PRACTICAL LAW COMPANY®

# Japan

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## MAIN DISPUTE RESOLUTION METHODS

**1. What are the main dispute resolution methods used in your jurisdiction to settle large commercial disputes?**

### Litigation

Litigation is the most frequently used dispute resolution method to settle large commercial disputes in Japan. The Code of Civil Procedure (CCP), which was significantly amended in 1996 and became effective in 1998, provides the following system to efficiently resolve disputes:

- The court conducts preparatory proceedings to clarify and ascertain the material issues and evidence at an early stage. These issues are mainly identified through the exchange of written briefs and evidence, and periodic hearings. The court may allow one of the parties to attend a hearing in the preparatory proceedings by teleconference but only when the other party attends the hearing in person.
- Examination of witnesses and parties must be conducted as efficiently as possible, focusing on the material issues legitimately in dispute after completion of the preparatory proceedings.

### IP disputes

Administrative proceedings are frequently used in relation to intellectual property (IP) disputes. Customs proceedings are available for a holder of IP rights, including patent rights, to prevent the import or export of items infringing those IP rights. The IP right holder can obtain a decision on his petition for an injunction within two to three months of starting the proceedings. A panel of expert advisers appointed by the customs bureau advises the customs director on technical issues relating to alleged patent infringement.

In addition, invalidity proceedings at the Japan Patent Office (JPO) are available for a third party to contend directly to the JPO that an issued patent is invalid. The invalidity proceedings can be used together with, or independently from, court proceedings and/or the customs proceedings.

## COURT LITIGATION - GENERAL

**2. What limitation periods apply to bringing a claim and what triggers a limitation period?**

The limitation period for major claims in relation to large commercial disputes is as follows:

- **Contractual claims.** Ten years from when the right becomes exercisable. However, commercial claims (that is, claims that arise out of the commercial activities of one or both parties) are subject to a five-year limitation period from when the right holder can exercise its right (this is normally interpreted from the time that the obligation is due to the right holder).
- **Tort claims.** Three years from when the right holder:
  - discovers that he has suffered damage; and
  - knows the identity of the person or entity liable for the damage.

  Japan has no concept of constructive or imputed knowledge, so the statute of limitations is based on actual knowledge. However, under an absolute statute of limitations, a claim in tort is finally barred after 20 years from the tortious act.
- **Product liability law claims.** These claims are subject to either:
  - a three-year limitation period from when a right holder discovers that he has suffered damage, and knows the identity of the person or entity responsible for the damage; or
  - a ten-year limitation period from the delivery of a defective product.
- **Ownership of land.** There is no specific statute of limitation.

**3. What is the structure of the court where large commercial disputes are usually brought? Are certain types of dispute allocated to particular divisions of this court?**

Large commercial disputes are usually brought in the District Court. Appeals from the District Court are brought before the relevant High Court depending on the territory. There are eight High Courts in Japan (*see Question 20*). The Supreme Court is the court of last resort.

Disputes involving patents, utility model rights, rights to use circuit patterns and copyright to computer programs are subject to the original and exclusive jurisdiction of either:

- The Tokyo District Court (IP Division) for cases in the eastern part of Japan.
- The Osaka District Court (IP Division) for cases in the western part of Japan.

The IP High Court in Tokyo has exclusive jurisdiction over appeals from these District Courts. The IP High Court was introduced on 1 April 2005 to secure prompt and uniform interpretation of patent law and other relevant IP laws, and to ensure that appropriate technical expertise is available to support courts in IP matters.

If a dispute is brought in a District Court with multiple civil divisions, for example the Tokyo District Court (which has 50 civil divisions), the dispute can be assigned to a particular civil division depending on the type of the dispute, to ensure that judges with the relevant experience and expertise adjudicate the matter. For example, in the Tokyo District Court:

- Disputes related to company law and corporate reorganisation law are allocated to the 8th Civil Division.
- Disputes concerning interim remedies are allocated to the 9th Civil Division.
- Labour disputes are allocated to the 11th, 19th or 36th Civil Division.
- IP disputes are allocated to the 29th, 46th or 47th Civil Division (IP Division).

