

The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2008

A practical insight to cross-border Litigation & Dispute Resolution



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Japan got? Are there any rules that govern civil procedure in Japan?

The Japanese legal system is based on the civil law tradition. The Japanese courts are bound by statutes. Although court precedents have no legal binding effect, Japanese courts, as a matter of practice, generally respect precedents, especially the decisions of the Supreme Court. The Code of Civil Procedure (1996 Law No. 109) (“CCP”) governs civil actions filed in Japanese courts.

As of the time of writing, there are approximately 23,000 attorneys-at-law (*bengoshi*) in Japan.

1.2 How is the civil court system in Japan structured? What are the various levels of appeal and are there any specialist courts?

Japan’s civil court system has three major strata. The “Supreme Court” (*saiko saibansho*) of Japan is the country’s premier court, and it hears appeals from intermediate appellate courts, which are referred to as “high courts” (*koto saibansho*). The high courts review appeals from courts located within the high courts’ geographic ambit, with the exception of the Intellectual Property High Court which hears all intellectual property appeals nationwide. Lower courts in Japan are called “district courts” (*chiho saibansho*), which are primarily the courts of first instance. However, district courts may sit in an appellate capacity when reviewing appeals filed in “summary courts” (*kani saibansho*), which deal mainly with small claims (JPY 1,400,000 or less).

Japan has two types of specialised courts. As mentioned above, the Intellectual Property High Court is the sole intermediate appellate court for cases involving patent rights. “Family courts” (*katei saibansho*) have jurisdiction over domestic matters such as divorces.

1.3 What are the main stages in civil proceedings in Japan? What is their underlying timeframe?

The main stages in civil procedures before the first instance courts in Japan are:

- the filing of a complaint;
- the service of the complaint on the defendant;
- the filing of an answer;

- several court hearings, which are conducted on roughly monthly intervals. The parties will exchange their allegations and written evidence;
- examination of witnesses; and
- the final judgment.

The court may recommend a settlement to the parties at any time during the court hearings, which may be an indication of how the court is inclined to rule on the matter.

The overall average duration of civil proceedings for courts of the first instance varies from one to two years, but occasionally more than two years is necessary depending on the complexity of a case.

1.4 What is your local judiciary’s approach to exclusive jurisdiction clauses?

If, by prior written consent, the parties agree that a certain foreign country’s court has exclusive international jurisdiction over a dispute between them and if one party files a lawsuit in Japan in contravention to such agreement, then the Japanese court will, in principle, dismiss the case on the basis that it has no international jurisdiction over such dispute.

1.5 What are the costs of civil court proceedings in Japan? Who bears these costs?

In principle, the non-prevailing party shall bear all costs, such as the revenue stamp payable at the filing of the complaint. If a party prevails on less than all claims, then the court will allocate the costs between the parties. Attorneys’ fees are not categorised as costs in this context, and, in principle, the prevailing party is not entitled to claim for a refund of any part of his attorneys’ fees from the non-prevailing party, except for certain categories of cases, such as personal injury caused by car accidents, medical malpractice, and intellectual property infringement cases.

1.6 Are there any particular rules about funding litigation in Japan? Are there any contingency/conditional fee arrangements? Are there rules on security for costs?

“No win, no fee” arrangements are not specifically prohibited. However, it is generally considered that such arrangements are not desirable in light of lawyers’ ethics. In practice, they are uncommon.

Security for costs is available where the plaintiff does not have an office address or a residence in Japan, unless otherwise stipulated by an applicable treaty.

2 Before Commencing Proceedings

2.1 Are there any pre-action procedures in place in Japan? What is their scope?

The CCR introduced the advance notice system in 2004, which enables exchanges of allegations and evidence between prospective litigants in advance of the actual initiation of a lawsuit. However, it is optional for a prospective plaintiff to use this system and, as a matter of practice, it is rarely used.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The Civil Code (1896 Law No. 89), the Commercial Code (1899 Law No. 48) and other relevant laws prescribe various limitation periods depending on the type of claims. In principle, the limitations period is 10 years. However, it is shortened to 5 years if claims are related to commercial activities. It should be further noted that there are many other exceptions to the length of applicable limitation periods, such as 3 years for tort claims and 2 years for accounts receivable related to movable assets.

Limitations periods commence when a right becomes exercisable. Limitations periods are basically characterised as a matter of substantive law. Although the right in question is deemed to expire at the conclusion of the relevant limitations period, a party is not prevented from filing suit, and the court will not inquire into the limitations period unless it is raised by the opposing party as a defence.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Japan? What various means of service are there? What is the deemed date of service? How is service effected outside Japan? Is there a preferred method of service of foreign proceedings in Japan?

