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Asia Law
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Japan enters a new era

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THE DISPUTE RESOLUTION FRAMEWORK

The national courts in Japan have for many years offered various dispute resolution services, including both litigation and civil mediation. From April 2006, they will also institute a labour tribunal. While there has been little use of arbitration procedures in Japan until recently, the new *Arbitration Law* enacted in 2003 will promote increased use of arbitration procedures. The national courts also have the power to enforce judgments and arbitral awards, both local and foreign. Despite the recent introduction of new legislation, however, the actual enforcement of a monetary judgment/award can still be a challenge.

LITIGATION

GENERAL OBSERVATIONS

The history of modern civil litigation in Japan began in 1890 when the *Code of Civil Procedure (Law No. 29 of 1890)* was first enacted, based primarily on German law with some French influences. In 1949, however, the old code was dramatically amended under the strong influence of American law. This amendment turned the old code into a mixture of a civil-law inquisitorial system and a common-law adversarial system.

In 1998 a new *Code of Civil Procedure (Law No. 109 of 1996)* was implemented in Japan, known as the CCP. The guiding principles for the new CCP remain centred on the civil law inquisitorial system. For example, there are no civil juries. A professional judge decides issues of both fact and law. There is no extensive pre-trial discovery, and there is no attorney-client privilege or attorney work product doctrine.

At the same time, however, there are some distinctive influences from the common-law adversarial system. For example, witnesses are examined by lawyers for the litigants, rather than by the presiding judge. Also, upon a motion from either party, the court can order the other party or a third party to produce certain documents, although the actual scope of document production is limited. The litigants themselves also introduce evidence, and the court cannot gather evidence on its own initiative.

In practice, evidence is presented primarily in written form, including written agreements, correspondence and reports, as well as witness statements. If the court deems it necessary, it has power to summon witnesses. As witness examination is considered an exercise of sovereign power, a witness must be within Japanese territory to be summoned by the court. If a witness resides outside Japan but is willing to travel to Japan to testify, he/she can be examined before a Japanese court. If a witness resides outside Japan and does not wish to travel to Japan, he/she can be examined by the appropriate judicial authority in his/her place of residence, as per

judicial aid between that country and Japan.

THE COURT OF FIRST INSTANCE

In general, the district court hears civil litigation as the court of first instance. There are 50 district courts in Japan. In principle, a single judge will hear the case, but the court does have the discretion to constitute a three-judge panel. In 2004, 148,706 civil cases were heard at district courts nationwide. Of these, 48% were resolved by a decision of the court, 34.5% by amicable settlement, and the remaining 17.5% by voluntary withdrawal or for other reasons. In contested cases, a district court will render a decision in 18.3 months on average.

APPELLATE PROCEEDINGS

If either litigant is dissatisfied with the decision of the district court, he/she can appeal to the high court, of which there are eight in Japan. The high court will conduct a *de novo* review of the district court decision, on issues both of fact and of law. In other words, the high court will hear the case much as a district court would. In 2004, there were 16,337 civil cases heard at high courts nationwide. Of these, 58.3% were resolved by a court decision, 33.1% by amicable settlement, and the remaining 8.6% by voluntary withdrawal or for other reasons. On average, an appellate proceeding at the high court took 6.9 months.

If either litigant is dissatisfied with the high court decision, he/she can file a further appeal to the Supreme Court. Unlike an appeal to the high court, however, an appeal to the Supreme Court is, in principle, heard only by *certiorari*, and the Supreme Court has discretion as to whether to review a high court decision. There is only one Supreme Court in Japan, and it will review issues of law only. The facts as found by the high court are binding on the Supreme Court unless these findings are extremely unreasonable. In 2004, the Supreme Court heard 2,200 civil cases. Of these, only 2.9% were granted *certiorari*. On average, a case at the Supreme Court took 4.5 months.

RECENT TRENDS

In 2003, the *Lawsuit Expedition Law (Law No. 107 of 2003)* was enacted. This law mandates that all civil cases at the court of first instance should be concluded within two years. To expedite the civil procedure, the courts are increasingly requiring that the plaintiff must have prepared the complaint and supporting evidence before filing the lawsuit, that the defendant must present all defences and supporting evidence as soon as possible, and that both parties must identify possible witnesses at an early stage, and the examination of witnesses, if any, should be conducted on the same occasion. Litigation lawyers must, therefore, prepare extensively and in a timely manner for these cases and this generally can be achieved only by a team of capable lawyers. It is becoming more and more difficult for traditional solo practitioners to prosecute complex commercial litigation. It is important now for any business litigant

to retain a large law firm that can organize a litigation team to handle any commercial lawsuit.

