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Japan

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Litigation

1 Court system

What is the structure of the civil court system?

In Japan, all judicial power is vested in the Supreme Court and the lower courts, such as the high courts, district courts, family courts and summary courts. The courts are the final adjudicators of all legal disputes. There are about 3,500 judges in Japan. Summary courts have jurisdiction over proceedings where the contested amount is not more than ¥1.4 million. The district courts will hear appeals from the summary courts and on first instance for all matters with a value above ¥1.4 million and those dealing with real estate. The family courts have jurisdiction to hear non-monetary family law claims. Appeals from the district and family courts are heard by the high courts. In addition to the existing eight high courts, the Intellectual Property High Court was established as of 1 April 2005. Finally, the Supreme Court hears appeals on certain matters from the high courts.

2 Judges and juries

What is the role of the judge and the jury in civil proceedings?

Japan has no jury system for civil proceedings. Judges analyse the facts, apply the law and issue judgments. In civil proceedings, judges have to rely on the factual information provided to the court by the parties and will not, as a rule, collect information themselves. They do not, therefore, have an inquisitorial role, but they are not passive either, as they will evaluate all arguments and all the evidence before them.

3 Limitation issues

What are the time limits for bringing civil claims?

As a general rule, contract claims are time-limited to 10 years. However, contract claims arising from commercial transactions are limited to 5 years. Tort claims are limited to 20 years from the occurrence of the event giving rise to the claim. For tort claims, a separate limitation period of three years applies from the time of knowledge of the damage and of the identity of the party responsible for said damage. The shorter of these limits applies to tort claims. In addition, there are various shorter limitation periods under the Japanese Civil Code, such as two years in the case of accounts receivable related to moveable assets.

Time limits can be suspended by a court action, attachment and provisional attachment or provisional disposition as well as by acknowledgement. Following suspension, the limitation periods mentioned above will start to run anew from the time when the cause of such interruption ceased to exist.

In cases of a private claim (for example, in order to obtain payment) the limitation period will only be suspended if court action is taken within six months from demand for payment.

4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

There is no obligation to take any pre-action steps in Japan. While there is the advance notice system, which enables the exchange of allegations and evidence between prospective litigants in advance of the actual initiation of a lawsuit, as a matter of practice it is rarely used. In practice, the claimant often sends a content-certified letter through the post, which states the issue at cause and asks for some action to be taken.

Interlocutory measures, which are designed to secure the enforceability of the judgment, are available under Japanese law. There are two types of interlocutory measures:

- provisional attachment (used to preserve the property at issue that belongs to the debtor for securing a monetary claim); and
- provisional disposition (used to preserve disputed property and to establish an interim legal relationship between the parties).

5 Starting proceedings

How are civil proceedings commenced?

Civil proceedings are initiated by filing a complaint with the court that has jurisdiction to hear the claim. Depending on the size of the claim, appropriate stamps need to be attached to the formal complaint.

6 Timetable

What is the typical procedure and timetable for a civil claim?

After the filing of the complaint, the court clerk will examine whether the correct form for the complaint has been used and whether the correct amount of stamps has been affixed on the complaint (the amount of the stamps depends on the amount of the claim). The clerk will then contact the plaintiff or the plaintiff's attorney and, depending on his or her availability, will decide the date of the first oral hearing. The court will then serve a summons and the complaint on the defendant. The first oral hearing will typically be held 40 to 50 days after the filing date. Before the hearing, the defendant has to file a defence, which will deny or accept each claim and factual information relied upon in the complaint. At each key event in the proceedings (particularly after the witness examination) the judge may ask the parties whether they have an intention to settle the case.

Following the first hearing, there will be a court hearing of (on average) 10 to 15 minutes once a month or once every few months. In addition to oral hearing, the judge may hold a preparatory court hearing, at which the judge and both parties will discuss the issues at hand for a relatively long time in chambers.

The examination and cross-examination of witnesses will follow. After this, each party will file its closing brief. The oral proceedings will close and the court will issue its judgment. On average,

judgment is rendered one-and-a-half or two years following the filing of the complaint.

7 Case management

Can the parties control the procedure and the timetable?

The parties have no control over the procedure or timetable in a civil trial but the judge will consider the parties' requests for changes to the procedure or timetable and may make changes to the procedure or timetable to the extent allowed by applicable laws.

8 Evidence – documents

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no legal obligation to preserve documents for the purpose of pending or foreseeable litigation. However, a party's disposition of valuable documents for pending or foreseeable litigation may lead the judge to find the facts unfavourable to the disposing party.

