

Client Alert

21 September 2018

Introduction of a Bargaining System to Japanese Criminal Procedure

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1. Introduction

A criminal proceeding bargaining system ("**Bargaining System**") was launched in June 2018 as one of the reforms to the Japanese criminal justice system aimed at improving and diversifying the evidence collection process and enhancing trial proceedings. The Bargaining System is among a series of new tools that investigators may use in gathering evidence.

Under the Bargaining System, a prosecutor and a suspect or defendant (individual or company) accused of certain types of crimes may enter into a formal agreement under which the suspect/defendant agrees to provide certain evidence or testimony that will aid in the charging or investigation of an offence of a certain type of crime by a "third party" (individual or company). In exchange for the suspect/defendant's cooperation, the prosecutor agrees to withdraw or reduce his/her criminal charges. Although Japanese prosecutors were bargaining behind the scenes even before the introduction of the Bargaining System, the Japanese criminal justice system had not formally approved the concept of bargaining in relation to criminal charges. In Japan, "bargaining" is widely believed to be incompatible with criminal procedures, and the practice has also been criticized for its potential to distort the truth. The mechanics of the Bargaining System have therefore attracted extensive public attention.

It was originally anticipated that the Bargaining System would mainly be used by prosecutors to enter into bargaining agreements with low-level members of criminal organizations. Under a bargaining agreement, prosecutors would be able to obtain important evidence which could uncover the criminal involvement of leaders of crime organizations in exchange for agreements not to charge or to reduce the sentences of low-level members. However, it was announced in July 2018 that the Bargaining System had been applied for the first time in a manner different from that which had originally been expected. A Japanese power equipment manufacturer entered into a bargaining agreement under which prosecutors agreed not to charge it in connection with a foreign bribery case in Thailand in exchange for evidence showing the involvement of its officers and employees in the same bribery case. In Japanese business culture, the voluntary disclosure by a company of the involvement of its officers or employees in corporate crime in exchange for immunity (i.e., "selling out" officers or employees and making them the scapegoats for the company's offenses) has long been perceived as unfair. Before this case, it had not been clear whether prosecutors would be willing to use the Bargaining System to charge a company's employees or officers. Therefore, this case has attracted a great deal of public attention and it is now understood that prosecutors will enter into bargaining agreements with companies in a manner similar to the deferred prosecution agreements (DPAs) or declinations frequently used by the United States Department of Justice in cases of corporate crimes.



First Case in Japan

A Japanese power equipment manufacturing company was engaged in the construction of a thermal power plant in Thailand in 2015. In February 2015, when the company's logistics provider tried to unload components destined for the plant at a jetty near the construction site, local residents — including, it is believed, public officials from the local port authority — blocked the jetty, claiming that the logistics provider had not properly obtained the necessary license to use it. The logistics provider was requested to pay TBH 20 million (around USD 600,000). As a delay in unloading the components would have led to significant expenses, including damages for delay under the construction contract, the company's employees paid the logistics provider the demanded TBH 20 million so that the logistics provider could then pay the amounts requested by the local residents and port authority officials.

The company became aware of the facts and began investigating in March 2015. The company found that the possibility that the payment of TBH 20 million to the logistics provider constituted bribery of foreign public officials could not be denied, and reported its findings to the public prosecutor's office in Japan in June 2015. After submitting its report to the public prosecutor's office, it cooperated with the authorities in the investigation of the case.

The prosecutors entered into a bargaining agreement with the company in July 2018 under which they agreed not to charge it in exchange for its cooperation in the investigation. Some former directors and employees were prosecuted for bribing foreign public officials.

Although the Bargaining System does not require timely and appropriate remediation measures, the company has announced that it has taken necessary disciplinary action and is implementing remedial measures, such as the commitment of the top management to the prevention of bribery, establishing various compliance issue reporting lines, implementing a more robust system to detect bribery risks both before and after contracts are concluded, strengthening the auditing of payments made at overseas construction sites, obtaining a compliance certificate from all management-level employees and officers, and conducting anti-bribery compliance training.

2. Overview of the Bargaining System


2.1 Crimes to which the Bargaining System applies

Crime categories

Unlike the US system (which generally permits plea bargaining for most criminal offenses), the Bargaining System only applies to certain types of crimes ("**Specific Crimes**"). For the Bargaining System to apply, both (a) the crimes of the suspect/defendant that is a party to the bargaining agreement and (b) the crimes of the third parties with regard to which the suspect/defendant will provide cooperation must be Specific Crimes.

