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This issue covers the following topics:

■ Risk and Crisis Management/Compliance

Amended Whistle-blower Protection Act

On June 8, 2020, a bill amending the Whistle-blower Protection Act was passed by the Japanese Diet and will enter into force in two years (the "Amended Act"). The primary goal of the Amended Act is to encourage Japanese companies to establish an effective confidential reporting structure and enhance whistle-blower protections. The Amended Act is consistent with the growing global trend of strengthening whistle-blower protections in the sphere of corporate crimes. This article will provide a brief overview of the revisions and outline several takeaways for those in key compliance positions.

I. Confidential Reporting Structures

(i) Obligation to establish confidential reporting structure

Under the Amended Act, companies with more than 300 employees are required to establish a mechanism where:

- confidential reports can be made internally;
- internal investigations are conducted based on the confidential reports; and
- remedial measures are implemented in response to the confidential reports and internal investigations.

Companies with less than 300 employees are required to "make efforts" to establish such a mechanism.

The relevant authority will be granted expanded powers to request reports, give advice, guidance, and make recommendations with respect to the obligation mentioned above. The relevant authority will also have the discretion to disclose publically if a company has failed to follow its recommendations.

(ii) Criminal sanction for breach of confidentiality

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The Amended Act stipulates that individuals in charge of a company's confidential reporting mechanism shall not disclose, without legitimate grounds, any confidential information that they have come to know in the course of performing their duties that identifies any person who has made a confidential report. Violation of this provision is subject to a criminal fine not exceeding JPY 300,000.

II. Relaxing the Requirements for a Confidential Report to be Protected

(i) Reports to the relevant authority

A whistle-blowers report made directly to the relevant authority under the Amended Act will be protected if it is made in writing and includes certain identifying details of the whistle-blower, such as their name and address. The revision relaxes the previousrequirements in place regarding reports made directly to the relevant authority in order to make it easier for potential whistle-blowers to come forward. Under the current regime, a report to the relevant authority is only protected if there are reasonable grounds to believe that the reportable fact has occurred or is about to occur.

(ii) Reports to media organizations

Whistle-blowing reports that are made to media organizations are protected under the current law in circumstances where there are reasonable grounds to believe that the reportable fact has occurred or is about to occur, and the whistle-blower:

- has reasonable grounds to believe that he/she will be dismissed or otherwise receive disadvantageous treatment if they make a report to the company or to the relevant authority;
- has reasonable grounds to believe that the evidence pertaining to the reportable fact might be concealed or altered if they make a report to the company;
- was requested by the company, without any legitimate reason, not to use the internal confidential reporting system and/or not to report the relevant facts to the relevant authority.
- does not receive notice from the company about the commencement of an internal investigation into the reportable fact within 20 days from the day of the confidential report, or the company does not investigate without any legitimate reason; or
- has reasonable grounds to believe that harm to the life or body of an individual has occurred or is about to occur.

The Amended Act expands the final point above to also includes cases where serious and irrecoverable damage to personal property has occurred or is about to occur.

III. Enhancing Whistle-blower Protections

(i) Board members can be whistle-blowers

Board members are currently not able to claim whistle-blower protections since it is considered that they are capable of addressing and managing the relevant issue without the need for confidential reporting. However, this has been changed under the Amended Act such that whistle-blower protections will cover board members as it is recognized that confidential reporting from a board member could be an important source to uncover the wrongdoing of senior management.

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(ii) Broadening the scope of reportable facts

Under the current law, a reportable fact to be described in a whistle-blowing report should only concern certain criminal violations. The Amended Act, however, broadens the scope of what is reportable to include several administrative offenses.

As described above, the amended Whistle-blower Protection Act includes several significant developments to encourage companies' efforts to establish and maintain an effective confidential reporting structure as a part of their corporate compliance programs, and to enhance whistle-blower protections. Under the new regime, companies will be required to devote sufficient resources, depending on specific circumstances, to establish a confidential reporting structure that is accessible for employees. Companies will also be expected to improve and update their confidential reporting structures through periodic reviews. The amended Whistle-blower Protection Act is Japan's answer to recent globally recognized developments in corporate governance that designing an effective confidential reporting mechanism is one of the key parts of a corporate compliance program needed to deter and detect corporate crimes.