9 Evidence – privilege

Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

No, Japanese law does not have the concept of 'privilege' in the context of document disclosure. In Japan, document disclosure is only intended for specific documents by means of a court's document production order.

Attorneys-at-law, patent attorneys, foreign attorneys licensed to practice in Japan, medical doctors, etc, are exempt from the obligation to submit documents containing confidential information disclosed by their clients. In addition, if the documents are related to matters concerning technical or professional secrets, a holder of such documents is exempt from the obligation to submit them.

10 Evidence – pretrial

Do parties exchange written evidence from witnesses and experts prior to trial?

No. However, a judge often instructs a party, which is requesting examination of a live witness, to submit an affidavit of the witness prior to oral testimony.

11 Evidence – trial

How is evidence presented at trial? Do witnesses and experts give oral evidence?

Witnesses and experts give oral evidence although a judge has discretion to hear the evidence or not. Documentary evidence can be presented to judges at the hearing or preparatory hearing to be held once a month or once every few months.

12 Interim remedies

What interim remedies are available?

In addition to the interlocutory measures mentioned in question 4, it is also possible in some cases to obtain an interim judgment, which is binding on the court but is not enforceable. The purpose of such interim judgment is to focus on particular issues in the proceedings and to prepare for the final judgment by first resolving some issues between the parties. However, the court has sole discretion to decide whether to issue an interim judgment and, in practice, Japanese courts seldom render an interim judgment, except to admit international jurisdiction over the claims.

13 Remedies

What substantive remedies are available?

Actual but not punitive damages are the most common form of remedy under Japanese civil procedure. Various types of injunctions are also available.

Interest is payable on money judgments. In the event of a claim arising from a contractual obligation, the interest rate follows the contract rate. Otherwise, in general, the default interest rate will be 5 per cent, while for contract claims arising from commercial transactions, the default rate will be 6 per cent.

14 Enforcement

What means of enforcement are available?

There are different enforcement procedures for monetary and non-monetary claims. Monetary claims are enforced by attachment of the assets of the defendant. This is achieved by acquiring possession of the property for moveable goods and in the case of immoveable goods through a court declaration that the property in question is attached. The attached property will then be converted into money by way of auction. In the case of attachment of a claim against a third party, a garnisher may collect the claim by filing a lawsuit against the third party or may receive assignment of the claim with permission from a court.

For non-monetary judgments, enforcement can take various forms. The judgment ordering the party to transfer property can be realised by direct enforcement. The court or bailiff will seize the property in question and hand it to the plaintiff. A judgment that obliges someone to do something can be enforced by substitute performance at the expense of the defendant. An obligation not to do something can be enforced by indirect enforcement, that is, the imposition of fines until the defendant complies.

Japanese civil procedure does not provide for criminal sanctions for contempt of court in the event of non-compliance with the court's directions.

15 Public access

Are court hearings held in public? Are court documents available to the public?

Oral hearings are held in public except for cases where trade secrets need to be protected in relation to patent and other IP cases. Court documents are available to the public. Anyone can inspect court documents regardless of their relationship to the parties to the case, and a person who proves to have an interest in the case can take copies of those documents. If either party to the case needs to restrict such inspection from a third party, a petition should be filed in court on the ground that the documents contain trade secrets or material secrets regarding the personal (namely, private) life of the party.

16 Costs

Does the court have power to order costs?

The court can order costs to be paid by one party to the other but that does not cover attorneys' fees. In tort cases, the plaintiff can add a certain portion (usually 10 per cent) of attorneys' fees as part of the damage that it has suffered.

The judge assesses the costs. These will cover the cost of the stamps that need to be attached to a complaint and other costs admitted by rules of the court, but will not cover the actual costs borne by the parties. The costs are assessed after either party makes a petition to fix the amount of costs.

As to security for costs, it is only available in special cases such as in lawsuits between shareholders and directors where the defendant asks the plaintiff to place a bond as security. This procedure is also available where the plaintiff does not have an office address or

a residence in Japan, unless otherwise stipulated by an applicable treaty.

17 Funding arrangements

Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

'No win, no fee' arrangements are not specifically prohibited under Japanese civil procedure law and Law of Lawyers. However, lawyers' rules of ethics may be interpreted as being against such arrangements. In practice, 'no win, no fee' arrangements are rare in Japan. Conditional fee arrangements are not rare in Japan, especially for boutique firms dealing with only domestic cases. Parties may bring proceedings using third-party funding, but it may cause a problem under the Law of Lawyers if the third party takes a share of any proceeds of the claim. A defendant may share its risk with a third party although such arrangements may be subject to insurance regulation.