Specific Crimes include (i) drug and firearm-related crimes and (ii) economic or financial crimes, with the exception of crimes for which the statutory penalties include death or life imprisonment. Economic or financial Specific Crimes include a number of crimes that are typically related to the business activities of corporations, such as bribery, fraud, antitrust offenses, tax evasion and violations of the Financial Instruments and Exchange Act.

Companies may be held criminally liable only where specific provisions imposing criminal penalties exist under relevant law. Under Japanese law,



provisions imposing criminal liability on companies generally take the form of a "dual liability clause." Under such a clause, a judicial person (e.g., a corporate entity) is penalized together with the natural person who actually committed the crime on behalf of the organization. Interestingly, no provision exists that would impose criminal liability on companies in cases of domestic bribery, while such a provision does exist with regard to foreign bribery.

Cooperation in the investigation or prosecution of "third parties"

As explained above, a suspect/defendant should cooperate with prosecutors in the investigation or prosecution of Specific Crimes of "third parties." Unlike a plea agreement in the US, a suspect/defendant cannot receive any immunity or reduction in penalty by providing evidence or testimony with regard to his/her own crimes under the Bargaining System. During the legislative process, the investigation authority argued relatively forcefully that if a suspect/defendant could obtain immunity or a reduction in charges for cooperation with respect to his/her own crimes, the suspect/defendant would be reluctant to provide evidence or confess until better conditions were offered. Prosecutors would thus be forced to grant large concessions to suspects/defendants to obtain confessions, which would distort the truth. The legislators also considered the general public perception that a person who committed a crime should confess without receiving any consideration for doing so.

2.2 Factors to be considered by prosecutors before entering a bargaining agreement

Under the Bargaining System, the prosecutors or the suspect/defendant may offer to bargain. The lawyer representing the suspect/defendant must be involved in negotiating the bargaining agreement. During the negotiations, prosecutors may request that the suspect/defendant provide testimony regarding the crimes of third parties. Then, the prosecutor will decide, based on the information obtained during the negotiations, whether to enter into a bargaining agreement. Prosecutors will consider: (i) the importance of the evidence to be provided by the suspect/defendant after the bargaining agreement is finalized; (ii) the seriousness of the crimes of third parties with regard to which the suspect/defendant will provide cooperation; and (iii) other relevant factors.

2.3 Suspect/defendant cooperation under the terms of a bargaining agreement

The cooperation that a suspect/defendant is obligated to provide under a bargaining agreement is limited to (i) providing full and truthful statements during the investigation by the investigative authorities, (ii) providing full and truthful statements during the trial or (iii) other necessary cooperation, such as providing evidence.

Unlike the terms found in plea agreements or deferred prosecution agreements in the US, the suspect/defendant is not required to implement or improve its compliance program (in the case of a company), carry out remedial measures or compensate victims.

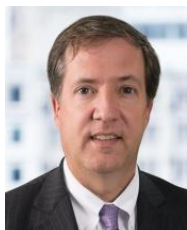
2.4 Benefits which a suspect/defendant may receive under a bargaining agreement in exchange for cooperation

Under a bargaining agreement, prosecutors can agree not to prosecute a suspect or withdraw the prosecution of a defendant, charge a suspect only in connection with pre-agreed counts (usually more minor charges than the suspect would ordinarily face), reduce the severity of a defendant's charges, charge a suspect/defendant with a pre-agreed sentence and agree to apply certain expedited processes.

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Unlike the US, Japan has no formal sentencing guidelines for a prosecutor's sentencing recommendation and a judge's sentencing decision. As a result, it may be difficult for a suspect/defendant to determine the value of the benefits which a prosecutor may be offering under a proposed bargaining agreement, which is critical for the suspect/defendant's decision to enter the bargaining agreement.

2.5 Relief from obligations under the bargaining agreement

Similar to the plea bargaining system in the US, a party may be released from its obligations under a bargaining agreement if the other party to the bargaining agreement breaches it. In addition, a defendant may cancel a bargaining agreement if the prosecutor fulfilled its obligations under the bargaining agreement but the court renders a judgment which contradicts the agreement (e.g., by imposing a harsher sentence than that requested by prosecutors pursuant to the bargaining agreement). A prosecutor may cancel the bargaining agreement if the suspect/defendant makes false statements or provides fabricated evidence to the prosecutor.

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