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GLOBAL INVESTIGATIONS / CRISIS MANAGEMENT / COMPLIANCE

Progress in the Human Rights Due Diligence in Japan

I. Introduction

ESG is facing increased attention from various stakeholders, including regulators, investors and consumers, and among all, human rights, which is positioned as S in ESG, increases the need for due diligence in recent years. METI (The Ministry of Economy, Trade, and Industry) and MOFA (The Ministry of Foreign Affairs) conducted a survey last year regarding companies' human rights due diligence, and it found that half of Japan's publicly traded companies do not do due diligence on human rights. Of those who do not, around 30% said they do not know how to conduct such investigations. Since the survey was limited to listed companies and the response rate was not high, it is likely that many more Japanese companies have not actually conducted due diligence. However, with the upcoming guidelines (as described below) and European legislation, Japanese companies will be more required to perform human rights due diligence.

II. The recent movement related to Business and Human Rights

(i) METI guidelines for human rights due diligence

In March this year, METI established the Study Group on Guidelines for Respecting Human Rights in the Supply Chain for the purpose of publishing Japan's first guideline for human rights due diligence. By creating this guideline, Japan hopes to close the gap with the U.S. and Europe, which are already responding to human rights concerns. The guideline will not be mandatory but will likely include recommendations on how companies should identify and assess risks, track and disclose their findings, and design grievance mechanisms for stakeholders should be designed. The targeted release date is Summer 2022.

(ii) The revision of the Corporate Governance Code (CG Code)

The Corporate Governance Code, which is an instruction established by the Tokyo Stock Exchange for listed companies, was revised in 2021, and the revised code requires corporate boards to deal with sustainability issues, including "climate change and other global environmental issues, respect for human rights, fair and appropriate treatment in the workforce, fair and reasonable transactions with suppliers" and other matters, and states that these are all important management

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issues that can lead to profit opportunities as well as risk mitigation.

Further, companies to be listed in the Prime Market are required to meet a higher standard of disclosure, where the revised code states that those companies should enhance the quality and quantity of their disclosure in relation to sustainability based on the recommendation of the TCFD (Task Force on Climate-related Financial Disclosures) or its equivalent.

(iii) Collaboration with ILO

Additionally, according to the media reports, METI has recently requested ILO (International Labour Organization) to dispatch experts to production sites in Asian countries to examine the human rights risks of Japanese companies' overseas business partners and encourage improvements. According to the announcement, ILO experts will be sent to production sites in Bangladesh, Vietnam, and Cambodia from April onward to check the status of human rights considerations for employees and compliance with labor standards laws and other laws and regulations.

III. Characteristics of human rights risks in Japan

When conducting human rights due diligence for Japanese companies, it is important to understand the human rights risks unique to Japan. First, in general, the supply chain of Japanese companies has traditionally been characterized by multiple layers of subcontractors in the supply chain, low visibility of the supply chain, and little substitution of procurement and production sites in the supply chain. Secondly, some companies are dependent on China and ASEAN countries for the procurement of raw materials and components.

Among industries, the textile industry is generally considered as one of the high-risk sector of human rights as it has built long supply chains that range from manufacturing raw materials of threads and textiles, to planning and manufacturing products, to distributing and selling them. METI established the sector-specific study group on Sustainability of Textile and Apparel Industry, and publicized a report last year. In the report, problems related to Technical Intern Trainee (*ginou jissusei*), improving supply chain structure, formulating guidelines on Design for Environment have been pointed out. Japan Textile Industry Federation is also discussing preparing the sector-specific guideline for human rights due diligence and future movements should be closely watched.

Recent Publications

- ***New Mandatory Safety Management Systems for the Workplace for Several Industries (Thailand)***
(NO&T Thailand Legal Update /June 2022)
by Yothin Intaraprasong and Ponpun Krataykhwan
- ***Japanese Tax Considerations of Registering "Representative in Japan" of Foreign Company: To Mitigate Permanent Establishment Exposure***
(NO&T Tax Law Update /June 2022)
by Yushi Hegawa
- ***Chambers Global Practice Guides Acquisition Finance 2022 Japan – Law & Practice***
(Chambers & Partners Publishing /May 2022)
by Jiro Mikami, Ryo Okubo and Hiromi Hattori
- ***Global Arbitration Review – The Asia-Pacific Arbitration Review 2023 Japan***
(Law Business Research Ltd /May 2022)
by Yoshimi Ohara, Yusuke Iwata and Annia Hsu
- ***Chambers Global Practice Guides Artificial Intelligence 2022 Japan – Law & Practice***
(Chambers & Partners Publishing /June 2022)
by Keiji Tonomura, Masahiro Kondo, Munetaka Takahashi and Hayato Maruta
- ***Chambers Global Practice Guides Artificial Intelligence 2022 Japan – Trends & Developments***
(Chambers & Partners Publishing /June 2022)
Keiji Tonomura, Yukiko Konno, Yoshiteru Matsuzaki and Minh Thi Cao Koike
- ***CHANGES IN THE RULE FOR SELECTION OF DEVELOPER OF COMMERCIAL HOUSING PROJECT (Vietnam)***
(NO&T Asia Legal Review /May 2022)
by Hoai Tran

CORPORATE

Shareholder Meeting Digitalization in Japan

I. Introduction

While discussions about the digitalization of shareholder meetings have been gradually increasing in recent years, the COVID-19 pandemic has drastically accelerated the digital movement in Japan. On June 16, 2021, legislation came into force permitting listed companies to hold exclusively virtual shareholder meetings. Similarly, legislation allowing the electronic distribution of shareholder meeting materials is scheduled to enter into force on September 1, 2022.

