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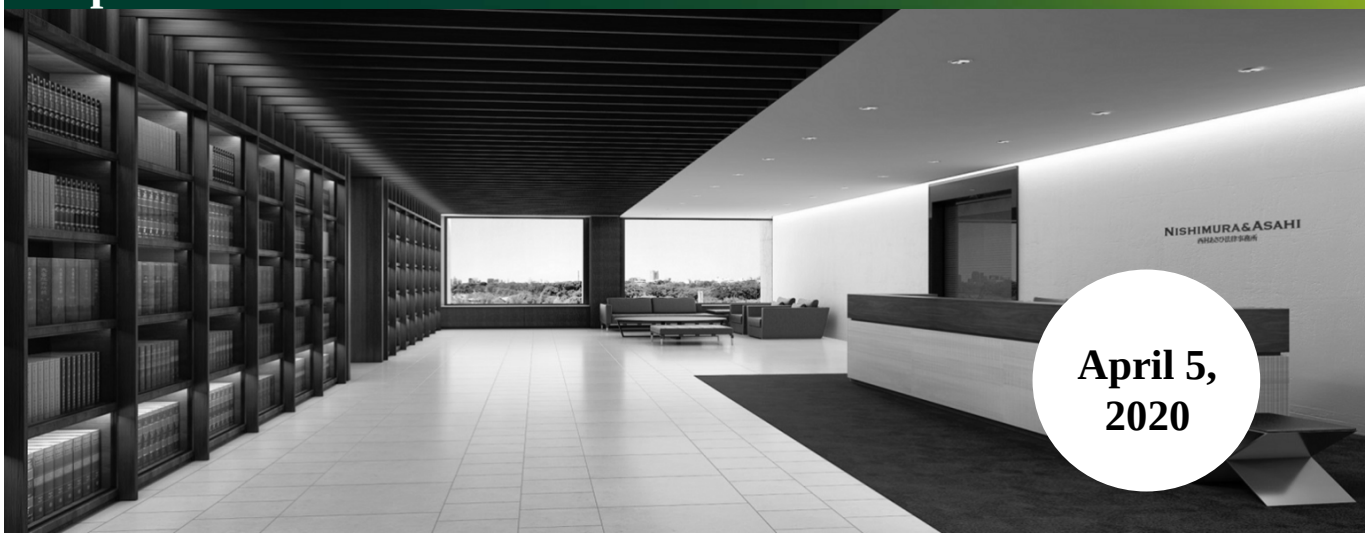

Japan: COVID-19 and important issues in corporate legal affairs

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1. Introduction

Novel coronavirus (COVID-19) impacts business and personal activities in various ways. From the perspective of corporate legal affairs, there is a wide range of issues that should be considered, such as contractual relationships with business partners and labour relations. This newsletter outlines such issues.[1]

2. Failure to perform contractual obligations

(1) *Force Majeure* Clause

If a seller cannot deliver goods on the delivery date or a contractor cannot perform agreed services in accordance with a contract, the obligor is responsible for the default due to such delay in, or failure of, performance. However, if the default is due to catastrophe or other reasons out of control of the obligor, they may be exempted from their liability due to *force majeure*.

What is defined as "*force majeure*" varies from contract to contract, and the effect of *force majeure* (scope of exemption of the obligation and whether or not parties to the contract have the right to cancel it) varies as well. Therefore, it is necessary to examine the contents of each contract. In practice, a *force majeure* clause often lists several events that are

[1] For more information about COVID-19, please see Nishimura & Asahi website: https://www.jurists.co.jp/en/news/covid_19.html.

considered *force majeure*, such as acts of God, war, or a riot, and some even include a type of catch-all provision. However, it may be difficult to determine whether effects of the novel coronaviruses can be considered as *force majeure* when "pandemic", "epidemic", or "infectious disease" is not clearly mentioned, or whether secondary effects such as inability to procure raw materials resulting from the closing of a supplier's operations are regarded as a *force majeure*. Even if the parties will ultimately seek mutual solutions to minimize their damages and resolve them through consultation, it is important they know their contractual positions in the course of consultation.