18 Insurance

Is insurance available to cover all or part of a party's legal costs?

There is no insurance available to cover all or part of a party's legal costs incurred in relation to all types of litigation. Insurance for product liability, directors and officers or professional malpractice, etc, may cover legal costs for relevant litigation.

19 Class action

May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Under Japanese law, a class action is not allowed and therefore each person needs to be a plaintiff, although there is no restriction on the number of the plaintiffs named in one complaint. In practice it sometimes happens, for example, that hundreds of plaintiffs file a complaint against a national or municipal government or a certain industry allegedly causing environmental problems or pharmaceutical side effects. In 2007, an amendment to the Consumer Contract Act introduced 'consumer organisation proceedings', which allowed certain qualified consumer unions and non-profit organisations to seek injunctions, for the benefit of the relevant consumers, against business operators to prevent them from performing unfair acts, such as soliciting for the execution of a consumer contract which contains an unfair provision.

In addition, a bill which will introduce a new class action system (the New System) has been presented before the Diet in 2013. The New System is aimed at providing remedies in respect of damages suffered by a considerable number of mass market consumers. The New System consists of two stages. The first stage is a procedure to determine the common issues of law and fact existing between a business operator and the relevant class of aggrieved consumers (namely, whether or not the business operator is obligated to make payment to consumers). This first stage procedure can only be filed by a 'specified qualified consumer organisation' (SQCO) and can only be filed against business operators that have privity of contract with the consumers on behalf of whom the procedure is filed. If the SQCO successfully obtains a declaratory judgment in its favour, the proceedings will go on to the second stage, which determines the existence and amount of the individual claims. The second stage is commenced by a petition filed by the SQCO, after which the SQCO will make an announcement encouraging consumers to join the second stage. After consumers join, the court determines the existence and amount of the individual claims through a prompt and simple procedure. It should be noted that the claims that can be brought under the New System are limited to certain types of monetary claims resulting from a consumer contract and do not include claims for compensation for life or bodily damage or for damage to property other than that which is the subject of the contract.

20 Appeal

On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Judgments and decisions of the district court can be appealed to the high court and then to the Supreme Court. The grounds for appeal from the district court to the high court are that the first judge made an error in a factual finding or in the application of the law. The Supreme Court will hear appeals from the high court on grounds of error in interpretation and other violations of the Constitution. In addition, violations of the civil procedure rules such as an error in jurisdiction, lack of reasoning, etc, will also give rise to a right of appeal to the Supreme Court. Parties may also file petitions to the Supreme Court, which gives the Supreme Court discretion to accept cases if the judgment being appealed is contrary to Supreme Court precedents or contains significant matters concerning the interpretation of laws and ordinances.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Japanese courts recognise foreign final and conclusive civil judgments for claims obtained in a foreign court and will issue an enforcement order, provided that:

- the jurisdiction of such court is recognised under Japanese law or applicable international conventions;
- the defendant received due notice of the foreign proceedings or voluntarily appeared before the foreign court;
- such judgment or the proceeding at such court is not contrary to public policy as applied in Japan; and
- reciprocity exists as to recognition by the foreign court of a final judgment obtained in a Japanese court.

If the enforcement order is rendered, it will be possible for the plaintiff to proceed with enforcement procedures against the defendant's assets just as they would be able to in the case of a Japanese domestic court judgment.

22 Foreign proceedings

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

There are two procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions. One is to request a Japanese court to provide judicial assistance and obtain evidence in accordance with the Convention Relating to Civil Procedure or bilateral international agreements. The Japanese court may examine a witness based on written questions annexed to letters rogatory received from a foreign court through the minister of foreign affairs. The other is to take depositions at consular premises in accordance with the Consular Convention between Japan and the United States or the Consular Convention between Japan and the United Kingdom. Obtaining evidence for use in other jurisdictions in any manner that is not in compliance with international conventions is generally considered to constitute a violation of Japan's judicial sovereignty.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Yes. Japan enacted the new Arbitration Law on 1 March 2004 (the enactment date) based on the UNCITRAL Model Law (an English-language version of the Arbitration Law is available at www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf).

