan is a nation surrounded by sea, offshore wind power generation projects were not widespread due to the absence of unified rules for the use of sea areas. However, upon the enforcement in 2019 of the Act on Promoting the Utilisation of Sea Areas for the Development of Marine Renewable Energy Power Generation Facilities (the "Act"), the general sea area could finally be designated as a promotion zone, allowing for its long-term occupation for up to 30 years. Consequently, offshore wind power generation projects began to attract more attention.

Offshore wind power generation projects cannot be executed arbitrarily in the general sea areas. Under the Act, the Minister of Economy, Trade and Industry and the Minister of Land, Infrastructure, Transport and Tourism are tasked with designating certain promotion zones. The results of the selection process for the following four designated promotion areas are currently attracting attention:

- offshore Happo Town and Noshiro City, Akita Prefecture;
- offshore Enoshima, Saikai City, Nagasaki Prefecture;
- offshore Oga City, Katagami City and Akita City, Akita Prefecture; and
- offshore Murakami City and Tainai City, Niigata Prefecture.

It is expected that the methods used in conventional onshore wind power generation projects would be used as a basis in structuring offshore wind power generation projects. However, when analysing and managing project risks, it is necessary to consider the unique risks inherent to offshore wind power generation projects – for example, how the vessels needed for construction and subsequent operation and maintenance are to be procured. There are also issues specific to offshore wind projects that need to be considered when entering various finance and project agreements – for example, the rights and obligations of offshore wind power projects differ from those of onshore wind power projects because

the power generation facilities are located offshore, which no one owns.

Corporate PPA projects

Corporate PPA refers to the procurement of renewable energy electricity by a company, the customer, from a specific renewable energy power producer. The advantages of this arrangement include the ability to hedge the risk of market price fluctuations and fix electricity prices, and secure renewable energy power over the medium to long-term.

Corporate PPA is classified as either on-site or off-site PPA. In an on-site PPA, the generation facilities are installed in the place where customers need electricity; while in an off-site PPA, the generation facilities are installed outside the place where customers need electricity.

Off-site PPA is further divided into physical PPA and virtual PPA. In a physical PPA, the customer directly procures electricity generated by a specific renewable energy power producer; while in a virtual PPA, the producer sells the renewable energy power in the wholesale power market, etc, and the consumer purchases the power from a retail electricity provider. The power producer and consumer agree on a fixed price for the electricity in advance, and the difference between the market price on the wholesale power market and the fixed price is settled. The power purchased by the consumer is not necessarily renewable energy, but it is treated as such when the power producer transfers a non-fossil certificate to the consumer.

An off-site PPA is more regulated than an on-site PPA, requiring the intervention of a retail electric utility before the generator can sell electricity to customers, thus making it more difficult for the generator to recover the capital invested in the corporate PPA project unless the project is above a certain size. Nevertheless, there are examples of large-scale power generation projects that were achieved by trading in bulk, such as having power generation projects in multiple locations.

In a virtual PPA, the power producer sells renewable electricity to the wholesale power market, in which the market price of electricity fluctuates. To hedge the risk of price fluctuations, the power producer and customer agree on a fixed price, and the difference between the fixed price and the market price is settled. If this transaction falls under the category of over-the-counter commodity derivatives transactions, it would be subject to regulation under the Commodity Derivatives Transaction Act, making it difficult to enter the virtual PPA market. In this regard, on 11 November 2022, the Ministry of Economy, Trade and Industry clarified that, under certain conditions, such transactions will not fall under the category of over-the-counter commodity derivatives transactions. As a result, the number of virtual PPAs is expected to increase in the future.

Labour and Employment

Contributed by: Daisuke Mure.

Overview

Generally speaking, there were no extremely significant changes or landmark court decisions, etc, relating to labour and employment law in Japan from 2022 to 2023. Nevertheless, certain legal amendments were made to keep the laws in line with current trends, as discussed below.

Digitisation of wages

Under Article 24 of the Labour Standards Law, salaries and wages are generally required to be paid in legal currency, while under the Ordinance for the Enforcement of the Law, payment by wire

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transfer to a bank account or into a general securities account is only permissible with the consent of the employee. However, on 1 April 2023, an amendment to the Labour Standards Law came into effect, which allowed employers to pay employees with digital currency (eg, through a smartphone payment app) to an account maintained with a business operator designated by the Minister of Health, Labour and Welfare as satisfying the requirements stipulated under the Funds Settlement Law. This amendment can be attributed to the widespread use of cashless payment methods, although most companies currently still pay salaries by wire transfers to bank accounts.

Expansion of information disclosure

The revised Law for the Promotion of Women's Activities came into effect on 8 July 2022, imposing an obligation on employers to disclose information on their female employees, depending on the size of the company (ie, based on the number of permanent employees). For companies employing 100 or fewer employees on a regular basis, the disclosure obligation is on a best-efforts basis. The information to be disclosed is to be selected by the employer itself from a number of items stipulated by law. Some of these items for disclosure include, for example:

- the percentage of female employees in management positions;
- the percentage of females on the board of directors; and
- the differences in wages between male and female employees.

In addition, under the revised Child Care and Family Care Leave Law, employers with more than 1,000 full-time employees are required to disclose the status of male employees taking childcare leave (acquisition rate) each year so that such information can be viewed on the internet or other media. This amendment became effective on 1 April 2023. The current trend is towards the gradual expansion of such disclosure requirements.

Application of overtime work limits

The maximum overtime work limit regulations under the Labour Standards Law will begin to apply to the construction industry, automobile driving operation businesses, and physicians from 1 April 2024. The application of these regulations to these industries had previously been postponed.