(2) Rights and the Obligations under the Civil Code

If there are no provisions concerning *force majeure* or breach in a contract, or such provisions are inapplicable for one reason or another, and the contract is governed by Japanese law, application of the Japanese Civil Code should be considered. The new Japanese Civil Code ("New Civil Code") came into force on 1 April 2020. In principle, the Old Japanese Civil Code ("Old Civil Code") still applies to contracts entered into prior to 1 April 2020.[2] Under the Old Civil Code, for grounds attributable to an obligor, an obligee may cancel a contract (Articles 541 to 543 of the Old Civil Code) or claim damages (Article 415 of the Old Civil Code). However, whether a cause is attributable to an obligor and to what extent damage can be legally claimed are issues to be determined on a case-by-case basis.[3]

Under the New Civil Code, it will be possible to terminate a contract based on default, regardless of whether there are reasons attributable to the obligor (Articles 541 and 542 of the New Civil Code). However, the Old Civil Code and the New Civil Code take different approaches to appropriating risk when impossibility of performance cannot be attributed to either party. If an obligor cannot perform its contractual obligation due to a reason not attributable to either of the parties, the obligee's contractual obligation will become extinguished under Article 536, para.1 of the Old Civil Code, but under Article 536, para.1 of the New Civil Code, the obligee may refuse the performance of its obligation, which means the obligee will still owe its contractual obligation until the contract terminates (i.e., obligee terminates the contract).

As legal effects may vary depending on whether the New Civil Code or the Old Civil Code applies, it is necessary to evaluate the contractual relationship in consideration of the application of the interim provisions of the New Civil Code.

3. Delay in receipt

Due to the outbreak of COVID-19, for example, a purchaser may not be able to make full preparations to receive deliverables or may not want to receive them because of decrease in demand. It is generally considered that the Supreme Court takes the position that the obligee does not have the obligation to receive or cooperate solely because he/she is the obligee (i.e., the non-receipt does not constitute a default). However, there may be cases where the obligation to receive or cooperate is recognized for a specific case based on the contract or the doctrine of good faith and fair dealing.[4] Please see item 4 below for points to keep in mind under the Subcontract Act.

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[2] However, if the contract is renewed on or after 1 April 2020, the New Civil Code applies.

[3] With regard to monetary liabilities, the absence of a ground attributable to the obligor or the existence of *force majeure* event does not exempt the obligor's payment obligations (Article 419, paragraph 3 of the Old Civil Code and the New Civil Code). The Pandemic Influenza Preparedness Action Plan of the Japanese Government (amended on 12 September 2017) states that, with respect to giving grace period, etc., for payment obligation, the Government will promptly consider measures to respond to a state of emergency if there is a risk of disruption of economic order (see Article 58 of the Act on Special Measures for Pandemic Influenza).

[4] See Supreme Court, Judgement, 16 December 1971, Minshu Vol.25, No.9, at 1472, which upheld the purchaser's obligation to receive based on the doctrine of good faith and fair dealing, in the case of sales agreement for sulfur ore.

With regard to the effect of delay in receipt when there is no relevant provision in a contract, the Old Civil Code only provides that "if an obligee refuses or is unable to accept the performance of an obligation, the obligee shall be responsible for the delay from the time when the performance was provided" (Article 413 of the Old Civil Code). The New Civil Code stipulates the effects of delay in receipt in accordance with judicial precedents and generally accepted interpretations under the Old Civil Code, which includes reduction of duty of care for preserving the goods, burden for the increased costs, and the inability to perform the obligation during the delay in receipt shall be deemed to be attributable to the obligee.

4. Issues regarding Subcontracting

The novel coronavirus also affects supply chains. On 14 February 2020, the Ministry of Economy, Trade and Industry ("METI") requested[5] that:

- Main subcontracting companies should take into full consideration the importance of not imposing burdens on their subcontractors in accordance with the occurrence of the novel coronavirus, including not (i) setting subcontract proceeds at a price lower than the price ordinarily paid for the same work, or (ii) demanding quick delivery of orders or commission services to procure parts without paying appropriate costs involving the delivery or services; and
- If their subcontractors are affected by the novel coronavirus and they intend to continue or resume their business activities, main subcontracting companies should strive to take care in continuing the conventional trading relationships with such subcontractors as far as possible or placing orders with them on a priority basis.

