WHITE & CASE

Dispute Resolution

Tokyo Disputes Practice

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Continuing our "Understanding Boilerplate Provisions" series, this month we examine "integration" clauses and why such clauses may be critical to minimizing or resolving contractual disputes that may arise as a result of the parties having signed agreements (such as letters of intent or memorandums of understanding) prior to the signing of the final, definitive contract. To read more, see page 2.

Law on Cybercrime and Obstructing Court Ordered Enforcement Comes into Effect

The Diet enacted the "Law for Partial Revision of the Penal Code, Etc. to Respond to Advancement of Information Processing, Etc." during its 177th session. The law was promulgated on June 24, 2011 and a portion of it came into effect on July 14, 2011. The date on which the remainder of the law will come into effect has not been determined.

The law has been referred to as the "Cyber Penal Code," but this is misleading because the law concerns not only new classes of cybercrime, but also punishments for obstructing enforcement of court orders for compulsory enforcement unrelated to cybercrime. This article discusses the cybercrime related aspects of the law and the compulsory enforcement aspects of the law in turn below.

Cybercrime

Cybercrime knows no national boundaries. Accordingly, national governments must cooperate to deter cybercrime. Each G7 member country, including Japan, and many European countries signed the Convention on Cybercrime. According to the Ministry of Justice of Japan, the number of cybercrime incidents in Japan have increased approximately seven times from 2000 to 2009. Many have commented that Japan's cybercrime law must evolve to meet the changing situation.

In 2005, a cybercrime bill was submitted to the Diet based on recommendations from the Ministry of Justice's Legislative Council on High-Tech Crimes, but after significant criticism in the Diet, it was voted down. The current law was drafted in part to address the criticisms of the 2005 bill.

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Practice Tip – Understanding Boilerplate Provisions

Integration Clauses

Contracts governed by US law often contain a standard clause that states that the contract is the entire agreement between the parties concerning the subject matter of the contract. This provision is called an "integration," "merger" or "entire agreement" clause. It is common that parties to a contract sign multiple LOIs, MOUs or other types of transaction agreements before finally agreeing and executing a single, definitive agreement. In the event of a dispute, a question might arise as to whether the previous agreements were terminated or completely superseded by the later definitive agreement, or merely amended and supplemented. The purpose of the integration clause is to preclude one party from claiming that an earlier written or oral agreement remained binding on the parties and that those provisions of the earlier agreement that are not directly supplanted by the later agreement continue to bind the parties. An integration clause would be asserted in response to such claim to support a counterargument that the "entire agreement" is contained in the later agreement and superseded and supplanted all prior agreements, whether oral or written, including terms that were not addressed in the later agreement. In summary, adding an integration clause to a contract is advisable to increase certainty between the parties.

The major amendments to the Criminal Code and Criminal Procedure Code concerning cybercrime found in the law are as follows.

(1) Investigators May Request Preservation of Transmission Logs

Investigators will be able to request internet service providers in writing not to delete specific transmission log information (recipients, senders and dates and times of transmissions, etc.) that have been recorded for its business purpose for a certain period of time (normally for thirty days; if there is a special need, the period may be extended to 60 days in total) to the extent such measures are necessary to enforce seizures.

<Qualifications>

- The contents of the transmission may not be preserved under this rule.
- The request shall be made in writing.
- If it is necessary to seize the electronic information, a warrant must be obtained.
- Any log not recorded at the time of request shall not be seizable.

(2) Creation and Transmission of Computer Viruses to be Criminalized

- Preparation or provision of a virus to be punished by imprisonment up to three years or fines up to JPY 500,000.
- Acquisition and retention of a virus to be punished by imprisonment up to two years or fines up to JPY 300,000.

There is a carve-out for preparation of viruses for testing antivirus software and for accidental creation of software bugs.

(3) *Attempt* to Obstruct Business by Damaging a Computer to be Criminalized

(4) Seizure of Data on Server with Order for Recording

It will be possible for an investigator obtaining a warrant against an internet service provider to order the internet service provider to record necessary data from an email server or storage server and to seize the CD-R instead of seizing the computer from which the data came.

(5) Seizure of Data on Server

It will be possible for an investigator obtaining a warrant against a person or an entity to copy necessary data which is recorded on outside servers such as hotmail, gmail or yahoo mail which the target person/entity sent or received through such outside server onto a computer that is specified on the warrant and then to seize the computer.

(6) Seizure of Discs

In place of seizing an entire computer, it will be possible to copy the relevant data to a disc and seize it.

