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FINANCIAL REGULATIONS

"Customer Oriented Business Conduct" in the Forthcoming Amendment to the FIEA

I. Background to the amendment of the laws

On March 14, 2023, the Financial Services Agency of Japan (the "**JFSA**") submitted to the Diet a bill (the "**Bill**") for partial amendment of the Financial Instruments and Exchange Act of Japan (the "**FIEA**") and the Act on Provision of Financial Services of Japan (the "**Financial Services Act**"). The Bill is expected to amend many matters, including an amendment to the FIEA aimed at ensuring "Customer-Oriented Business Conduct", and is generally expected to affect companies operating financial businesses (particularly businesses for individual customers) in Japan.

By way of background, this amendment is based on proposals made by the "Interim Report of the Customer-Oriented Task Force of the Working Group on Capital Market Regulations of the Financial System Council" published on December 9, 2022.

The following explanations for this amendment are set forth in the JFSA's explanatory materials for this amendment:

- The JFSA formulated certain "Principles for Customer-Oriented Business Conduct", (the "Principles") pursuant to which efforts have been made to pursue the best interests of customers; and

- There are, however, many financial business operators that have not adopted these Principles or do not publicly announce their policies for the Customer-Oriented Business Conduct.

In addition, the following points have been raised as issues in the Japanese financial services industry:

(i) In some cases, financial instruments the risks of which are difficult to understand and the costs of which may not be reasonable have been recommended and sold by sellers of financial instruments without sufficient explanation (i.e., issues with respect to sellers of financial instruments);

(ii) In some cases, financial instruments are structured and managed with a priority on sales promotion over

customer profits (i.e., issues at investment management companies); and

(iii) The underuse of investment specialists and inadequate processes for selecting investment institutions (i.e., issues at asset owners such as corporate pensions).

In response to the above issues, the purpose of the Bill is to ensure that relevant businesses are acting in the best interests of customers, and to enhance the provision of information to customers. Some examples of this amendment are as follows.

II. Duty of Best Interest of Customers

This amendment will delete the "Duty of the Good Faith" clause set forth in Article 36, Paragraph 1 of the FIEA, and will stipulate the new clause "Duty of Best Interest" in lieu thereof as Article 2, Paragraph 1 of the amended Financial Services Act.

It has been predicted that the addition of the phrase as "taking into account the best interests of customers, etc." in the new clause means that financial business operators may have to implement various additional customer-friendly measures.

III. Substantial Accountability

Under this amendment, the FIEA will stipulate that financial instruments business operators shall be obliged to provide tailored explanations to their customers on the basis of their customer's attributes (i.e., customer's knowledge, experience, property, and purpose for concluding contracts for financial instruments transactions) (Article 37-3, Paragraph 2 of the amended FIEA).

Any exemption from this obligation will be stipulated in the amended Cabinet Office Ordinance, which will be published in near future.

IV. Change from "Duty to Provide Documentation" to "Duty to Provide Information"

Under the existing FIEA, financial instruments business operators must in principle provide customers with the documents stipulated in the FIEA, such as the Documents Delivered Prior to the Conclusion of a Contract (Article 37-3, Paragraph 1 of the FIEA), the Documents Delivered Upon the Conclusion of a Contract (Article 37-4, Paragraph 1 of the FIEA), the Best Execution Policy (Article 40-2, Paragraph 4 of the FIEA), the Documents explaining that the order has been executed in accordance with its Best Execution Policy, etc. (Article 40-2, Paragraph 5 of the FIEA), and the Investment Report (Article 42-7 of the FIEA).

Under the amendment, there is no further obligation to provide the above documents; instead, it is sufficient to provide the customer with the information contained in such documents, rather than the documents themselves, via methods (i.e., not only providing documents) to be specified by the Cabinet Office Ordinance.

The amended Cabinet Office Ordinance, which specifies the method of providing information, will be published in near future.

V. Conclusion

At present, the timing of enforcement of these amendments is uncertain, but it is important for companies operating financial businesses (particularly businesses for individual customers) in Japan to pay close attention to this trend.

[Author]

Toru Takayama, Partner
+81-3-6889-7664 toru_takayama@noandt.com
Toru Takayama handles a wide variety of matters of financial institutions, including financial regulations, risk management, internal investigation and other compliance matters, utilizing his experience at the Financial Services Agency of Japan. He has also been advising on M&A transactions, JREIT and general corporate matters.

