HAYABUSA ASUKA LAW OFFICES NEWSLETTER VOL.4 JANUARY 2014

CONTENTS

INTRODUCTION TO RENEWABLE ENERGY BUSINESS IN JAPAN

1. Overview

In Japan, the “Feed-in Tariff (FIT) System for Renewable Energy” was introduced in 2012. The “Feed-in Tariff (FIT) System for Renewable Energy” (the “System”) is a system in which the Japanese government gives its assurance that electric power made by Renewable Energy will be purchased at a certain rate by an electric power company at the located site. “Renewable Energy” means the five (5) energy sources: solar, wind-power, water-power, geothermal heat and biomass. Among these sources, entry into the solar power business has been very active these days.

In the System, the purchase price and purchasing terms are determined by the Minister of Economy, Trade and Industry (the “METI”) each fiscal year. As for solar power, in the 2013 fiscal year (from April 1, 2013 to March 31, 2014), the purchase price was stated to be JPY37.8/kwh (in case the generating power is more than 10kw.), and the purchasing term was stated to be 20 years. These are considered to be fairly high levels compared with other countries. Recently in Japan, not only the number of domestic business operators, but also the number of overseas business operators and the amount of investments from overseas has been increasing significantly.

We would next like to briefly introduce the legal procedures needed for entry into the electric power business under the System.

➢ 2. Facility Certification by METI and Applicable Purchase Price

♦ Facility Certification by METI

To utilize the System, an operator has to obtain a Facility Certification (Setsubi-nintei) from METI with regard to whether the electric generating facility and electric generating methods will comply with the levels stated by law.

Also, in order to be eligible to take advantage of the purchase price related to the applicable fiscal year, the operator has to obtain said Facility Certification by the end of said fiscal year (for example, in the case of the 2013 fiscal year, it should be by March 31, 2014).

An application for Facility Certification has to be by way of a written application that satisfies the noted items designated by law as well as the accompanying documents required by law. Also, in general, it takes approximately one (1) month from the time an application is made to be able to obtain a Facility Certification from METI.

♦ Application to enter into Contracts with an Electric Power Company

In addition to the above, in order to be eligible to take advantage of the purchase price related to an applicable fiscal year, the operator has to complete an offer to execute certain agreements (power purchase agreement and system connection agreement) with an electric power company. The process of making an offer to an electric power company is generally carried out by the following steps; (i) the first stage: prior consultation→(ii) the second stage: main deliberation →(iii) the third stage: offer to execute agreements. Generally speaking, the first stage takes one (1) month and the second stage takes two (2) months. Therefore, it is necessary to take into account such time frames when making your schedule.

➢ 3. Rights and Permission for Land Utilization

Reservation of utilization rights on the land to be the project site is also essential for starting construction related to a solar power generation business. Briefly speaking, there are two (2) methods of reservation, one of which is acquisition of the land itself by sale and purchase, and the other of which is establishing a right of lease (or surface right (“Chijyo-ken”)). In both methods, it is necessary to verify in advance whether the land owner duly has the ownership of the land or not, and whether there are any mortgages or other liens on the land

or not.

In addition, with regard to the utilization of land, there are various regulations under Japanese law. For example, the development of a certain size and type of land is necessary to obtain permission from a local government. In addition, if the legal classification of the land is “agricultural land (Nouchi)”, permission from the local government to change such land classification is also required. Further, some prefectural or municipal ordinances, such as a landscape ordinance or a treasure-trove ordinance also may exist in some cases. It is necessary to verify these regulations in advance and comply with them appropriately.

In dealing with the procedures concerning these regulations, mutual consultation between the local government and/or local residents might be required in some cases, so the process should be carried out in a prudent manner. Also, in some cases the procedures may take over one (1) year or more, therefore, taking into account such time frame when planning your schedule is also essential.

➢ 4. Our Services for Renewable Energy Business

Our law offices would be pleased to provide various types of services for a Renewable Energy Business. For example, we can provide:

- Legal advice regarding the regulations for Renewable Energy Business
- Preparing an application for Facility Certification
- Preparing an application for other necessary permissions and authorizations
- Drafting and/or reviewing of various agreements including the power purchase agreement and land purchase agreement
- Legal due diligence
- Any advice not mentioned above related to a Renewable Energy Business

We are confident in our ability to provide these services on a reasonable fee basis since we fortunately have been able to accumulate a significant amount of experience and know-how in this field. If you are interested in a Renewable Energy Business in Japan, please feel free to contact the following attorneys at our office:

Kaoru Takamatsu (Mr.), Attorney-at-law (Email to: kaoru.takamatsu@halaw.jp)
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EFFECTIVE MANAGEMENT OF BUSINESS FUNDS

➢ 1. Cash Pooling Arrangement

Effective management of business funds is a very important goal for a company with several foreign branches or affiliate companies. One strategy for achieving effective funds management is to implement a cash pooling arrangement (including a cash management system). There are two types of cash pooling arrangements: actual cash pooling; and notional cash pooling.