On 10 March 2020, METI made further requests to main subcontracting companies with respect to (i) taking actions for subcontractors' delay in delivery, (ii) bearing cost burdens appropriately, (iii) completing quick and flexible payments to subcontractors, and (iv) taking appropriate actions for cancellation and changes of orders.[6]

In order to complement the regulations on abuse of dominant position under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade ("Antimonopoly Act") (Article 2, para.9, sub-para.5 and Article 19 of the Antimonopoly Act), the Subcontracting Act stipulates the prohibited acts by main subcontracting companies, such as refusal to receive, delay in payment, reduction in subcontract price, and return of purchased goods (Article 4 of the Subcontracting Act). In the event of the Great East Japan Earthquake, the Fair Trade Commission ("JFTC") posted on its official website its views on the Antimonopoly Act and the Subcontracting Act with respect to trade problems, such as refusal to receive and return, in the event of a disaster. In the aforementioned METI request, it states that the basic view on the issue is the same in relation to COVID-19. For example, if main subcontracting companies unilaterally keep unit prices at the same level as that of ordinary orders without sufficient consultation with subcontractors, despite subcontractor requests to raise unit prices due to the effects of COVID-19 significantly increasing their costs, it would constitute a problem under the Subcontracting Act (Question 11). It is also considered a violation of the Subcontracting Act when, for example, a company that usually manufactures product C with parts A and B refuses to receive part B because part A is no longer available, if the reason such company refuses to receive part B is not attributable to some failure by the subcontractor

[5] Available at the official website of the Ministry of Economy, Trade and Industry at https://www.meti.go.jp/english/press/2020/0214_003.html.

[6] For details, please see the official website of the Ministry of Economy, Trade and Industry at https://www.meti.go.jp/english/press/2020/0310_001.html.

manufacturing part B (Question 9). A main subcontracting company may also be unable to receive delivered goods due to the closure of the workplace, but in this case, it is considered necessary for the company to take measures to receive goods to the extent possible, including the possibility of receipt at an alternative workplace. However, if it is objectively impossible to accept the delivery on the original delivery date, and after due consultation between the two parties, if the delivery date is to be postponed for a reasonable period of time, such circumstances will be taken into consideration by the JFTC. Therefore, companies should keep records of such special circumstances and the course of events so that they can be understood later (Question 4).[7]

5. Cancellation of Events

The "Basic Policies for Novel Coronavirus Disease Control",[8] decided by the Government on 25 February 2020, requests communities and companies re-examine the necessity of hosting public events from the viewpoint of infection control, taking into account the spread of infection, and the conditions of the venue. Based on that, on 26 February 2020 and 10 March 2020 the Government requested the cancellation, postponement, or downscaling, of events nation-wide.[9] The Government also requests that organizers review the necessity of holding the event, no matter how large or small, and to make utmost efforts to avoid places with poor ventilation if they decide holding the event is necessary.[10] Given these requests and the circumstances, many events have been cancelled or postponed, necessitating assessment in accordance with the provisions of the respective contracts, terms of agreements, etc. In the case of contracts between consumers and businesses, it is necessary to pay attention to the application of the Consumer Contract Act.[11]

6. Labour Relations

(1) Telework, etc.

Many companies have introduced telecommuting (work from home) and staggered working hours. Telecommuting is one category of telework that uses information and communications technology. Labour laws, such as the Labour Standards Act, the Industrial Safety and Health Law, and the Industrial Accident Compensation Insurance Act, apply also to telework employees.