The answers to the following questions relate to procedures applicable in the District Court, the High Court and the Supreme Court.

**4. Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought? What requirements must they meet? Can foreign lawyers conduct cases in these courts?**

*Bengoshi* (lawyers) who are admitted to practise law in Japan can conduct cases in courts regardless of the claim amount or case type. Foreign attorneys licensed to practise in Japan (*gaikokuhou jimu bengoshi*) cannot conduct cases in court, but can appear in international arbitrations.

*Benrishi* (quasi-legal patent professionals) can conduct cases involving patents, utility model rights, trade marks, design rights, rights to use circuit patterns and certain violations of unfair competition laws, provided that both:

- The client is represented by a *bengoshi,* and the *benrishi* is involved as a co-counsel.
- The *benrishi* passes an exam to qualify as a co-counsel in the above cases.

Instead of being involved as co-counsel, a *benrishi* can assist a *bengoshi* in court as an assistant counsel (*hosanin*) even if they have not passed the exam.

## FEES AND FUNDING

**5. What legal fee structures can be used? Are fees fixed by law?**

A variety of legal fee structures can be used, including hourly rates, task-based billing, conditional or contingency fees and a combination of these, provided the fee is fair and reasonable.

Until April 2004, legal fee structures were regulated by the Japan Federation of Bar Associations and each individual bar association. However, a majority of Japanese lawyers still use the abolished regulation as a guideline.

In general domestic disputes, Japanese lawyers traditionally work on a task-based billing structure, consisting of an initial fee (set at a certain percentage of the claim amount) and a success fee (set at a certain percentage of the award obtained). For example, if the claim amount is JPY100 million (as at 1 February 2011, US$1 was about JPY83), the initial fee is usually 3% of the amount and the success fee is 6% of the award (if the award exceeds a certain agreed threshold). For a claim amount of JPY400 million, the initial fee is usually 2% of the claim amount, and the success fee is 4% of the award exceeding the threshold.

In large or international commercial disputes, fees are often based on hourly rates because it is difficult to predict at the outset the amount of attorneys' work required to resolve the dispute.

**6. How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?**

### Funding

Generally, parties must bear their own litigation costs. However, for individuals with limited financial means, financial support from the Japan Legal Support Centre is available if certain requirements are met.

### Insurance

In 2000, insurance companies started selling insurance covering litigation costs including attorneys' fees (*bengoshi hoken*) through the Japan Federation of Bar Associations. Directors' and officers' insurance (D&O insurance) is also available to cover litigation costs including attorneys' fees if a lawsuit is brought against them in connection with the company's business.

## COURT PROCEEDINGS

**7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?**

Court proceedings are open to the public, unless the court unanimously decides that this would be detrimental to public policy (*Article 82, Constitution*). However, preparatory proceedings (*see Question 1, Litigation*) are generally closed to the public.

To protect confidential information, the court can prevent a third party from reading or copying sections of the litigation records that contain trade secrets or material, or private or confidential information, if a party presents prima facie evidence that it is entitled to this protection (*Article 92, CCP*).

To protect trade secrets, the court can both:

- Impose a confidentiality duty on the parties, their attorneys and their employees.
- Order them not to use the trade secret for purposes other than the litigation or to disclose the trade secret to a third party.

A party must present prima facie evidence that the briefs or evidence contain trade secrets, as well as evidence of why the order is necessary (*Article 105-4, Patent Law* (laws on utility model, design right, trade mark, unfair competition and copyright have similar provisions)). Criminal sanctions apply for violation of a confidentiality duty.

When a party, its attorney or its employee are examined in relation to the party's trade secrets, the court can close the hearing to the

public if it decides that both (*Article 105-7, Patent Law* (laws on utility model and unfair competition have similar provisions)):

- The party or witness cannot make a sufficient statement in a public hearing due to the material adverse effect it would have on the party's business activities based on the trade secret.
- It cannot reach a proper judgment on the dispute without the proper examination of the witness.