➢ 2. Actual Cash Pooling

- **What is actual cash pooling?**

  This arrangement focuses on actual transfers of excess funds between the accounts of various group companies. For instance, a cash pooling arrangement may be useful in cases where a certain company of a group of companies has excess funds and just deposits them in a bank account while the other companies which are short on funds ("Shortage Companies") borrow money from an outside financial institution and pay interest. In such cases, if the excess funds are applied to the shortages of the Shortage Companies, such excess funds can be used effectively within the group without the need to borrow from an outside financial institution.

  Under an actual cash pooling arrangement, funds which are deposited in several accounts and held by several group companies are "actually" transferred to a specific account and pooled in such account. Then, the Shortage Companies borrow money from the pool of concentrated funds.

- **Legal Issues**

  There are some legal issues to consider with respect to an actual cash pooling arrangement, especially the implications of the Money Lending Business Act (Act No. 32 of 1983, "MLBA").

  First and foremost, a license is necessary for conducting a Money Lending Business under the MLBA. If lending money to the Shortage Companies falls under a Money Lending Business, the intra-group lender will likely be required to obtain a license under the MLBA. According to the case law precedents, a

Money Lending Business just means the business of making loans "repeatedly and continuously". The intention to obtain profit or the result of obtaining profit is not a requirement of a Money Lending Business (the loaning of money to the general public is also not a requirement).

However, a key question related to the MLBA issue is whether loans between a parent company and an affiliate company/sister company fall within the above-noted definition. On this question, three answers have been given by the FSA to No-Action Letters (i.e., preliminary inquiries to the FSA) on the matter ("NAL Answers"). In short, the NAL Answers indicate that the loaning of money between a parent company and a direct/indirect affiliate company (i.e., cases where the parent company has no less than 51% of the voting rights of the affiliate company) would not be considered a Money Lending Business by the FSA. On the other hand, according to the FSA, the lending of money between sister companies could be considered a Money Lending Business. While the FSA does not explain in the NAL Answers the reason for the difference between the case of lending to a subsidiary and lending between sister companies (and some scholars argue that there is no difference between these two types of lending), other than the NAL Answers, no policy has been published by any authority regarding the necessity of an MLBA license in the case of a group company. Therefore, adopting an appropriate actual cash pooling arrangement is critical if the intra-group lender does not have a license under the MLBA.

In addition to the MLBA issue, legal issues regarding the Act Regulating the Receipt of Contributions, the Receipt of Deposits, and Interest Rates (Act No. 195 of 1954), the Banking Act (Act No. 59 of 1981), and the Payment Service Act (Act No. 59 of 2009) should be taken into account depending on the scheme or a role of the intra-group lender. Furthermore, in cases where the funds are transferred to a foreign bank account (i.e., the account holder is located in a foreign country and such foreign company plays the role of intra-group lender), the Foreign Exchange and Foreign Trade Act (Act No. 228 of 1949) likely applies to such fund transfer. However, we believe that these non-MLBA issues probably should not prevent companies from being able to adopt an actual cash pooling arrangement, so please consult us if you are considering an actual cash pooling scheme and we will assist you with overcoming such issues.

➢ 3. Notional Cash Pooling

♦ What is notional cash pooling?

This arrangement mainly focuses on the application of an advantageous interest rate on deposits or borrowed money. Notional cash pooling is a mechanism for calculating, at an advantageous interest rate, interest on the combined credit and debit balances of accounts that a company chooses to group together, without actually transferring any funds. It is ideal for companies with decentralized organizations that want to allow some autonomy to their subsidiaries, including allowing such subsidiaries to have control over their own bank accounts.

♦ Several Schemes

For the calculation of the advantageous interest rate, there are mainly two types of the notional cash pooling schemes: (i) the advantageous interest rate applies to the total amount of the deposit and/or debts; and (ii) such rate applies to the smaller amount of either the deposits or the debts, while a normal interest rate applies to the excess amount over the amount to which the advantageous interest rate applies.

In addition to the above, if the deposits/debts are denominated in several different currencies, the subject amounts have to be converted to a certain principal currency designated by the company or the bank at which the company has a bank account only for the purpose of calculating the advantageous interest (in other words, this conversion is conducted notionally and the company does not actually obtain the principal currency).

Furthermore, variations such as the following exist: (x) the company has multiple bank accounts to which the funds are notionally transferred; (y) the company designates multiple currencies as the principal currency; and (z) the company breaks down its group companies by regions and adopts a notional cash pooling scheme on a regional basis.

♦ Legal Issues

As the funds are not actually transferred under a notional cash pooling and the purpose of this arrangement is different from that of actual cash pooling, the legal issues which arise from an actual cash pooling are not triggered.

As to operational issues, if several foreign group companies are involved in a notional cash pooling arrangement, the company has to take into account time

zone differences to calculate the total amount of the deposits/debts. In such case, the scheme mentioned in "Several Schemes" (z) above will minimize the effect of the time zone difference.

➢ 4. Combined Cash Pooling Arrangements

Depending on the purpose, a combination of an actual and notional cash pooling arrangement might be helpful:

(i) the companies transfer funds to a certain bank account under an actual cash pooling arrangement;
(ii) the advantageous interest rate applies to the transferred funds; and
(iii) the Shortage Companies borrow money from a bank against the security of the actually transferred and deposited funds, and the advantageous interest rate applies to such overdraft.