Some have criticized the law in question as a "Big Brother" style intrusion on privacy. To assuage concerns, the Ministry of Justice published Q&A concerning the law.[1] The Ministry has also released information on the drafters' thinking concerning computer virus crimes.[2]

As discussed above, if an investigator intends to obtain an electronic log that has been preserved, the investigator must obtain a warrant from a court. This judicial oversight is to prevent reckless violation of citizen privacy. However, if those warrants are issued without due scrutiny in practice, there is still the possibility that the general public's computer use could be inappropriately surveilled by the government.

1 http://www.moj.go.jp/content/000073740.pdf

2 http://www.moj.go.jp/content/000076666.pdf

New Punishments for Obstruction of Court Enforcement Orders

The Justice System Reform Council of 2001 recommended that measures be introduced against obstruction by occupiers, etc., of real estate subject to compulsory execution. A law came into effect in 2004 that included civil measures to curtail such obstruction. The corresponding criminal penalties are introduced by the law at issue in this article.

The major amendments to the Penal Code concerning compulsory enforcement provided for in the law at issue are as follows.

(1) Broadening "Destruction of Seals" under Article 96 of the Penal Code and Increased Punishment

Not only those who damage notices affixed by a public official but also those who violate such notices by occupying real estate subject to compulsory enforcement will be subject to new, heavier punishment. "Imprisonment up to two years or fines up to JPY 200,000" will be amended to "imprisonment up to three years or fines up to JPY 2,500,000, or both."

(2) Broadening "Obstruction of Compulsory Execution" under Article 96-2 of the Penal Code and Increased Punishment

The following acts will be punishable: decreasing the value of property by leaving waste in a building that is subject to compulsory execution, giving property subject to compulsory execution to another person at no charge intending to obstruct compulsory execution, threatening violence against a person who is entitled to claim compulsory execution. The punishment provision will be amended from the current "imprisonment up to two years or fines up to JPY 500,000" to "imprisonment up to three years or fines up to JPY 2,500,000, or both."

(3) Broadening "Obstruction of Auctions" under Article 96-3 of the Penal Code and Increased Punishment

Some measures such as discouraging potential bidders from participating in an auction by displaying an organized crime group's crest on the property will be added as a punishable obstruction of auction. The punishment provision will be amended from the current "imprisonment up to two years or fines up to JPY 2,500,000" to "imprisonment up to three years or fines up to JPY 2,500,000, or both."

(4) Crime Aggravated if Done for Compensation

With respect to (1) and (2) above, if the act is conducted to receive compensation, the penalty limit will be increased to "imprisonment up to five years or fines up to JPY 5,500,000, or both."

Discrimination of Off-duty Behavior in the US Curtailed by Lifestyle Discrimination Statutes

Traditionally, discrimination based on legal off-duty activities has been generally permitted under American employment law because, in contrast to Japan, employment in the US is typically at-will. However, over the years, legislation at the state and federal level has expanded the scope of protected classes of employees. An employer's actions against an employee based on the employee's protected class status can be deemed illegal discrimination. Protected classes have been closely linked to immutable characteristics, such as race, religion, sex and disability, rather than discretionary activities, such as smoking.

Recently however, workers' antidiscrimination protection in the US has broadened beyond the established protected classes as state legislatures have passed so-called "lifestyle discrimination statutes" forbidding discrimination based on smoking, and in some cases other legal off-duty activities. For example, Minnesota and Illinois have passed statutes forbidding employment discrimination based on consumption of legal substances outside the office. Colorado and North Dakota have gone further to ban discrimination based on any form of legal off-duty behavior. At the federal level, the National Labor Relations Board weighed in on the specific issue of social media use outside of work in its publicized settlement in February 2011 with a company in Connecticut for the company's allegedly illegal discharge of an employee for posting negative comments about her boss on the Facebook social media site.

From the employer's point of view, an employee's legal activities outside of the office, such as smoking, drinking, and participation in other high risk activities can cost significant lost productivity and increase healthcare costs. Similarly, certain speech, especially that which is viewable by a large audience on the internet, can hurt the employer's reputation in the marketplace.

At the crux of the issue surrounding lifestyle discrimination statutes is a conflict between individual freedom and the freedom of companies to make employment decisions in their own economic interest. Although individuals may desire to be judged solely on their work performance, allowing employees to do as they please off-duty could result in substantial lost profits and goodwill.

In summary, the general rule in the US remains employment at-will, but lifestyle discrimination statutes have proliferated making it more difficult for employers to make employment decisions based on legal off-duty behavior. Before an employer in the US issues a policy that may penalize employees for their off-duty behavior, it should examine whether the state(s) in which the employees work have enacted a lifestyle discrimination statute and to what extent off-duty behavior is protected under such statute.

Document Production: A Critical Feature of International Arbitration

Documents are crucial to proving a case in international arbitration. Arbitrators usually rely primarily on contemporaneous documents in reaching their ultimate decision and rendering their award.