■ **Restructuring and Bankruptcy**

Overview of Turnaround ADR and Recent Amendment

I. Introduction

A distressed debtor in Japan commonly seeks to reach a consensual agreement with its financial creditors (particularly banks) out-of-court to avoid statutory in-court insolvency proceedings. It is generally perceived among restructuring practitioners in Japan that an out-of-court debt restructuring or workout is preferable to statutory in-court insolvency proceedings in order to preserve a debtor's going-concern value and reduce the costs for restructuring. While an out-of-court workout, by its nature, is not backed up by any statute or set of procedural rules, it is beneficial for both debtors and creditors to standardize out-of-court workout procedures so as to increase the foreseeability of the process. From this context, a standardized out-of-court workout scheme called Turnaround Alternative Dispute Resolution ("Turnaround ADR") was created in 2007.

II. What is Turnaround ADR?

Turnaround ADR was established through an amendment to the Act on Special Measures for Industrial Revitalization and Innovation (currently the Act on Strengthening Industrial Competitiveness) and is now one of the most commonly used consensual out-of-court debt restructuring schemes in Japan. Turnaround ADR is designed to help facilitate negotiations between a distressed debtor and its financial creditors under the supervision of mediators licensed by the Ministry of Economy, Trade and Industry and the Ministry of Justice. The Japanese Association of Turnaround Professionals (the "JATP") is the only licensed organization permitted to mediate Turnaround ADR cases. Further information about the JATP is available at http://turnaround.jp.

Turnaround ADR can be defined by several important aspects.

- First, by its nature as an out-of-court workout, no court is involved in the process. Instead, three impartial, experienced professionals chosen by the JATP (usually two lawyers and one accountant) preside over the whole process as mediators by chairing creditors meetings, scrutinizing a restructuring plan proposed by the debtor, and providing an objective view on the plan for creditors participating in Turnaround ADR.

- Second, unlike in-court restructuring, only financial creditors, typically banks, are involved in the process. Agreeing to a standstill with participating financial creditors, a debtor is not required to pay loan principals during the Turnaround ADR process, which can help stabilize liquidity. A debtor can, and is expected to, continue to pay trade creditors in the ordinary course of business and operate the business as before to keep the going-concern value.

- Third, contrary to in-court restructuring, Turnaround ADR is confidential except for some cases involving listed companies. This confidentiality can minimize potential deterioration of a debtor's business through public disclosure.

- Fourth, a debtor must obtain unanimous consent from all the participating banks to agree on a restructuring plan. In practice, this is the biggest challenge to a successful Turnaround ADR.

III. Process of Turnaround ADR

Turnaround ADR starts with a debtor filing an application with the JATP and sending a "standstill" notice in the joint names of the debtor and the JATP to the financial creditors that the debtor wants to participate in the process. The standstill notice is a unilateral notice sent from the debtor and the JATP requesting the financial creditors to refrain from collecting loan principals even when such amounts fall due and payable. This includes, among others, refraining from receiving or demanding payments, demanding collateral or guarantee, exercising set-offs, enforcing security interests, and filing a petition for any type of insolvency proceedings. This standstill notice expires at the time of the first creditors meeting but is usually extended with the creditors consent until the third creditors meeting. The standstill notice is not generally deemed to be default by the debtor of its obligations.

There are three types of statutory creditors meeting that are held under Turnaround ADR:

- *First creditors meeting:* At the first creditors meeting, three mediators chosen by the JATP are approved by the participating financial creditors if they are satisfied with those mediators supervising the process. Also, at the first creditors meeting, the standstill notice sent by the debtor needs to be acknowledged by the participating financial creditors, who will also decide until when the standstill will continue to be effective. In almost all cases, the participating financial creditors agree to extend the period of the standstill until the end of the third creditors meeting.