One of the issues to be solved in the case of teleworking is the proper management of working hours. When companies apply regular working hours system to teleworking employees, it is necessary to appropriately manage working hours in accordance with the "Guidelines for Measures to be Taken by Employers to Properly Monitor Working Hours."[12] In order to adopt the "deemed work hours system outside the workplace" (Article 38-2 of the Labour Standards Act) and deem the teleworking employee to have worked the prescribed work hours or the hours normally required for the performance of

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7 "Q&A regarding the Great East Japan Earthquake" (available at the official website of the Japan Fair Trade Commission at https://www.jftc.go.jp/soudan/shinsaikanren/23jishinqa.html) (in Japanese).

8 Official website of the Ministry of Health, Labour and Welfare, at https://www.mhlw.go.jp/content/10200000/000603610.pdf.

9 Official website of the Prime Minister of Japan and his Cabinet, available at http://japan.kantei.go.jp/98_abe/actions/202003/_00012.html.

10 Official website of the Prime Minister of Japan and his Cabinet, available at https://japan.kantei.go.jp/ongoingtopics/_00013.html.

11 For details, please refer to Masako Yajima and Taeko Morita "Refund Upon Cancellation and Consumer Contract Act" (Nishimura & Asahi Newsletter, February 25, 2020) (https://www.jurists.co.jp/ja/newsletters/corporate_200225.html) (in Japanese).

12 Official website of the Ministry of Health, Labour and Welfare, at https://www.mhlw.go.jp/file/06-Seisakujouhou-11200000-Roudoukijunkyoku/0000149439.pdf (in Japanese).

work, it is necessary that (i) it is difficult to calculate the work hours, and (ii) the teleworking employee carries out work without the concrete direction and supervision of the employer.[13]

It has also been pointed out that, given employers' reduced capacity to monitor employees working from their respective homes, there is a possibility that employees may work longer. Measures to prevent long working hours through telework include: (i) ordering executives/supervisors to refrain from sending e-mails overtime, on holidays, or late at night; (ii) restricting access to the company's system late at night or on holidays; (iii) prohibiting or requiring company permission for, in principle, overtime, holidays, and late-night work when telework is performed; and (iv) sending alerts to employees who work long hours.

In response to the COVID-19 outbreak, many employees were hurried into "work from home" scenarios. As such, there are many matters that should be stipulated in companies' rules of employment, such as start and finish times, systems for "deemed working hours outside the workplace", systems for the prohibition or permission of overtime work, holiday work, and late-night work, as well as the accompanying wage structure, cost burden of information and communications equipment and work supplies, and the internal education and training of employees who engage in telework. Moreover, it is generally desirable to review the systems and rules for telework.

(2) Allowance for absence from work

Employees infected or suspected of being infected with COVID-19 and employers alike are being forced to suspend activities due to the effects of the COVID-19. Accordingly, employers are obliged to give necessary consideration to means of enabling employees to work while ensuring their physical safety (Article 5 of the Labour Contract Act). Therefore, in order to prevent the spread of infections in workplaces, it is necessary to consider measures such as ordering employees suspected of being infected with novel coronaviruses to stay at home.

Article 26 of the Labour Standards Act states that in the event of an absence from work for *reasons attributable to the employer*, the employer shall pay an allowance equal to at least 60 percent of the employee's average wage during such absence. *Force majeure* is not considered a "reason attributable to the employer", but in order to be considered as "*force majeure*", the following two requirements must be satisfied: (i) the causal circumstance must have arisen outside the course of business activities, and (ii) the matter could not have been avoided even if the employer exercised the utmost care befitting a reasonable manager in a similar position. In addition, the Supreme Court construes that the "grounds attributable to employers" set forth in the same Article are broader than the "grounds attributable to the obligee" set forth in the first sentence of Article 536, para.2 of both the New Civil Code and the Old Civil Code, and include management and administrative obstacles caused by employers.[14]

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[13] Official website of the Ministry of Health, Labour and Welfare: https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/roudoukijun/shigoto/guideline.html (in Japanese).