The revisions to the Labour Standards Law on 1 April 2019 established specific limits on overtime work. In principle, overtime work may only be up to 45 hours per month, 360 hours per year, or 720 hours per year for those falling under special circumstances (for instance, staff working in the accounting department during the accounting period). In addition, employers are mandated not to make employees work, combining both overtime and legal holiday work, for more than 100 hours per month and an average of no more than 80 hours per month in each two- to six-month period, with possible criminal penalties for violations. For the construction industry and automobile driving operation businesses, the application of these ceiling regulations had been previously postponed for five years, but on 1 April 2024, these regulations will start to apply to them in the same manner as in other industries.

For physicians, the specific upper limit has been set by an ordinance issued by the Ministry of Health, Labour and Welfare. Specifically, the limit is 960 hours per year, in principle, and 1,860 hours for physicians belonging to medical

institutions recognised by the prefectural government as having special circumstances.

New law protecting freelancers

The Law Concerning Appropriateness of Transactions with Specified Fiduciary Business Operators was enacted and promulgated on 28 April 2023, and will come into effect on a date to be specified through a cabinet order within a period not exceeding one year and six months from the date of promulgation. Companies that outsource work to individual freelance workers will be obligated to:

- clearly state the terms of the transaction when the work is outsourced;
- pay compensation within 60 days from the date of receipt of benefits from the work, in principle; and
- establish a system to prevent harassment.

Recently, there was a dispute regarding whether the delivery staff of Uber Eats are employees who should be protected under the Labour Union Law of the Tokyo Labour Relations Commission. The Commission ruled that they are employees under said law and issued an order directing Uber to engage in collective bargaining with them. As was seen in this case, the protection of platform users and freelancers has become a popular topic of debate in the country.

Data Protection

Contributed by: Yuki Kuroda.

The Amended Telecommunications Business Act goes into effect

The amendments to the Telecommunications Business Act (TBA) went into effect in June 2023. The revised law contains two essential amendments relating to the processing of information.

The first is a special rule that applies to large telecommunications operators when processing specified user information, which is similar to personal information under the Act on the Protection of Personal Information (APPI). According to the TBA regulations issued by the Ministry of Internal Affairs and Communications, operators whose average monthly active users per year are 10 million or more, for free services, and 5 million or more, for paid services, are designated to be subject to this rule. Such operators include large-scale platforms such as SNS and search service providers. This practice of imposing special obligations on large platformers is similar to that under the EU's Digital Services Act.

The designated business operators are required to:

- create information processing rules;
- publicise information processing policies;
- conduct annual assessments of the status of information processing; and
- appoint a chief responsible officer.

These obligations are similar to the DPIA and DPO under the GDPR, which do not exist under the APPI. Thus, these business organisations will be subject to more stringent regulations on the processing of personal information.

The second is the regulation of cookies and other web tracking technologies. The TBA had been primarily concerned with communication intermediaries such as internet and telecommunication service providers, and not with owners of regular websites. The revised law, however, expands the scope of businesses subject to the regulation of web tracking technologies to include, in particular, websites that deliver general information viewed by unspecified users. However, although the Ministry has provided

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guidelines and FAQs, the regulation's applicability to certain sites remains vague. At the very least, web services not previously subject to the TBA, such as news distribution sites, are now considered subject to the regulation. Nevertheless, it has also been suggested that websites where companies deliver information about their products and services are not subject to the regulation.

This specific regulation stipulates that, in principle, certain information must be notified to an individual or that such individual must be placed in a condition where they would easily know when a command is given to their device to transmit information to the outside (practically speaking, the latter is done by stating the required information in a privacy policy and posting it in the operator's website in a conspicuous manner). However, not all commands are subject to regulation. An exception is admitted when the external transmission is essential for providing the individual's requested service. This exception resembles the strictly necessary cookies under the EU ePrivacy Directive. Thus, web tracking technologies, mainly analytical and advertising cookies, are the main targets of this regulation. If subject to this regulation, the operator must notify the individual of, or place the individual in a condition where they would easily know about, the content of the information to be transmitted, the name of the recipient, and the purpose for which the transmitted information will be processed. In addition to such requirement, businesses may also obtain opt-out or opt-in consents, though they are not obligated to do so.

Current landscape of web tracking technology regulation under the APPI

Until the aforementioned amendment to the TBA, there was no law specifically regulating web tracking technologies, although it was already possible to cover two scenarios under the APPI.

The first scenario occurs when the information being collected by web tracking technologies is personal information. However, it has been widely accepted that in many cases, such collected information is not considered as personal information by itself but only when it can be combined with other personal information. An example of this is when an operator of an e-commerce site can combine membership information with data collected by cookies. In such a case, the collected data is likely personal information. Therefore, this scenario only applies to limited situations.

The second scenario relates to the rule on "information related to personal information". This rule was added under the 2020 amendment to the APPI. "Information related to personal information", in principle, means information which is related to a living individual, but which, on its own, cannot directly or indirectly identify such person. Thus, information related to a person is part of non-personal information (non-personal information includes statistics and aggregate information, both related to a group, not to a living individual). This rule works in the following context: information collected by website operators using analytical or advertising cookies often constitutes information related to personal information. When the operator discloses this information to a third-party recipient, such as a platformer, the recipient may be able to identify the individual by combining the information received with other information already in its possession. This rule therefore requires obtaining the individual's consent to such disclosures. Thus, while this rule regulates some web tracking technologies, it is not broad in scope.

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These two rules will continue to be in effect even after the enactment of the amended TBA. As a consequence, business operators may need to be aware and comply with both the APPI and the TBA.

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