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The Arbitration Law requires that an arbitration agreement be in writing (article 13). Electromagnetic records of agreements are deemed to be in writing.

25 Choice of arbitrator

If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The Arbitration Law has adopted the same rules as stipulated in the UNCITRAL Model Law. Most of the commercial arbitration institutions in Japan appoint an arbitrator from among the candidates listed in their own panel of arbitrators. In addition, parties are permitted to appoint an arbitrator who is not listed in the panel subject to the rules of the individual commercial arbitration institutions.

26 Arbitral procedure

Does the domestic law contain substantive requirements for the procedure to be followed?

The Arbitration Law contains almost the same procedural rules as those of the UNCITRAL Model Law. It stipulates that the 'equal treatment principle' be the basic substantial rule of procedure (article 25). Besides this principle, parties are free to agree on procedural rules, subject to ensuring that there is no violation of public policy principles contained in the Arbitration Law. If the parties' agreement on the procedure is silent, the arbitral tribunal may, subject to the provisions of the Arbitration Law, conduct the arbitration in a manner it considers appropriate.

27 Court intervention

On what grounds can the court intervene during an arbitration?

In addition to the scope of intervention and jurisdiction stipulated by the UNCITRAL Model Law, the Arbitration Law has a set of concrete rules; that is, basic rules for hearing procedures, procedures to appeal court decisions, to access to court records, etc. According to these rules, district courts that exercise jurisdiction over a place of arbitration or to which parties have agreed shall have jurisdiction over the arbitration. Other than the appointment procedures of the arbitrator (including challenges and removal), the court does not have any power to intervene during an arbitration procedure. Its role is only to support the examination of evidence and witnesses upon the application of either party.

28 Interim relief

Do arbitrators have powers to grant interim relief?

Yes. The Arbitration Law introduced the possibility for arbitrators to grant interim relief. However, due to the legislation being relatively new, it is not yet clear how interim relief will be enforced. Concrete enforcement procedures of the interim measures may be determined by future legislation or amendments to the Arbitration Law.

29 Award

When and in what form must the award be delivered?

As stipulated in the UNCITRAL Model Law, the arbitral tribunal has to render a reasoned award signed by the arbitrators. A copy signed by the arbitrators must be delivered to each party after the award date.

30 Appeal

On what grounds can an award be appealed to the court?

No, there is no right of further appeal. The parties to the arbitration have a right to set aside the award only when certain specific events stipulated in the Arbitration Law occur (the events are identical to those in the UNCITRAL Model Law). In *Descente Ltd v Adidas-Salomon AG et al*, 123 Hanrei Jiho 1847 (2004) the court decided, obiter, that parties could not find causes for the setting aside of an award other than those contained in the Arbitration Law.

31 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

As stipulated in the UNCITRAL Model Law, an arbitral award can be enforced when the relevant court recognises an award (article 45). Substantial requirements for recognition are almost the same as stipulated in the UNCITRAL Model Law. When the court recognises the award, the court renders an enforcement decision. With respect to procedure, the Arbitration Law uses a decision procedure in which the court can discretionally hold an oral argument.

32 Costs

Can a successful party recover its costs?

The parties can decide to split costs by mutual agreement. The Arbitration Law states that the arbitral tribunal shall determine actual costs based on the agreement of the parties. When an agreement is silent on the subject, each party shall bear its respective costs with respect to the arbitration procedure. It should be noted that, unless otherwise agreed to by the parties, the arbitral tribunal may order the parties to deposit an estimated cost amount with the arbitral tribunal prior to the arbitration proceedings (article 48).

Alternative dispute resolution

33 Types of ADR

What types of ADR process are commonly used? Is a particular ADR process popular?

In the context of international commercial transaction, arbitration would be the most popular type of ADR, although many Japanese parties still prefer to go to state court (Tokyo District Court). For domestic disputes, the preference of mediation and conciliation is very strong; furthermore, even Japanese arbitrators, unless experienced parties or counsel remind them otherwise, recommend the parties to settle without rendering an award.

Recently, new types of ADR have been introduced in Japan. For example, turnaround ADR has been created for the rehabilitation of companies suffering financial difficulties. This proceeding assists with the coordination between the financial creditors and debtors and is carried out under independent specialists; the participation of trade creditors is not required. It should be noted that in spite of the name, this proceeding does not necessarily involve the resolution of disputes.