DISPUTE RESOLUTION

Amendment to the Arbitration Act

I. Introduction

The amendment to the Arbitration Act of Japan (the "**Arbitration Act**"), passed by the Japanese Diet on April 21, 2023, will become effective within one year from the day of promulgation, April 28, 2023 (the "**Amended Act**"). The current Arbitration Act was enacted in 2003 based on 1985 UNCITRAL Model Law on International Commercial Arbitration. While the UNCITRAL Model Law was amended in 2006 ("**2006 UNCITRAL Model Law**") and this amendment was adopted by many jurisdictions, the current Arbitration Act had not been amended for 20 years. The Amended Act seeks to incorporate changes adopted in 2006 UNCITRAL Model Law. Below we set out in brief an overview of the Amended Act.

II. Interim Measures

While the current Arbitration Act provides that an arbitral tribunal may issue interim measures, it does not include any provisions affording courts the authority to enforce such interim measures. As such, interim measures have not been enforceable in Japanese courts, and a party obtaining interim measures via arbitration had no choice but to rely on voluntary compliance by the opposing party.

The Amended Act clarifies and organizes the types of interim measures and the requirements for issuing them. Specifically, the arbitral tribunal may order a party:

(a) To take necessary measures or restore the status quo to avoid any substantial loss or imminent danger concerning the subject of the arbitration;

(b) Not to dispose of or alter assets or properties in preparation for enforcement or satisfaction of claims;

(c) Not to engage in any conduct harmful to arbitration proceedings; or

(d) Not to destroy, delete or modify evidence necessary for arbitration proceedings.

The Amended Act also establishes a specific system for Japanese courts to allow enforcement of interim measures ordered by the arbitral tribunal, regardless of whether the seat of arbitration is in Japan or not. In accordance with the types of interim measures described above, the Amended Act affords two routes for enforcement as follows:

For interim measures pursuant to "(a)" above:

The court will order to allow enforcement of the interim measure unless there is any stipulated ground for refusing such enforcement.

For interim measures pursuant to "(b)," "(c)" and "(d)" above:

(i) First, the court will order to allow enforcement of the interim measure unless there is any stipulated ground for refusing such enforcement.

(ii) Second, in the event that the party against which the interim measures are ordered violates or is likely to violate such measures, the court will order payment of a specified monetary penalty.

Furthermore, the court may order (i) and (ii) simultaneously.

It should be noted that only interim measures "ordered by the arbitral tribunal" are enforceable under the

Amended Act. In other words, the Amended Act does not establish a mechanism that allows for enforcement of interim measures ordered by an emergency arbitrator, who is appointed by arbitral institutions (such as JCAA, SIAC and ICC) under those institutional rules before the arbitral tribunal is constituted. Furthermore, the Amended Act does not stipulate whether the arbitral tribunal may grant interim measures on *ex parte* basis; this is left as a matter of interpretation.

III. Written Requirement for Arbitration Agreement

Under the current Arbitration Act, an arbitration agreement is valid if it is in writing. While this requriement itself is not modified, the Amended Act enables an oral agreement to qualify as a written agreement under certain conditions.

IV. Jurisdiction of the Courts

The Amended Act provides that, if the seat of arbitration is in Japan, the Tokyo District Court and Osaka District Court have concurrent jurisdiction over arbitration-related cases including cases for enforcement of the arbitral award. The purpose of this amendment is to concentrate arbitration-related cases in Tokyo and Osaka district courts and thereby increase the arbitration expertise of these courts.

V. Translation of Arbitral Awards

Under the current Arbitration Act, the party seeking to enforce the arbitral award is required to prepare a Japanese translation of the arbitral award and submit it to the relevant court unless the arbitral award is written in Japanese. This requirement was time consuming and often increased the cost of arbitration proceedings, especially in large-scaled international arbitration. In order to address this issue, the Amended Act provides that the court has the discretion to waive the submission of the translation of the arbitral award in whole or in part. This new regulation also applies to cases where the party seeks to enforce the interim measures.

VI. Comments

Although international arbitration has been widely used as a means of international dispute resolution, even by Japanese companies, the number of cases in Japan remains low. To encourage the use of this method in Japan, the Japanese government has recently taken several measures to facilitate international arbitration in Japan. The implementation of the Amended Act is one of these efforts to demonstrate that Japanese arbitration legistration conforms to international practices.

[Author]

Soh Inoue, Partner
+81-3-6889-7633 soh_inoue@noandt.com
Soh Inoue's practice focuses on dispute resolution in the areas of employment law, intellectual property law, commercial law and real estate law. He has represented both domestic and foreign clients in litigation, arbitration, mediation and other dispute resolution proceedings. His experience on these types of cases also includes providing the assistance and advice on enforcement of arbitral awards.

NAGASHIMA OHNO & TSUNEMATSU

www.noandt.com

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com

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