**8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?**

A party can request evidence from the other party or a third party before the start of litigation under certain circumstances. However, there is no formal penalty if the other party does not provide evidence in response to a party's or the court's request.

A potential claimant or defendant can request that the other party answers interrogatories if the potential claimant has sent a notice of future litigation to the potential defendant. The requested party cannot refuse to answer the interrogatories, unless one of the reasons for refusal specified in the CCP applies (*Article 132-2, CCP*). However, even if it refuses to answer the interrogatories without meeting the criterion for refusal (or falsely answers them), there is no formal penalty. The party's refusal can be taken into consideration in the future litigation and can adversely affect its position.

The court can allow a party to request that the other party or a third party provide documents in its possession, if the court considers that (*Article 132-4, CCP*):

- The documents are necessary for the future litigation.
- It is difficult for the requesting party to collect the documents.
- It is not unreasonable to request production of the document.

Although there are no formal penalties for non-compliance, failure to co-operate can be taken into consideration by the court in subsequent litigation.

Additionally, if it would be difficult to use certain evidence later unless the evidence is immediately preserved, the court can, on petition, order the procurement and examination of the evidence through inspection, witness examination or other methods (*Article 234, CCP*). While there are no formal penalties immediately imposed for non-compliance, if a party fails to comply with a court order for the preservation of evidence, the court, in subsequent litigation, can make an adverse inference and accept the requesting party's characterisation of the documents or matters subject to inspection or examination.

**9. What are the main stages of typical court proceedings? In particular:**

- **How is a claim started?**
- **How is the defendant given notice of the claim and when must the defence be served?**
- **What are the subsequent stages?**

### Starting proceedings

A claim is started by submitting a complaint to the court. After submission, the complaint is subject to review for compliance with formalities and, if necessary, amended. The complaint normally contains substantive argument and is filed with evidence.

### Notice to the defendant and defence

The court serves the complaint on the defendant by a special type of mail service (*tokubetsu sotatsu*). The claimant or its agent cannot personally serve the complaint on the defendant.

If the address of the defendant is unknown, or other exceptional circumstances exist, the court can serve the complaint by posting it on a notice board in court (*kouji soutatsu*) (*Articles 110 and 111, CCP*). The complaint is deemed served on a defendant in Japan two weeks after the posting, and on a defendant in a foreign country six weeks after the posting (*Article 112, CCP*).

The defendant must submit an answer in response to the complaint within a period set by the court in a notice of summons to the first hearing date and demand for an answer, which is served together with the complaint. The deadline is usually set about one week before the first hearing date, which is usually about four to six weeks from the service of the complaint.

### Subsequent stages

**Hearing date.** The hearing is open to the public. The parties submit briefs and produce evidence. If the defendant does not appear in court at the first hearing date, and also does not submit an answer, the defendant is considered to have admitted the allegations in the complaint, unless the complaint was served by way of posting (*kouji soutatsu*) (*Article 159, CCP*).

**Preparatory proceedings.** The court has preparatory proceedings to clarify and ascertain material issues and evidence. These issues are generally identified through several exchanges of briefs and evidence, followed by court hearings. The proceedings are generally closed to the public.

**Obtaining evidence.** This includes the following:

- **Interrogatories.** A party can send interrogatories to the other party on matters necessary for the requesting party to present its case (*Article 163, CCP*). The party to whom the request is addressed can refuse to answer the questions if the questions are one of the following:
  - not specific;
  - insulting;
  - repetitive;
  - for the purpose of obtaining opinions of the requested party;
  - unduly burdensome to answer; or
  - subject to privilege or confidentiality (*see Question 17*).