ARBITRATION

GENERAL OBSERVATIONS

Until March 2004, Japanese arbitration procedures were governed by the old Arbitration Law enacted in 1890, which was not substantially amended for more than 110 years. As a result, arbitration proceedings in Japan were said to be very outdated, user-unfriendly, and out of sync with global standards. Thus, in 2003 the Japanese government enacted a new *Arbitration Law (Law No. 138 of 2003),* implemented on March 1, 2004. This new law is modelled on the *United Nations Commission on International Trade Law (Uncitral) Model Law on International Commercial Arbitration*.

Under the new law, in principle, the parties are free to agree on rules for the arbitration procedure, and on the place of arbitration. As the parties usually agree to use an arbitral institution and these have their own rules of procedure, the arbitral agreement, in general, includes an agreement whereby the procedure will be subject to those rules. Either the arbitral tribunal or a party that has obtained the approval of the arbitral tribunal, may apply to a court for assistance in taking evidence.

INSTITUTIONAL ARBITRATION

There are several permanent arbitration institutions in Japan. The Japan Commercial Arbitration Association (JCAA) was established in 1950, and now has offices with experienced support staff in Tokyo, Osaka, Nagoya, Kobe, and Yokohama. It enjoys a solid reputation in managing complex international commercial arbitrations in a fair and efficient manner. In 2004, 21 cases were filed with the JCAA. While the International Chamber of Commerce (ICC) also has an office in Tokyo, it has fewer support staff to manage commercial arbitrations. As a result, in Japan it appears that ICC arbitrations are less common than JCAA arbitrations.

The Japan Shipping Exchange (JSE), established in 1921, has a significant track record in conducting maritime arbitrations. The Japan Intellectual Property Arbitration Center (JPIAC) was established in 1998 by the Japan Patent Attorneys Association and the Japan Federation of Bar Associations. It handles arbitrations concerning intellectual property rights. The Japan Sports Arbitration Agency was established in 2003 to resolve problems between athletes and sports associations. Some governmental organizations, such as the Committee for Adjustment of Construction Work Disputes, the Labor Relations Commission, and the Environmental Dispute Coordination Commission provide arbitration services for particular disputes. In addition, some local bar associations have their own arbitration centres, primarily intended to resolve private disputes between individual citizens.

RECENT TRENDS

The number of arbitrations in Japan has been relatively small. There are reportedly only about 100 cases a year, while the American Arbitration Association alone handles approximately 200,000 a year. By implementing the new Arbitration Law, the Japanese government expects Japan to become a leading arbitration centre. To this end, there are several organized efforts to promote international commercial arbitration in Japan. For example, the Japan Association of Arbitrators, a non-profit organization comprised of leading scholars and practitioners, provides professional training for arbitrators and mediators. The number of arbitration proceedings in Japan is expected to increase significantly in the coming years.

OTHER DISPUTE RESOLUTION METHODS

CIVIL MEDIATION

Under the *Civil Mediation Law (Law No. 222 of 1951)*, the national court administers civil mediations. One special characteristic is that it is meant to resolve disputes not by means of a formal court decision, but by reaching consensus between parties concerned. The mediation panel is composed of one judge and two neutral civic people (often lawyers or businessmen), and facilitates settlement discussions between parties. If a party fails to appear at a mediation session without just reason, it may be subject to monetary sanctions. 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. In 2004, 484,081 mediation cases were heard nationwide. Of these, 74.4% were successfully resolved. On average, a civil mediation proceeding took 2.2 months to conclude.

LABOUR TRIBUNAL

In 2004, the *Labor Tribunal Law (Law No. 45 of 2004)* was enacted to promptly resolve disputes between individual employees and their employers. It is scheduled to be implemented on April 1, 2006. The national court will organize a labour tribunal to hear these employment disputes, a panel comprised of one judge and two experts (one being chosen from management and the other from labour union members). The panel is expected to conclude disputes within three hearings, and then render an order. A party is allowed to object to the order within two weeks. If an objection is filed, the order will automatically be deemed null and void. On the other hand, if no objection is filed the order becomes final and irrevocable. The panel is also authorized to mediate an amicable settlement between the parties.