II. Commencement of Exclusively Virtual Shareholder Meetings

Since the Companies Act of Japan assumes that a shareholder meeting will be held in a physical venue, holding an exclusively virtual shareholder meeting has generally been considered to be impermissible. As such, the Japanese government amended the Industrial Competitiveness Enhancement Act to add provisions superseding the Companies Act to allow a listed company to hold an exclusively virtual shareholder meeting. Those provisions took effect on June 16, 2021.

Under the amended Industrial Competitiveness Enhancement Act, a listed company may hold an exclusively virtual shareholder meeting if: (i) the company has completed a specified procedure for confirmation by the Minister of Economy, Trade and Industry and the Minister of Justice that the company has satisfied certain conditions prescribed in the relevant ministry ordinances; and (ii) the company has amended its articles of incorporation to state that a shareholder meeting may be held as a 'shareholder meeting without a designated location.' As a provisional measure, for a period of two years after June 16, 2021, a listed company may hold an exclusively virtual shareholder meetings, even if it has not amended its articles of incorporation to permit 'shareholder meeting without a designated location', so long as it obtains the confirmation of the Ministers mentioned above.

As of March 31, 2022, however, less than 150 listed companies had changed their articles of incorporation to provide for exclusively virtual shareholder meetings. It is thought that one of the main reasons why most listed companies are not proactive in changing their articles of incorporation is that standard practice for an exclusively virtual shareholder meeting has not been determined. In 2021, while more than 400 listed companies held hybrid shareholder meetings (i.e., shareholder meetings attended by board members and shareholders both in-person and online or through other virtual means), only three listed companies held virtual-only shareholder meetings. The fact that Institutional Shareholder Services Inc. (ISS), a proxy advisory firm, recommended to vote against proposals to change the articles of incorporation to enable holding an exclusively virtual shareholder meeting could also have been influential on listed companies' decision making. It appears that, despite the legislative changes made by the Japanese government, there may still be some time until exclusively virtual shareholder meetings become commonplace in Japan.

III. Electronic Distribution of Shareholder Meeting Materials

Under the current Companies Act, a company is in principle required to physically deliver shareholder meeting materials (i.e., reference documents, voting forms, annual reports and financial statements) and a convocation notice to its shareholders in advance of the shareholder meeting itself. As a special rule, the Companies Act allows a company to make some of the information to be described in the shareholder meeting materials available on its website by specifying that it may do so in its articles of incorporation. In practice, most listed companies utilize this method. However, companies are not permitted to electronically provide certain important information such as the meeting agenda. While it is technically possible for a company to electronically deliver all of the relevant shareholder meeting materials to shareholders who have provided their consent to electronic delivery in advance, it is very uncommon for a listed company to seek shareholders' consent for electronic delivery because of the typically large number of shareholders.

As such, the Japanese government enacted a bill in 2019 to amend the Companies Act to permit a company to make all information to be described in shareholder meeting materials available on its website without obtaining the consent of its shareholders if the company has included the use of this electronic method in its articles of

incorporation. That amendment is scheduled to take effect on September 1, 2022. For listed companies that make the necessary amendment to their articles of association before the new legislation comes into force, they will be deemed to have amended their articles of incorporation as of September 1, 2022 and will be required to make the information to be described in shareholder meeting materials available on their websites for shareholder meetings to be held after March 1, 2023. However, if a shareholder requests the physical delivery of shareholder meeting materials, the company will be required to comply with that request and provide physical copies thereof to that shareholder.

Under the new system, the directors of a listed company are required to make the information to be described in shareholder meeting materials available on the company's website for a period starting from three weeks prior to the date of the shareholder meeting or the date that the convocation notice of the shareholder meeting is dispatched (whichever is earlier) until three months after the relevant shareholder meeting. As far as listed companies are concerned, they will be required under the rules of the stock exchange to use its efforts to make shareholder meeting materials as well as a convocation notice electronically available at a date earlier than the deadline under the Companies Act (i.e., three weeks prior to the shareholder meeting).

The current Companies Act requires a company, absent any share transfer restrictions, to provide shareholder meeting materials to its shareholders no later than two weeks prior to a shareholder meeting. The reforms discussed in this article will be beneficial not only for the company insofar as it will be able to save costs and time for printing and delivering shareholder meeting materials, but also for shareholders in a sense that they will be able to review the shareholder meeting materials earlier and have more time to conscientiously consider the agenda for the relevant meeting.

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