A civil action is commenced when a plaintiff files a complaint. If the court determines that the complaint meets the formality requirements, then the clerk of court serves it on the defendant.

The clerk of court usually uses the post office's staff to serve the complaint to the defendant at the defendant's residential or work address. Such service is completed usually one to two weeks after the filing of the complaint.

If the clerk of court cannot serve the defendant due to the defendant's lack of an obvious address, then the clerk of court may effectuate service by publication, which consists of posting notice at the courthouse.

If the defendant has no residential or work address in Japan, then the court will request a foreign country where the defendant is located to serve the complaint on such defendant, through formal diplomatic channels and in accordance with applicable treaties such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. This process may take several months to complete.

With respect to the service of process of foreign proceedings on a defendant in Japan, service of process need not occur in the same

manner as domestic proceedings in Japan since it is primarily a matter of the civil procedure of the foreign country. However, if the plaintiff intends to enforce a judgment against any of the defendant's assets which are located in Japan, then it would be advisable to serve the complaint through a formal diplomatic channel in accordance with applicable treaty. See question 9.3. In such case, the Japanese court will take charge of the service on the defendant in Japan.

3.2 Are any pre-action interim remedies available in Japan? How do you apply for them? What are the main criteria for obtaining these?

In Japan, there are two types of interim remedies available in advance of initiation of the lawsuit under the Code of Civil Provisional Remedies (1989 Law No. 91): provisional attachment (*kari sashiosae*) and provisional disposition (*kari shobun*). Provisional attachment may be issued to prohibit a prospective defendant from disposing of specified assets for the purpose of preserving the plaintiff's monetary claim. In contrast, provisional disposition may be issued to prohibit a prospective defendant from disposing of or moving disputed assets for the purpose of preserving the plaintiff's monetary or non-monetary claim.

To obtain such provisional orders which freeze the status quo of the target assets, a party must first file a petition in court and convince a judge that the petitioner has the alleged claim, and that urgency is needed. If the judge is convinced during this *ex parte* procedure, then an order granting provisional relief is rendered. Usually, the court requires the petitioner to post a bond as collateral to be used for possible future loss to be incurred by the opposite party. The amount of the bond is determined by the judge, taking several factors into account such as the value of the assets.

3.3 What are the main elements of the claimant's pleadings?

A complaint must contain the following:

- names and addresses of parties;
- relief sought, including the amount to be paid by the defendant;
- claims for relief with supporting facts; and
- legal grounds to establish the claim.

The plaintiff must set forth the relevant facts and evidence which are material to prove the complaint so that the court may understand the nature of the dispute and claims in dispute at an early stage.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The plaintiff may change and/or add a claim if the following conditions are satisfied:

- the change and/or addition of a claim will not result in excessive delay of court proceedings;
- the common nucleus of operative facts is the same;
- the change and/or adding of the claim occurs before the conclusion of a series of court hearings; and
- the claim sought to be added must not fall within the exclusive jurisdiction of another court.

The court is entitled to disallow changes or additions if it concludes they are inappropriate.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

In the answer to the complaint, the defendant is required to state which parts of allegations of the complaint he admits, denies or is without knowledge. The defendant may also allege facts that controvert the plaintiff's allegations.

The defendant may include the defence of set-off in the answer.

Counterclaims are permissive so long as they are related to the plaintiff's original claim and/or the defendant's defence thereto. Counterclaims may be filed at any time prior to the conclusion of a series of the court hearings. If bringing a counterclaim will result in excessive delay of court proceedings, however, then the counterclaim will not be permitted and the defendant must initiate a separate action.

If the defendant validly files a counterclaim, then the plaintiff is required to file a defence thereto.

4.2 What is the time-limit within which the statement of defence has to be served?

Generally speaking, the court conducts a first hearing within one to two months after the filing of the complaint. The court will direct the defendant to file his statement of defence, together with relevant evidence about one week before the first hearing.

In case the complaint is served on the defendant outside of Japan, then the first hearing date will be several months after the filing of the complaint.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on liability by bringing an action against a third party?

There is no mechanism whereby the defendant can force a third party, who, the defendant believes, should be solely liable or jointly liable with the defendant, to become an additional defendant in the ongoing lawsuit.