International arbitration practice has developed a specific procedure of "document production" (narrower than the common law discovery) by which each party (claimant or respondent) may force the other party to produce documents in its possession which are relevant to the outcome of their dispute.

Document production has become a frequent feature of international arbitration. Parties must be prepared for it. When mastered, "document production" can be a powerful tool to strengthen a party's case; however, it can be of limited value, or even counter-productive, if not used properly.

The Procedural Framework: the IBA Rules

In international arbitration, the parties and arbitrators can agree on procedural matters, including the method for document production. The 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration have become the standard reference for document production. The IBA Rules have achieved an effective balance between the US or common law-style discovery (often seen as excessive) and civil law systems (with a very restrictive approach to document production) and are, in that sense, truly international. This balance has been maintained in the new IBA Rules on the Taking of Evidence in International Arbitration, which were adopted by the IBA Council on May 29, 2010.

The procedure for document production is usually determined at the outset of the arbitration when the arbitrators and parties agree on the overall timetable. The new IBA Rules impose an obligation on the arbitral tribunal to consult the parties at the earliest appropriate time with a view to agreeing on an efficient, economical and fair process for taking evidence, and includes a nonexhaustive list of matters which such a consultation should address.

Document production typically takes place following the parties' first detailed written submissions, with each party submitting a request to produce documents to the other party. Under both the 1999 and 2010 IBA Rules, such requests should contain:

- A description of a document or a narrow and specific category of documents which the party wants to obtain;
- A description of how these documents are relevant and material to the outcome of the case;
- Confirmation that these documents are not in the "possession, custody or control" of the requesting party, and of the reason why that party assumes such documents to be in the "possession, custody or control" of the other party.

Requests for production can cover a wide variety of documents (in electronic or paper form), such as letters, e-mails, memoranda, minutes of meetings or any other documentary evidence.

A party can either produce the documents requested or object to the production. Reasons for objections under the IBA Rules include: (a) lack of relevance or materiality; (b) legal impediment or privilege under applicable legal or ethical rules; (c) unreasonable burden to produce the requested evidence; (d) reasonable loss or destruction of the document; (e) compelling commercial or technical confidentiality; (f) compelling special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution); or (g) compelling considerations of fairness or equality of the parties.

In case of objections, the tribunal will rule on the issue and either agree to the objections or order the production of documents.

In practice, requests for production, objections and the tribunal's decision are frequently presented together in a table called a "Redfern Schedule" (named after the prominent British arbitrator, Alan Redfern).

Advantages and Pitfalls of Document Production

The main advantage of document production is getting documents from the other party to strengthen your case. Obtaining such documents can be critical. To illustrate, in a construction dispute, we succeeded in obtaining the production of internal cost documents from the other party which evidenced that the amount of its claim had been significantly inflated. In a dispute related to the abrupt termination of certain negotiations, we obtained internal board minutes from the other side showing, contrary to what it alleged, that its board had in fact decided months earlier than it claimed, without informing our client, not to proceed with the acquisition. In both cases, document production had a decisive impact on the outcome of the dispute.

Document production can, however, have pitfalls if not approached or understood properly. It may indeed backfire and be prejudicial to a party's position. A party's (and its counsel's) understanding and approach to document production may vary greatly depending on legal background. Thus, a party from a civil law system, where document production is virtually nonexistent, may be inclined to object in principle to the production of documents. This approach is likely to be counterproductive and may antagonize the tribunal. Objections without justification are unlikely to succeed, but likely to be seen as obstructive. On the other hand, a party from a common law system, with broad discovery, may be led into producing more documents than it was required to disclose and, thus, overexpose itself.

Practical Tips

If used carefully, with a good understanding of the rules, practice and goals, document production can be a useful tool to make a party's case. Here are a few practical tips:

- Know your case and your documents from the outset: it is essential to identify "good" documents; "bad" documents, which may become an issue in document production; and "missing" documents, which may be requested from the other party;
- The later a party produces a "damaging" document, the stronger the resulting damage, especially if the party is ordered to do so by the tribunal; thus, often it is preferable to produce such documents before being forced to do so; this ensures better "damage control" and allows such documents to be presented in the most favorable light;
- Be cooperative, straightforward and responsive to document production requests, unless there are justified grounds for objections: it strengthens credibility vis-à-vis the tribunal.

Document production should be taken seriously from the outset of the arbitration and approached with experience, caution and preparation. If used properly, it can be a decisive tool to win your case.

This article was written by Christophe von Krause and Luka Kristovic Blazevic and appeared originally in the Summer 2010 issue of *International Disputes Quarterly*, at http://www.whitecase.com/idq/summer-2010-1/.

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