  The party has a duty to answer the questions, but there are no formal penalties for failure to answer them. However, failure to answer can be taken into consideration by the court and adversely affect that party's position.
- **Request of research to a government or civil organisation.** The court can, at its discretion or at a party's request, request a local or foreign government body, an academic institution, a chamber of commerce or other organisation that has expertise on matters at issue, to conduct any necessary research and answer questions (*Article 186, CCP*).

- Order for document production and experts. See *Questions 16* and *19*, respectively.

**Examination of witnesses.** Examination of witnesses focuses on the material issues legitimately in dispute, once the preparatory proceedings are over.

**Court mediated settlement.** Once the issues in the case are well understood, one of the judges in the case often attempts to mediate a settlement between the parties. In practice, the parties often settle the dispute before a judgment is given.

**Judgment.** After judgment is given, a dissatisfied party in the court of first instance (normally the District Court) can appeal to a higher court (normally the High Court) within two weeks of the receipt of the judgment.

The Law on Expedition of Court Proceedings 2003 sets a maximum period of two years as a target for completion of the first instance court proceedings.

## INTERIM REMEDIES

**10. What actions can a party bring for a case to be dismissed before a full trial? On what grounds must such a claim be brought? What is the applicable procedure?**

Summary judgment as seen in, for example, the US, is not available in Japan. However, the court can, at its discretion, give an interim judgment (*chukan hanketsu*) on a part of the dispute before giving a final judgment, if both (*Article 245, CCP*):

- That part is independent from the remaining parts.
- A separate judgment on that part is feasible.

An interim judgment is useful, particularly in large or complex disputes, to reduce the number of issues in dispute in the subsequent proceedings. However, interim judgments are rare.

**11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?**

The court must order, at the defendant's application, the claimant to provide security for litigation costs if the claimant has no address or office in Japan or any other signatory country to the Hague Convention on Civil Procedure 1954. However, the defendant does not have a right to file an application for security for litigation costs if either:

- The claimant has a payment claim against the defendant which is larger than the amount of the security, and the defendant admits this.
- The defendant continued to respond in the litigation proceedings after knowing that the claimant has no such address or office.

The court determines the amount and deadline for the provision of security. The amount is determined based on the litigation costs the defendant is likely incur at all stages of the litigation, including appeals. The defendant has a preferential right or lien over the security. If the claimant does not provide security by the deadline, the court can dismiss the claimant's claim. In practice, it is rare for a defendant to file an application for security for litigation costs.

**12. In relation to interim injunctions granted before a full trial:**

- **Are they available and on what grounds are they granted?**
- **Can they be obtained without prior notice to the defendant and on the same day in urgent cases?**
- **Are mandatory interim injunctions to compel a party to do something available in addition to prohibitory interim injunctions to stop a party from doing something?**

### Availability and grounds

A preliminary injunction is available to secure the enforcement of a non-monetary judgment through preliminary injunction proceedings (*kari shobun*). The court grants a preliminary injunction if it concludes that the claimant has presented prima facie evidence of the claimant's rights to the relief requested and the necessity of the preliminary injunction. The preliminary injunction proceedings are separate from the main proceedings, and if the district court has multiple divisions (*see Question 3*), it is often handled by a different division and a different judge. However, for certain types of disputes, such as IP and labour disputes, the request for a preliminary injunction is filed with a particular division with judges with specific experience and expertise, not the division responsible for interim remedies. There are two types of preliminary injunctions:

- **Preliminary injunction relating to the subject matter in dispute.** This order prevents the respondent from disposing of its assets in dispute or exercising its rights related to the assets. For example, a prohibitory injunction can be granted to prevent a respondent from transferring its ownership of real estate to a third party, to secure a claimant's right to register the claimant as the owner of the real estate.
- **Preliminary injunction temporarily determining the state of affairs between the parties (preliminary declaratory judgment).** This type of remedy is used to prevent the present harm a claimant is suffering, and temporarily creates a certain state corresponding to the claimant's right in dispute (for example, an injunction to prohibit the sale of products that infringe the claimant's IP rights).