However, the defendant is entitled to have a formal court notice sent to such third party through the ongoing lawsuit procedures. If the third party receives such formal court notice which formally informs the third party of the ongoing lawsuit, then such third party is entitled to voluntarily intervene in the lawsuit by way of "Intervention to Assist Parties" (see question 5.1). If the third party so intervenes, then the judgment rendered will be binding not only on the defendant but also on such third party. Even if such third party does not intervene in the ongoing lawsuit despite formal notice, such third party would be, in principle, regarded to have implemented so in the ongoing lawsuit and would be subject to the effect of the judgment to be rendered.

4.4 What happens if the defendant does not defend the claim?

If a defendant, upon whom the complaint has been properly served, does not file a defence prior to the first hearing and does not attend the first hearing, then the defendant is deemed to have admitted the plaintiff's allegations. Accordingly, the court will grant a default judgment for the plaintiff.

4.5 Can the defendant dispute the court's jurisdiction?

It is possible for a defendant to dispute the court's jurisdiction. In the case of the international jurisdiction, the defendant simply asks for dismissal of the lawsuit. In the case of the domestic jurisdiction within Japan, the defendant seeks to transfer the case to a court of competent jurisdiction. However, the defendant must raise lack of subject matter jurisdiction at the outset of the case and before going into the arguments on the merits, otherwise he will be regarded to be subject to the jurisdiction of the pending court.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Joinder of third parties into ongoing proceedings may occur, for example, in the following cases:

1) Intervention as an Independent Party

A third party may intervene in pending litigation as an independent party when he has an independently legally cognizable interest in the outcome of the litigation that is not aligned with any existing party.

2) Intervention as Co-party

A third party may intervene in pending litigation as a co-plaintiff or co-defendant when he has a legally cognizable interest in the outcome of the litigation in common with an existing party.

3) Intervention to Assist Parties

A third party may intervene in pending litigation as a supporter to assist either party, when his interest would be affected by the judgment of such litigation.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The court has discretion to consolidate two or more proceedings. The court takes into consideration: 1) whether rights or liabilities in controversy are common to the parties; 2) whether rights or liabilities in controversy are based on law or facts in common; 3) whether the rules of court procedure applicable to each of the proceedings may be consistently applied in one action; 4) whether excessive delay will be caused as a result of the consolidation; and 5) other relevant factors.

5.3 Do you have split trials/bifurcation of proceedings?

The CCP does not provide for split trials or bifurcated proceedings. However, Japanese courts, especially in the intellectual property litigation, at its discretion, may determine whether a defendant infringed the plaintiff's rights before the amount of damages may be addressed.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Japan? How are cases allocated?

Allocation of cases at the first instance court is made pursuant to the

court's internal rules, but cases are generally automatically assigned to judges.

Certain district courts which deal with numerous cases, such as Tokyo District Court, have special divisions which deal with specific categories of cases, such as those relating to intellectual properties, construction, labour, and medical malpractice. If a new lawsuit falls under one of these categories, then such lawsuit will be allocated to one of the appropriate special divisions.

6.2 Do the courts in Japan have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court has discretion how to manage cases over which it presides. The court may order the parties to clarify the allegations in the pleadings, and it may also establish a case management plan (which is required in case of certain kinds of lawsuits, such as a complex case).

In addition, the court may establish timelines for the filing of court briefs or submitting evidence. Further, the court can actively encourage the parties to settle the case or any issues raised therein, and, as a matter of actual practice, the court frequently promotes resolution of the case by settlement.

For interim applications, please see questions 3.4, 4.1 and 7.1.

6.3 What sanctions are the courts in Japan empowered to impose on a party that disobeys the court's orders or directions?

The primary type of sanctions available is the adverse inference. In addition, if any submission of allegations and/or evidence is unreasonably late, the court may dismiss such submission.

6.4 Do the courts in Japan have the power to strike out part of a statement of case? If so, in what circumstances?

There is no established system of "strike out".

6.5 Can the civil courts in Japan enter summary judgment?

There is no summary judgment.

6.6 Do the courts in Japan have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Legal proceedings are stayed in very limited cases, such as where a civil reconciliation procedure has been separately commenced on the same matter, where a litigant (individual) dies, etc.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Japan? Are there any classes of documents that do not require disclosure?

A party may file an application with a court to require an adverse party to produce documents. This application should be made for specific documents, and comprehensive production is not permitted. In addition, the applicant should establish that the documents in question are necessary to prove the applicant's allegations. The other party may oppose such application by saying

that production is unnecessary or that the documents are immune from productions (e.g., documents prepared solely for internal purposes or those which may invoke criminal liabilities). As a matter of practice, Japanese courts are not inclined to grant document production requests. If a document production request is granted and if the adverse party fails to comply with such order, then the court may draw an adverse inference.