- *Second creditors meeting:* Prior to the second creditors meeting, the debtor drafts a restructuring plan that incorporates a debt restructuring plan, which takes various forms on a case-by-case basis such as debt rescheduling, refinancing, debt-for-equity swap, and debt forgiveness or debt haircut. The plan will be proposed to the participating financial creditors at the second creditors meeting for their review. The mediators scrutinize the plan from an objective viewpoint and submit an investigation report to the participating financial creditors opining on the plan's fairness and reasonableness.

- *Third creditors meeting:* Upon receiving the investigation report, the participating financial creditors consider whether to accept the plan and vote on it at the third creditors meeting. If all the participating financial creditors vote in favor, the plan is approved and the debtor will execute it accordingly. However, if the outcome is not unanimous, the Turnaround ADR ends in failure. At this point, the debtor has two alternatives: (i) initiate in-court "special mediation" proceedings presided over by a court to reach a consensus with the dissenting creditor(s) notwithstanding the fact that the dissenting creditor is not obligated to accept the outcome of the special mediation; or (ii) file to initiate in-court insolvency proceedings.

IV. Recent Amendment in 2018

What if unfortunately Turnaround ADR ends in failure and the debtor is forced into bankruptcy? The debtor should consider capitalizing on the restructuring plan developed during the preceding Turnaround ADR as the most effective way to emerge from bankruptcy as soon as possible. The restructuring plan, however, only outlines how to treat the participating financial creditors and does not cover other general claims, typically trade claims; whereas a reorganization plan under in-court proceedings will cover all claims against the debtor. Given this, one route that can be pursued is to pay trade creditors in full even in bankruptcy so that the Turnaround ADR restructuring plan can be used. In this regard, under civil rehabilitation proceedings, which is the most commonly used in-court proceedings in Japan and the Japanese equivalent of Chapter 11 in the U.S., a debtor can pay trade creditors in full prior to plan confirmation if a court determines that the following two requirements are met:

- the amount of their respective claims are small; and

- non-payment would cause significant hindrance to the debtor's business continuation.

The debtor is also allowed to provide in a plan that trade creditors shall be paid in full if a court determines the two requirements are met. This essentially means that the court's interpretation of these two requirements is crucial and leaves the debtor with somewhat significant uncertainty.

Out of this consideration, the Act on Strengthening Industrial Competitiveness was amended in 2018 to increase the foreseeability of how a court will judge the two requirements. The amendment provides that during the preceding Turnaround ADR a debtor may ask the JATP (not a court) to confirm whether these two requirements are satisfied and, if confirmed, in subsequent in-court insolvency proceedings, a court shall take such confirmation into consideration as part of its determination. The language of the statute only provides that a court will make its determination after "considering" the confirmation of the JATP, because any decision made by the court must be independent. Nonetheless, it is widely expected among restructuring practitioners that a court will respect and uphold the JATP's confirmation.

Although this appears to be a minor amendment, it may have a broader, practical effect on restructuring practices in Japan by opening the door to pre-arranged/pre-packaged in-court restructuring. If the confirmation is made by the JATP during the preceding Turnaround ADR and duly respected by a court in subsequent in-court proceedings, a debtor can implement the original Turnaround ADR restructuring plan by paying trade creditors in full, thereby allowing itself to emerge from in-court proceedings fairly soon.

■ Consumer Law

Collective Consumer Actions: Three Years On

I. Introduction

In October 2016, the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (the "Act") came into force and introduced new court proceedings for collective consumer actions ("Proceedings"). During deliberations on the Act, the Diet determined that the Japanese government should conduct a review of the Act three years after its implementation and take any measures it deemed necessary, including the amendment of the Act. The review would consider various factors, such as the circumstances of property damage incurred by consumers and the use of Proceedings.

Three years have now passed since the Act entered into force and the review of the Act is anticipated to commence shortly. This article will briefly recap the main features of the current Act, provide an overview of how Proceedings have been used in the three years after the implementation of the Act, and offer brief analysis on potential future amendments to the Act.