[14] Supreme Court, Judgement, 17 July 1987, Minshu Vol.41, No.5, page 1283. For example, absence from work due to difficulties in obtaining funds and materials from a parent company due to the parent company's financial difficulties (notification No.1998 from Director-General of Labour Standards Bureau of Ministry of Health, Labour, and Welfare dated June 11, 1948) and absence from work due to failure to receive orders (Tokyo District Court, Judgement, May 21, 1999, Rohan No.776, page 85). On the other hand, the Ministry of Health, Labour and Welfare's Q&A regarding novel coronavirus (for companies) (as of April 3, 2020) Q4-5 states that, in the event that the operation of a business is suspended due to the operation suspension of a business partner effected by novel coronavirus, whether or not allowance for absence from work is required under the Labour Standards Act is determined by taking into consideration, for example, the degree of dependence on the business partner, the availability of alternative measures, the period from the partner's suspension of business, and specific efforts taken by the employer to avoid suspension of business.

The Q&A regarding novel coronavirus (for companies) (as of April 3, 2020), posted by the Ministry of Health, Labour and Welfare on its official website, provides their views on the necessity of allowances for absence from work. The Q&A asks labour and management to talk thoroughly about wages during absence from work for reasons related to novel coronavirus, and to cooperate to structure a system that allows employees to feel more comfortable about taking leave.

According to the Q&A, if a employee takes leave due to Restrictions on Attendance at Work imposed by the prefectural governor (Article 18 of the Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases), it generally does not fall under the category of leave due to "reasons attributable to the employer", and it is not necessary to pay a leave allowance (Question 4-2). In the event that there are no Restrictions on Attendance at Work imposed by the prefectural governor and employees are able to work based on the results of consultations at the Consultation Centers for Japanese Returnees and Potential Contacts, but the employer orders such employee to take leave, a leave of absence allowance must be paid because such leave is generally categorized as a leave of absence due to "reasons attributable to the employer" (Question 4-3). In principle, annual paid leave could be taken at that time by request of the employee. Therefore, the employer may not deem employees suspected of being infected with novel coronavirus as having formally requested to take annual paid leave (Question 4-7). In addition, employees who voluntarily take leave from work due to fever or other illness will be treated in the same manner as those who take ordinary sick leave (Question 4-4).

7. Shareholders Meeting

Under the Companies Act, annual shareholders meetings must be held within a certain period of time after the end of each business year (Article 296, para.1 of the Companies Act), and there are many corporations that plan to hold an annual shareholders meeting in June for the fiscal year that ended in March 2020.

(1) To reduce the number of shareholders who physically come to the place of meeting

From the viewpoint of reducing contact with infected persons and preventing the spread of COVID-19, it is advisable to encourage or call for, through writing on the convocation notice or the company website, the prior exercise of voting rights (written voting or electronic voting, Article 298, para.1, subpara.3 and 4 of the Companies Act) in lieu of visiting the venue on the day of the annual shareholders meeting. In addition, it is also possible to consider holding hybrid virtual shareholders meetings via the Internet and other means. METI established "Guidelines on Approaches to Hybrid Virtual Shareholder Meetings" on 26 February 2020 for companies considering the convening of hybrid virtual shareholder meetings. They explain specific approaches to holding such meetings that take into account legal and practical challenges and provide grounds on which these approaches are permissible. The guidelines also present two categories of hybrid virtual shareholder meetings, "hybrid participation-type" and "hybrid remote attendance-type", based on whether or not participation of shareholders in shareholder meetings over the Internet or through other means are considered to constitute "attendance" under the Companies Act.[15] From the viewpoint of enhancing the disclosure of information via the Internet to shareholders who have not come to the venue, it is also worth considering the implementation of measures such as posting question and answer summaries on the company's website and distributing videos on-demand.

(2) Actions taken at the meeting place

Measures to prevent infections at venues may include: (i) wearing of masks by staff; (ii) calling on shareholders to wear

[15] Available at the official website of the Ministry of Economy, Trade and Industry at https://www.meti.go.jp/english/press/2020/0226_002.html.

masks; (iii) providing disinfectant solutions in multiple locations, such as around the entrance of the meeting place, and asking shareholders to use the disinfectant solutions; (iv) confirming the physical condition of attending shareholders at the reception site; and (v) requesting that shareholders refrain from entering the venue if they are sick or suspected of having contracted COVID-19.

