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## Franchising - Japan

### Forum Selection Clauses in Franchise Agreements

Contributed by [Anderson Mori & Tomotsune](#)

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#### Introduction

Japanese law provides that if a franchise agreement does not contain a written forum selection clause, a franchisee wishing to file a lawsuit against the franchisor may file suit in the court where the franchisor is located or, as is often the case, in the court where the franchisee is located. Defending lawsuits filed throughout Japan by franchisees imposes a substantial burden on franchisors that have a large number of franchisees across the country. In order to mitigate this burden, franchisors typically require franchisees to agree to resolve disputes in a designated forum.

An agreed choice of forum is generally regarded as valid, provided that the choice is recorded in a written agreement, such as a forum selection clause in a franchise agreement. For example, a typical forum selection clause for a franchisor located in Tokyo might read:

*"The franchisor and the franchisee hereby agree that the Tokyo District Court shall have exclusive jurisdiction as the court of first instance over any and all disputes arising from or related to this franchise agreement."*

Provided that an exclusive forum selection clause of this kind is included in the franchise agreement, the dispute may not be litigated in any other forum pursuant to the Code of Civil Procedure.

Notwithstanding the existence of such a forum selection clause, many franchisees still file suit in the court where they are located, hoping to be able to litigate the matter in the court of their place of business. The franchisor can consent to the franchisee's choice of forum or it may file a petition to transfer the case to the agreed forum (ie, the Tokyo District Court in the example above). However, some Japanese courts refuse to transfer such cases to the agreed forum and instead retain them.

#### Filing a Petition for Transfer

In order to transfer the case to the previously agreed forum, the franchisor must first file a petition in the court where the lawsuit was initiated (ie, the court of the franchisee's place of business). The petition must be filed before the franchisor files a pleading on the merits of the case. The court will then decide whether to transfer the case or retain it.

It often takes between one and three months (or sometimes longer) for a district court to render a decision on such a petition. During this period, submissions on the merits of the case will not be heard and the case cannot otherwise be advanced by the parties.

Notwithstanding the existence of a valid forum selection clause, the courts tend to exercise discretion to transfer the case based on a provision in the code which allows for transfer (i) in the interests of fairness, or (ii) to avoid serious delays in the case. Neither the code nor judicial precedent provides clear guidance on the criteria for transferring or retaining a case. However, many courts take into account:

- the financial situation of the parties;
- the location of the dispute; and
- the location of potential witnesses at the time the suit was filed.

Franchisees, which are often local companies, generally have fewer financial resources than franchisors. Accordingly, courts often give effect to a franchisee's choice of forum on the grounds of the parties' financial condition. With respect to the location of the dispute, if the franchise itself is close to the franchisee's workplace, the courts will often uphold the franchisee's choice of forum. Therefore, franchisors often strongly urge courts to make their decision on the basis of the location of potential witnesses. However, in the early stages of a lawsuit it is often difficult for a franchisor to identify key

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#### Authors

[Kenichi Sadaka](#)



[Aoi Inoue](#)



[Taisuke Yamamoto](#)



witnesses - given the relatively lax pleading standards in Japan, franchisees often deliberately avoid framing the issues to give themselves additional leeway later in the case.

Thus, although a franchise agreement may contain a valid forum selection clause, some courts will nonetheless retain the case. It is relatively difficult for the parties to predict at the outset whether a court will retain or transfer the case.

### Appealing a Decision on a Petition

If transfer is not permitted, the defendant which filed the petition may file an appeal. If transfer is permitted, the plaintiff may file an appeal. The appellate court will review the first instance court's decision based on the standard set forth in the code. The appeals process takes at least one month.

### Comment

Forum selection clauses in franchise agreements are generally valid in Japan. However, such clauses may not always be enforced by the courts. Therefore, franchisors should be aware of the possibility that lawsuits filed by franchisees may be litigated in the court of the franchisee's place of business, not in the agreed forum, and that a request to transfer the case may be refused.

Litigating the issue of whether a court should retain or transfer a case is relatively time consuming. If a franchisee initiates a lawsuit against a franchisor, it is seeking some form of redress. Thus, some franchisees file suit in the agreed forum in order to avoid protracted litigation regarding the choice of forum. However, when a franchisee files a lawsuit in a forum other than the agreed forum, the franchisor can ask the courts to enforce the forum selection clause by filing a petition to transfer the case. When it is the franchisor which initiates legal action against the franchisee, the former can file suit in the agreed forum.

Thus, forum selection clauses in franchise agreements remain a crucial tool for franchisors dealing with franchisees located across a wide area in Japan.

*For further information on this topic please contact [Kenichi Sadaka](mailto:kenichi.sadaka@amt-law.com), [Aoi Inoue](mailto:aoi.inoue@amt-law.com) or [Taisuke Yamamoto](mailto:taisuke.yamamoto@amt-law.com) at Anderson Mori & Tomotsune by telephone (+81 3 6888 5802) or by fax (+81 3 6888 6802) or by email ([kenichi.sadaka@amt-law.com](mailto:kenichi.sadaka@amt-law.com) or [aoi.inoue@amt-law.com](mailto:aoi.inoue@amt-law.com) or [taisuke.yamamoto@amt-law.com](mailto:taisuke.yamamoto@amt-law.com)).*

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