II. Main Features of Proceedings under the Act

(i) Parties

Under the Act, only a Specified Qualified Consumer Organization ("SQCO") *(tokutei tekikaku shouhisha dantai)* certified by the Prime Minister of Japan, is permitted to file a collective consumer action to the court against a business operator (an "Action"). In other words, individual consumers cannot file an Action. The Act adopts an opt-in system whereby, in order to join the Proceedings, individual consumers have to proactively make a delegation of power to the SQCO which filed the relevant Action. The delegation of power occurs in connection with the second stage of the Proceedings (discussed below).

(ii) Two-stage actions

The Proceedings, which are also known as Court Proceedings for Redress for Damage *(higai kaifuku saiban tetsuduki)*, are divided into two stages. The first stage is Litigation Seeking Declaratory Judgment on Common Obligations *(kyoutsu gimu kakunin soshou)* and the second stage is Simple Determination Proceedings *(kanni kakutei tetsuduki)*.

In the first stage, a SQCO files a lawsuit against the business operator, and the court determines whether or not the business operator must compensate for property damage suffered by a considerable number of consumers based on common facts and common legal grounds. If the court finds that all or part of the SQCO's claim is granted and renders a declaratory judgment to that effect, the SQCO can file a petition to proceed to the second stage.

Based on the result of the first stage, the second stage is held to determine the existence and the amount of each individual consumer's claim. If the business operator does not make an objection to an individual consumer's claim, then the amount of that consumer's claim is automatically finalized. On the other hand, if the business operator objects to the existence or the amount of a consumer's claim, and the SQCO, on behalf of such consumer, appeals against the objection, the court will issue a Simple Determination Order to decide the appropriate amount.

(iii) Scope of claims

The scope of claims available under the Proceedings is limited as follows:

- First, the Proceedings only cover consumers' monetary claims. Therefore, for example, it does not cover claims for the repair of products.
- Second, in principle, a SQCO cannot make claims against business operators who are not counterparties to the relevant consumer contracts. In practice, this means that although the Proceedings cover claims against the retailer of products, they do not cover claims against manufacturers.
- Third, the Proceedings exclude from its scope such damages as secondary losses, lost earnings, damages for personal injury or death, and damages for mental suffering. This effectively limits the extent of the

recoverable damages to the purchase price of the product or service in question.

- Fourth, the Proceedings exclude from its scope tort claims based on special laws (not based on the Civil Code). For example, the Proceedings do not cover tort claims based on the Product Liability Act.

III. Overview of the Use of the Proceedings

(i) Number of SQCOs

As of June 2020, only three consumer organizations have been certificated by the Prime Minister and are recognized as SQCOs.

(ii) Number of Proceedings

Only four Actions have been filed since the Act came into force. No Actions were filed during the first two years after the implementation of the Act and the initial complaint of the first case was only submitted to the court in December 2018. The table below summarizes the details and status of these cases.

Case	Date of File	Factual Background	Status
1	December 2018	An SQCO claims against a university for refund of various fees, including the entrance examination fee, charged to consumers who had been treated unfairly in the process of admission decisions.	The declaratory judgment in the first stage was rendered on March 2020. The second stage has not yet commenced.
2	April 2019	An SQCO claims against business operators for the refund of the purchase price of DVDs due to fraudulent advertisement and inaccurate prior explanation.	In the process of the first stage
3	October 2019	Same claim as in Case 1 against a different university	
4	June 2020	An SQCO claims against a business operator who runs a salary factoring business for the refund of payment due to the application of extortionate interest rates.	

(iii) Brief Analysis on Potential Future Amendments to the Act

As is apparent from the foregoing overview, the utilization of the Proceedings has been fairly low to date. The limited scope of claims permitted under the Proceedings is thought to be one of the principal reasons for such low utilization. With that in mind, it is likely that the upcoming review of the Act will discuss how the scope of permissible claims should be broadened. If the scope of claims is broadened, business operators may face a greater risk of potential exposure to lawsuits and reputational harm. Consumer facing business operators would be well served to closely monitor the ongoing Proceedings and stay informed of any recommendations made by the upcoming review which may impact their business practices.

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