The issue is whether it is possible to refuse entrance to, or order the removal of, a shareholder with noticeable signs of illness, given that preventing the spread of novel coronaviruses is a societal issue. From the perspective of preventing the infection of other stockholders, even if the company cannot confirm whether someone is actually infected with COVID-19, it is thought that, based on the chairman's authority to maintain order (Article 315 of the Companies Act), the chairman may request such person to refrain from entering the meeting and, if they do not respond to the request, reject them entry or order them to leave. However, in cases of noncompliance with such requests, it is best to issue a warning before actually ordering someone to leave.

(3) Change in the date and time of the meeting

The impossibility convening a shareholders meeting at the scheduled date and time may require withdrawal of the convocation, change of the date and time of the meeting, and reestablishment of the record date. Companies should confirm what procedures are necessary in each case.

(i) If it is not possible to decide and schedule a new meeting date, the convocation procedure will be revoked. It may only be resumed when it can be determined for certain when the new meeting will be held. Withdrawal of the convocation should be notified in writing to shareholders upon resolution by the Board of Directors. Although it is desirable that such notice should reach shareholders before the date of the initial scheduled meeting date, even if there is no adequate time left, the company should inform shareholders as soon as possible by means of announcements on websites, etc.

(ii) If it is possible to decide and schedule a new meeting date, in principle, the Board of Directors may decide the change and give notice thereof to shareholders at least two weeks prior to the date the meeting was initially scheduled and two weeks prior to the new meeting date.

The Ministry of Justice has issued an interpretation on the holding of an annual shareholders meeting in the event that a shareholders meeting cannot be held at the time originally planned due to the effects of COVID-19. It states that: (i) even if there are provisions in the Articles of Incorporation concerning the timing of the annual general meeting of shareholders, it is not intended to require the holding of the annual shareholders meeting at that time where it is not possible to hold the annual shareholders meeting due to a natural disaster or other reason. If it is not possible to hold the annual shareholders meeting at the time specified in the Articles of Incorporation due to COVID-19, it is considered sufficient to hold the annual general meeting of shareholders within a reasonable period after the situation has been resolved; (ii) shareholders on the record date may exercise voting rights on the meeting date when the meeting date is within three month from the record date, and in the event that an ordinary general meeting of shareholders cannot be held within three months from the record date (Article 124, para.2 of the Companies Act), the company is required to set a new record date for the exercise of voting rights and give public notice of the new record date and the details of the rights that the shareholders may exercise at least two weeks prior to the new record date (Article 124, para.3 of the Companies Act); and (iii) even if the Articles of Incorporation stipulate a specific date as the record date for the payment of dividends, when it is not possible to pay dividends to the shareholders on the record date due to the effects of COVID-19, the company may set a new record date

different from the date specified as the record date for dividends in the Articles of Incorporation. In such case, the company needs to give public notice about the new record date at least two weeks prior to the new record date (Article 124, para. 3 of the Companies Act).[16]

8. In conclusion

In addition to the matters mentioned above, there are many other actions that companies should undertake, such as confirming the impact on financial results,[17] and reviewing business continuity and risk management plans. A number of legal issues arise in these situations that are far from 'usual'. At the moment, it will be important for corporate legal affairs staff to accurately understand information and conduct thorough legal analyses.

16 Ministry of Justice "Annual Shareholders Meeting" (available at http://www.moj.go.jp/MINJI/minji07_00021.html) (in Japanese).

17 In addition, the Financial Service Agency has announced that, regarding the disclosure of the documents based on the Financial Instruments and Exchange Act (annual securities report, internal control report, quarterly securities report, semi-annual securities report), if such documents cannot be submitted by the deadline due to unavoidable reasons triggered by the impact of the COVID-19, such as it becoming impossible to continue auditing of Chinese subsidiaries, companies may receive an extension to the submission deadline according to the approval of the head of the relevant local Finance Bureau or its branch office (available at https://www.fsa.go.jp/en/ordinary/coronavirus202001/press.html).

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