Update and trends

In order to enhance corporate governance standards in Japan, amendments to the Companies Act have been discussed by the Japanese government, and as a result a draft outline of the proposed amendments to the Companies Act was finalised on 1 August 2012 by the Companies Act Subcommittee established within the Ministry of Justice. The proposed amendments were adopted by the Legislative Council of the Ministry of Justice on 7 September 2012. An amendment bill to the Companies Act in accordance with the outline is expected to be presented before the Diet in 2013. As one of the amendments to the Companies Act, the introduction of multiple derivative actions is being proposed. Japanese parent companies have generally been reluctant to take single derivative actions (which are permitted under the current Companies Act) against officers (directors and statutory auditors, etc) of their subsidiaries who have breached their duty of care to those subsidiaries, and to request their subsidiaries to file lawsuits against such officers. The introduction of multiple derivative actions is aimed at providing the shareholders of a parent company with the right to institute a derivative action against such officers (instead of the parent company) so that corporate governance standards can be enhanced.

Based on the proposed amendments, the major requirements for instituting multiple derivative actions (and for demanding that a subsidiary institute actions against its officers as the premise for instituting multiple derivative actions) can be summarised as follows:

- shareholders of the parent company must hold voting rights or shares exceeding one one-hundredth of the total voting rights or the total issued and outstanding shares. In addition, in cases where the parent company is a public company (a company whose shares can be transferred without the permission of the company), the shareholders of the parent company are required to have continuously held the above proportion of voting rights or shares for the six months preceding their demand to institute an action against officers of the subsidiary;
- the book value of the shares of the subsidiary must exceed one-fifth of the total assets of the parent company, as at the date on which the facts constituting the cause giving rise to the liability of the officers occurred (the relevant date);
- the subsidiary is the (direct or indirect) parent company's wholly-owned subsidiary as at the relevant date and the date on which shareholders of the parent company demands that the subsidiary institute actions against the officers; and
- the parent company incurred damage resulting from the cause giving rise to the liability of the officers.

Although it is not crystal clear from the wording of the proposed amendments, it is generally understood by legal practitioners that both the parent company and the subsidiary referred to in the above requirements must be companies (*kabushiki kaisha*) established in accordance with the Companies Act. Therefore, for example, shareholders of a foreign parent company cannot initiate multiple derivative actions against officers of its Japanese subsidiary.

The above requirements are provided in consideration of the concern from the business community that allowing derivative actions to be taken against officers (directors in particular) of subsidiaries would inhibit the formulation of flexible corporate structures.

As a result, the circumstances in which multiple derivative actions may be taken are very limited.

In addition, financial ADR has also been introduced to assist in the resolution of disputes between financial institutions and customers. The characteristics of this ADR are that:

- a financial institution cannot refuse to participate in dispute resolution proceedings without a justifiable reason if a customer files a petition with a designated dispute resolution institution;
- a financial institution cannot refuse to give a explanation or to submit related documents without a justifiable reason if requested by a designated dispute resolution institution; and
- a designated dispute resolution institution may, at its discretion, make a special conciliation proposal, which the financial institution must accept unless it chooses to file a lawsuit.

34 Requirements for ADR

Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

No, parties do not have to consider ADR before litigation except in family cases and certain cases such as rent review. However, for particular types of cases like construction disputes and medical malpractice, if the courts find the case suitable for mediation and conciliation they may suggest the transfer of the case to the court's special division for mediation and conciliation, where the courts have a list of experts in such technical fields.

Miscellaneous

35 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The revised Code of Civil Procedure came into force on 1 April 2012. It has introduced a new set of provisions stipulating the international jurisdiction of Japanese courts in civil and commercial matters. Considering the disparity in bargaining power, the revised Code of Civil Procedure provides special rules on jurisdiction over lawsuits relating to consumer contracts and employment relationships. With respect to lawsuits relating to consumer contracts, where a consumer files a lawsuit relating to a consumer contract against a

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company, Japanese courts will have jurisdiction if the domicile of the consumer at the time of the conclusion of the contract or at the time of filing the suit in Japan. On the other hand, a company can only file a lawsuit relating to a consumer contract against a consumer if the consumer is domiciled in Japan.

With respect to lawsuits relating to employment relationships, where an employee files a lawsuit relating to an employment relationship against his or her employer, Japanese courts will have jurisdiction if the place where the labour was supplied under the employment contract (or, if no such place is specified, the office which hired the employee) is located in Japan. On the other hand, an employer can only file a lawsuit relating to an employment relationship against an employee if the employee is domiciled in Japan.

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