ADR LAW

In 2004, the *Law Concerning Promotion of Alternative Dispute Resolution (Law No. 151 of 2004)* was enacted, known as the ADR Law. It will be implemented before June 2007, but the exact date is yet to be announced. The law purports to promote a fair and just ADR procedure. To this end, it provides for a governmental

authentication system for ADR organizations, among other things. The ADR Law also provides certain special benefits for ADR procedures, such as to stall the statute of limitations and to stay parallel lawsuits pending the outcome of an ADR procedure.

ENFORCEMENT

LOCAL JUDGMENTS

The *Civil Execution Law (Law No. 4 of 1979)* provides for enforcement procedures. In order to enforce a local judgment against a debtor, the judgment must be either temporarily enforceable by a court declaration, or final and irrevocable. The creditor seeking enforcement must file the appropriate petition with the competent national court. Where a judgment is for the payment of money, compulsory execution begins with the seizure of real property, personal property, and the receivables of the debtor, and then these assets are converted into money through a sale at auction. Finally, the funds recovered from the sale are provided to creditors. Where a judgment is for the delivery of a specific asset, the court bailiff will seize that asset and deliver it to the creditor. Where a judgment is for the completion of a specific action by the debtor, the court will force the debtor to perform the action by means of a monetary sanction, or allow the creditor to carry out action and then force the debtor to reimburse the cost afterwards.

In enforcing a judgment for the payment of money, the creditor will often experience difficulties in locating the debtor's seizeable assets. While the Civil Execution Law was amended in 2004 to force the debtor to disclose his/her assets under oath, it is still a significant challenge for the creditor to conduct a search for the debtor's assets.

FOREIGN JUDGMENTS

Under Article 118 of the CCP, a Japanese national court will recognise a foreign judgment if certain requirements are met. These include, among other things, that the judgment is civil in nature, that it is final and irrevocable and that under Japanese standards for jurisdiction, the foreign court had jurisdiction over the case. The defendant must also have received due notice of the foreign proceedings, or have voluntarily appeared before the foreign court. Furthermore, the judgment must not offend public policy in Japan, and the respective foreign jurisdiction must reciprocally recognise Japanese judgments in its jurisdiction. When a foreign judgment satisfies these requirements, it will be pled as *res judicata* in Japan. To enforce such a judgment, however, the plaintiff must obtain an enforcement judgment from a competent national court in Japan. As long as the Article 118 requirements are met, a Japanese court must grant an enforcement judgment, and the court cannot review the merits of the foreign judgment. Once an execution judgment is granted, the foreign judgment is enforceable in Japan as if it were local.

ARBITRATION AWARDS

Japan is a member of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards. The new Arbitration Law provides for the same enforcement procedures for both a local and a foreign arbitral award, and these are consistent with the New York Convention and the Uncitral Model Law. Article 45 of the new Arbitration Law provides that an arbitral award will be pled as *res judicata* unless, among other things, the underlying arbitration clause was invalid; either party had not received due notice of the proceedings; either party was unable to defend the case; or the arbitral award offends public policy in Japan. To enforce an award, the enforcing party must procure an enforcement order from a competent national court in Japan. As long as the Article 45 requirements are met, a Japanese court must grant an enforcement order, and the court cannot review the merits of the award. Once the execution order is granted, the arbitral award is enforceable as if it were local.

FUTURE PROSPECTS

Japanese society used to be very non-litigious, particularly until the 1990s. Before then, bureaucrats had decisive power over the private sector. Thus, the number of business disputes was very limited, as business activities were often pre-arranged by bureaucrats. If a business dispute occurred, it rarely developed into litigation or another organized dispute resolution procedure. Rather, it was often "resolved" through direct negotiation between top management, or though mediation by a "big boss".

The situation changed in the 1990s as the bubble economy collapsed, and bureaucrats lost their power. Businesses entered into the world of free competition, and the number of disputes increased. These changes required a bigger, faster, and more reliable judiciary. Thus, in 2001, the Japanese government began judicial reform, which has resulted in variety of new legislation.

As noted, the new legislation is almost complete. Japan now has a bigger, faster, and more reliable dispute resolution mechanism. There are expected to be more business disputes than ever, and Japan is now ready to resolve them in fairer and more expeditious manner.