Under this scheme, the advantageous interest rate will apply and the company does not need to be concerned about legal issues which arise from an actual cash pooling scheme because the bank is involved in this arrangement. However, the regulations under the Foreign Exchange and Foreign Trade Act should be considered even if the bank is involved.

➢ 5. Comments

We believe that cash pooling arrangements can be useful for a company to manage its business funds effectively because such arrangements may be designed on a tailor-made basis depending on the goals of the company regardless of the size of the company.

However, in order to implement this arrangement appropriately, legal issues have to be considered and clearly dealt with prior to the launch of the scheme, and all the relevant documentation has to be prepared very carefully. If a scheme is adapted without taking into account the legal consequences, the business might fail due to violations of the relevant laws or insufficient documentation. Accordingly, please consult us prior to the adaptation if you are interested in a cash pooling arrangement.

RECENT DEVELOPMENTS CONCERNING THE INHERITANCE RIGHTS OF OUT-OF-WEDLOCK CHILDREN

➢ 1. Supreme Court Ruling

In early September of 2013, the Supreme Court of Japan held that the long-standing law that children born out of wedlock are legally entitled to only half the inheritance of that of a "legitimate" child violates the Constitution of Japan (in particular the constitutional principal of equality under the law). In its decision, the court said that a child should not be at a disadvantage just because he or she has unmarried parents, which is of course something that a child has no choice about. The court further indicated that, in coming to its decision, changes in attitudes toward family arrangements and the global trend to eliminate discrimination were taken into account. More specifically, Chief Justice Takesaki said, "…children themselves have no control whatsoever over their parents' non-legal marital status," and added that it is unforgivable that children suffer because of the marital status of their parents.

The decision was unanimous among the 14 justices (one did not join due to a conflict of interest). Although the law apparently violated the Constitution as far back as 2001, the court said that inheritance claims will not be retroactive for cases already settled. It appears that the court was concerned about confusion arising from invalidating settlements of inheritance disputes that have already been decided. One can imagine, however, that such a position on the retroactive effect of the decision is extremely hard to accept for many "illegitimate" children who have already resolved legal disputes over inheritance based on the law to date.

The unanimous decision by the top court was in response to two separate claims filed by people in Tokyo and Wakayama Prefecture who were born out of wedlock whose fathers died in 2001. They argued that being deprived of full inheritance rights amounts to an infringement of the principle of unconditional legal equality.

➢ 2. Prior History

This was the first time the law in question had been changed since it took effect in 1898. Although the law did come under scrutiny in 1995, the law was voted constitutional (by a

vote of 10 to 5) on the basis that "its acknowledgement of half heir-ship for illegitimate children rather means their rights are protected."

Thereafter, the law was examined several times, but each time it was found to be constitutional. The votes, however, were getting closer and, in fact, in 1996 a legislative council under the Justice Ministry concluded that inheritance rights must be made equal regardless of the situation surrounding one's birth. Unfortunately, the recommendations of the council were dismissed by the conservative Liberal Democratic Party, which was concerned about undermining the nation's traditional family values and possibly encouraging adultery.

➢ 3. Enactment of Bill

As a result of the above-noted Supreme Court decision, in early December 2013, a bill was enacted to repeal Article 900 of the Civil Code, which had limited the inheritance to which an out-of-wedlock child was entitled to half that of an "in-wedlock" child. The change significantly improves the rights of children born out of wedlock, and ends years and years of what was viewed as discrimination against such children. Nevertheless, some conservative members of the ruling Liberal Democratic Party voiced opposition to the change, saying it would "destroy the traditional family system."

➢ 4. Did the Bill go far enough?

Even with this significant improvement, some civic groups and experts are still not totally satisfied because the bill fails to strike from the family registration law a clause stipulating the need to register a child's "legitimacy" at the time of birth. It is felt that having to indicate on a birth registration that a child is "illegitimate" is not fair and brings about undue emotional pain to both the parent and the child. In a sense, it can be argued that the registration requirement continues a form of discrimination against such children. The bill to repeal the registration provision was rejected as the LDP and Nippon Ishin no Kai (Japan Restoration Party) voted against it.

➢ 5. Conclusion

Other industrial nations with similar discriminatory provisions long ago changed to guarantee equality in inheritance rights between legitimate and illegitimate children.

Although this recent change in the law in Japan has come far too late for many, and perhaps does not go far enough (both in terms of the family registration issue and the lack of retroactive effect), it still represents a very significant step in the right direction.

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EDITORS' NOTE

In Japan we have animal symbols for every year ("*Eto*"), the symbols originating from the Chinese astrological calendar. Eto consists of 12 animals in total and "horse" is the animal for 2014. A horse has long been considered here in Japan to be an animal which helps and assists people with their lives. In such a horse year, we at Hayabusa Asuka Law Offices also hope to help and assist all of our clients to the greatest extent possible!

\- The Newsletter Team

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