7.2 What are the rules on privilege in civil proceedings in Japan?

There is no categorical concept of "attorney-client privilege" with respect to production of documents. Please also refer to question 7.1 above.

7.3 What are the rules in Japan with respect to disclosure by third parties?

Japanese courts are entitled to order, at the request of a party, a non-party who is in possession of documents that are critical to the proceedings to produce such documents. If such non-party does not comply with the order, he will be subject to an administrative fine.

7.4 What is the court's role in disclosure in civil proceedings in Japan?

See questions 7.1 and 7.3.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Japan?

The CCP does not specifically govern the use of documents obtained by the document production order. Under the Patent Law and certain intellectual property laws, however, the court may enter an order prohibiting litigants from using certain evidence containing trade secrets for any purposes outside of the litigation, a violation of which is subject to criminal sanctions.

8 Evidence

8.1 What are the basic rules of evidence in Japan?

A party is entitled to submit any evidence in his possession. A party can submit evidence which is disclosed by other persons. The court has discretion to determine which evidence is credible and which evidence is valuable.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

In Japan, essentially all forms of evidence are admissible, including hearsay, expert opinions, and witness statements.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

If the parties would like to call a witness, they must file an application setting forth the identity of the witness and the matters upon which such witness will testify. The court will determine whether such testimony is necessary and, if so, will hear the

witness' testimony.

Although it is not mandatory, written statements are usually prepared and exchanged to shorten examination-in-chief and to enable the opposite party to fully prepare for cross-examination.

There is no deposition system.

If the witness does not appear, it is possible for the court to force him to appear before the court with the assistance of the police.

8.4 What is the court's role in the parties' provision of evidence in civil proceedings in Japan?

See questions 7.1, 7.3, 8.1 and 8.3.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Japan empowered to issue and in what circumstances?

A final judgment on the merits is rendered when the court concludes that it has reached a conclusion.

Another type of judgment (*soshō hanketsu*) is rendered when the court does not decide the case on the merits, but rather dismisses the complaint if it determines, for example, that it does not have jurisdiction over a case.

A court may render a certain type of decision (*kettei*) or order (*meirei*) to make ancillary decisions, such as those for witness examinations or document production orders (see question 3.2).

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

If the court concludes that a party is liable for damages, the court will assess the amount of damages and enter a judgment in such amount.

There is no punitive damage system.

When the court renders the judgment ordering monetary payment, it decides the interest payable. In principle, the court uses a statute rate of 5% per annum or, for payment arising from commercial activities, another statute rate of 6% per annum. If the claim derives from a contract which adopts a different interest rate, then the court may use such agreed interest rate.

With respect to the cost allocation, please refer to question 1.5.

9.3 How can a domestic/foreign judgment be enforced?

There are different procedures for monetary and non-monetary claims. Monetary claims are enforced by garnishment of the defendant's bank account or its accounts receivables, and/or by attachment of the defendant's real estate or movable assets. For non-monetary claims, such as eviction of a tenant, enforcement can take place in various ways as stipulated in the Civil Execution Act (1979 Law No. 4).

Regarding a judgment of a foreign (non-Japanese) court, Japanese courts will issue an enforcement order, provided that all of the following requirements are satisfied:

1. in light of principles of international jurisdiction established under Japanese law, the foreign (non-Japanese) court has jurisdiction over the matter;
2. the defendant was properly served;
3. the foreign court's judgment is not contrary to Japanese

public order and sound morals;

4. there is a reciprocal guarantee with the foreign jurisdiction rendering the judgment; and
5. the foreign court's judgment is final and conclusive.

If the enforcement order is rendered, then it is possible for the plaintiff to proceed with the enforcement procedures against the defendant's assets just like the case of the Japanese domestic court judgment.

9.4 What are the rules of appeal against a judgment of a civil court of Japan?

Judgments of the first instance courts (usually district courts) can be appealed to the intermediate appellate courts (usually high courts) and then to the second appellate courts (usually the Supreme Court). Non-prevailing parties can appeal if they are not satisfied with a judgment, and their appeals may be based on legal error or factual findings. However, the gateway to the Supreme Court is quite narrow and the grounds for secondary appeals are limited to constitutional violations, misinterpretation of the Constitution, significant misinterpretation of laws, etc.

An appellant must file an appeal within 14 days after the service of a judgment and must submit detailed reasons for the appeal within 50 days thereafter.

II. DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of dispute resolution are available and frequently used in Japan? Arbitration/Mediation/Tribunals/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration (*chusai*)

Parties are generally free to agree to resolve disputes through arbitration prior to or after occurrence of a dispute. If one party files a lawsuit with a Japanese court in defiance of an arbitration agreement, the Japanese court is, in principle, bound to dismiss the lawsuit. Arbitrations are not as common in Japan as they may be in other jurisdictions.

Civil Mediation (*minji chotei*)

Civil mediation is one of the dispute resolution systems provided by the Japanese courts and is a mechanism which tries to achieve resolution through a consensus of the parties. For this procedure, a mediation panel is formed by one judge and two neutral civic persons (often lawyers or experienced businessmen). When the parties have reached an amicable settlement or when the mediation panel finds an amicable settlement cannot be reached, the panel closes the mediation proceeding. During the process, the two neutral civic persons (*not* the judge) take initiative roles. These civil mediation procedures are frequently used in Japan.

Labour Tribunals (*rodo shinpan*)

Labour tribunals are also one of the dispute resolution systems provided by the Japanese courts and they consist of a panel of one judge and two neutral experts (one being chosen by management and the other by labour). The panel is expected to resolve disputes related to employment within three hearings (about 2 to 3 months) by facilitating a settlement between the parties, or, if no settlement is reached, by rendering an order. A party may object to such an order within two weeks, in which case the order will be deemed null

and void. If no objection is filed, then the order becomes final and enforceable. These labour tribunals were introduced in 2006, and an increasing number of cases have been resolved in an expeditious manner (mainly by settlement).

1.2 What are the laws or rules governing the different methods of dispute resolution?

The laws governing each dispute resolutions are as follows:

1. Arbitration: the Arbitration Law (2003 Law No. 138).
2. Civil Mediation: the Civil Mediation Law (1951 Law No. 222).
3. Labour Tribunal: the Labour Tribunal Law (2004 Law No. 45).

1.3 Are there any areas of law in Japan that cannot use arbitration/mediation/tribunals/Ombudsman as a means of dispute resolution?

A basic rule is that if the matter in question can be resolved through settlement by its nature, then such matters are considered arbitrable. Therefore, most of the commercial matters are arbitrable. An example of a non-arbitrable case is a family law matter.

Mediation is supposed to cover any civil disputes. However, family matters are subject to family conciliation (*kaji chotei*) available at the family courts.

Labour tribunals are available only for labour disputes.

2 Dispute Resolution Institutions

2.1 What are the major dispute resolution institutions in Japan?

The major dispute resolution institutions in Japan are as follows:

1. Arbitration: Japan Commercial Arbitration Association (JCAA), Japan Shipping Exchange (JSE).
2. Civil Mediation: district courts and summary courts.
3. Labour Tribunal: district courts.

2.2 Do any of the mentioned dispute resolution mechanisms provide binding and enforceable solutions?

An arbitration decision has the same legal effect as the final and conclusive judgment and is enforceable. If a settlement is reached through the civil mediation or family conciliation, then such settlement has the same effect.

With respect to Labour Tribunal, please see question 1.1.

3 Trends & Developments

3.1 Are there any trends in the use of the different dispute resolution methods?

To promote a fair and just ADR procedure, the Law Concerning Promotion of Alternative Dispute Resolution (2004 Law No. 151) took effect on April 1 2007. To this end, the government may provide permission to act as an ADR organisation to a private entity. As of the time of this writing, only three private entities have such permission.

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those dispute resolution methods in Japan?

One of the current trends is to make dispute resolution systems more accessible to Japanese residents. To this end, Japan recently adopted a legal studies system requiring the study of law as an advanced degree, and the number of *bengoshi* is expected to gradually increase as more persons are expected to pass the bar examination. Further, some quasi-legal professions in Japan, which may not exist in other jurisdictions, are entitled to represent their clients at the court. For example, patent lawyers (*benrishi*) may represent clients in patent infringement cases. Solicitors (*shihoshoshi*) are qualified to represent clients in small claims cases at summary courts.

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ANDERSON MŌRI & TOMOTSUNE

Anderson Mori & Tomotsune is one of Japan's premier law firms. As of September 2007, the firm has more than 230 Japanese lawyers (bengoshi), over 10 lawyers qualified in foreign jurisdictions, approximately 90 other professional staff including patent lawyers, immigration lawyers, foreign legal trainees, translators and paralegals, and more than 130 other general staff members.

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