### Prior notice/same-day

For a preliminary injunction relating to the subject matter in dispute, the court generally orders this injunction without prior notice to the respondent. However, the court, in its discretion, can order notice and an opportunity for the respondent to be heard, if the court considers it necessary and reasonable.

In relation to a preliminary declaratory judgment, the court usually gives the respondent an opportunity to be heard (usually through an interview). However, in exceptional circumstances where the purpose of the injunction cannot be achieved if the court provides the respondent with an opportunity to be heard, the court can order the injunction without notice.

Technically, it is possible to obtain interim injunctions on the same day as the application. However, it is rare because the court normally requires more time to consider whether a claimant has

presented prima facie evidence of the claimant's rights to be secured, and the necessity of the preliminary injunction.

### Mandatory injunctions

Mandatory interim injunctions to compel a party to do something are available in addition to prohibitory interim injunctions to stop a party from doing something. For example, a claimant can seek a preliminary injunction to vacate immovable property to secure the claimant's possession or to compel the respondent to provide the claimant with products under a long-term purchase agreement. This mandatory interim injunction has effects similar to a final judgment and could significantly damage the respondent. Therefore, the claimant generally must prove a higher level of necessity to secure a mandatory interim injunction.

**13. In relation to interim attachment orders to preserve assets pending judgment or a final order (or equivalent):**

- **Are they available and on what grounds must they be brought?**
- **Can they be obtained without prior notice to the defendant and on the same day in urgent cases?**
- **Do the main proceedings have to be in the same jurisdiction?**
- **Does attachment create any preferential right or lien in favour of the claimant over the seized assets?**
- **Is the claimant liable for damages suffered as a result of the attachment?**
- **Does the claimant have to provide security?**

### Availability and grounds

Preliminary attachment (*kari sashiosae*) is available to secure the enforcement of a monetary judgment. This order prevents the respondent from disposing of its assets. The court grants preliminary attachment if it considers that the claimant has presented prima facie evidence of the claimant's rights to be secured and the necessity of the preliminary attachment.

### Prior notice/same-day

The court generally orders preliminary attachment without prior notice to the respondent. However, it can order notice and an opportunity to be heard at its discretion, if it considers it necessary and reasonable.

Technically, it is possible to obtain preliminary attachment on the same date as the application, but in practice, it is rare. A preliminary attachment order can be obtained within a week if the case is not complex and the claimant has submitted sufficient evidence in good time.

### Main proceedings

Preliminary attachment proceedings are separate from proceedings on the merits, and the petition for preliminary attachment can be filed in the appropriate division of the court which has jurisdiction over the main proceedings (which may be different from the division that has jurisdiction over the main proceedings) or with the court that has jurisdiction over the property to be attached.

### Preferential right or lien

Attachment creates a preferential right or lien in favour of the claimant over the attached assets. If and when a claimant obtains a winning judgment in the main proceedings, the claimant is entitled to payment from the attached assets before any third party who obtains a right to the attached assets after the attachment.

### Damages as a result

The claimant is liable for damages suffered as a result of the attachment. In practice, the court generally requires the claimant to provide security, to protect the respondent from these damages.

### Security

As stated above, the court generally requires the claimant to provide security. The court determines the amount of the security by taking into consideration all of the relevant factors, including the nature of the dispute and the value of the assets to be seized.

**14. Are any other interim remedies commonly available and obtained?**

When multiple claims are at issue in a single litigation, and part of them is not disputed by the parties or the parties have already exhausted their arguments on that part of the claims, the court can give judgment for that part before giving judgment for the rest of the claims (*Article 243, CCP*). The court can also, at its discretion, separate the oral proceedings (*Article 152, CCP*) relating to that part of the claims and give judgment for that part independently from the rest of the claims. Such judgment is given to mitigate the complexity of litigation with multiple legal issues, and to facilitate the litigation by focusing on the material issues.

## FINAL REMEDIES

**15. What remedies are available at the full trial stage? Are damages just compensatory or can they also be punitive?**

The types of remedies available in commercial disputes are:

- **Judgment (*kyufu hanketsu*).** This judgment orders a defendant to do or not do a certain act. This type of remedy includes payment of damages, specific performance, permanent injunction, eviction and restitution.
- **Declaratory judgment (*kakunin hanketsu*).** This judgment:
  - declares a certain right or legal relationship at issue between the parties; and
  - includes a judgment on whether one party has liability to the other.
- **Formative judgment (*keisei hanketsu*).** This judgment creates a new right or legal relationship between the parties. This type of remedy is available only if the law specifically allows it, and includes, for example, revocation of a shareholder's resolution.

Punitive damages are not allowed in Japan, and punitive damages awards from other jurisdictions are not enforceable.

## EVIDENCE

**16. What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?**

Document discovery in Japan is very limited, and broad and extensive document requests are not permitted. However, a party can file a petition to order the other party or a third party to produce a certain document(s) (*Article 221, CCP*). On filing of the petition, the party must specify (*Article 221, CCP*):

- The title of the document.
- A summary of the document.
- The holder of the document.
- The fact to be proved.
- Grounds for the document holder's duty to submit the document.

If the party cannot specify the title and give a summary of the document, other information that is sufficient for the document holder to identify the requested document must be provided.

If a request for specific documents is made and granted, each party must produce all of the requested documents in its possession unless the document falls within one of the non-disclosure exceptions (*Article 220, CCP*) (*see Question 17*). If the requested party fails to comply with the order, the court can draw an adverse inference and rule in favour of the requesting party in relation to the contents and meaning of the requested document (*Article 224, CCP*).

**17. Are any documents privileged? In particular:**

- **Would documents written by an in-house lawyer (local or foreign) be privileged in any circumstances?**
- **If privilege is not recognised, are there any other rules allowing a party not to disclose a document (for example, confidentiality)?**

### Privileged documents

Privileged or confidential documents that do not need to be produced include those that (*Article 220, CCP*):

- Would incriminate a party, a party's spouse or relative.
- Relate to a secret held by a government official within the scope of his official duty (state secret), and disclosure of which may harm the public interest.
- Contain information obtained by lawyers, doctors, or other professionals acting in a professional capacity under a duty of confidentiality.
- Relate to a technological or professional secret which is subject to a duty of confidentiality.
- Are for the sole use of the holder (however, documents in possession of a government solely for its organisational use must be produced). Documents are for the party's sole use if:
  - they are prepared for internal use only and not intended for disclosure and disclosure of the documents would cause the party in possession irreparable harm; or
  - relate to criminal or juvenile protection proceedings.

Documents written by lawyers or in-house lawyers qualified to practise in any jurisdiction do not need to be produced, unless the lawyers are released from their duty of confidentiality.

The concept of "without prejudice" communications is not recognised under Japanese law. However, given the very limited scope of discovery in Japan, documents relating to settlement negotiations are highly unlikely to be subject to a discovery order.

### Other non-disclosure situations

In addition to the confidential documents protected under the CCP (*see above, Privileged documents*), a party can withhold a document subject to a court's order of production if the party has a "reasonable cause" to do so (*Article 105, Patent Law*). Other laws related to IP, such as utility model, trade mark, design right, copyright and unfair competition, have a similar provision. The court can hold a review in private to determine whether a document is privileged, confidential or to be withheld for a reasonable cause.

**18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?**

Witnesses of fact normally submit written evidence first, and, depending on the importance of the fact to be proved and the necessity of oral examination, give oral evidence. Witnesses of fact can be cross-examined.

**19. In relation to third party experts:**

- **How are they appointed?**
- **Do they represent the interests of one party or provide independent advice to the court?**
- **Is there a right to cross-examine (or reply to) expert evidence?**
- **Who pays the experts' fees?**

### Appointment procedure

Third-party experts are, at a party's request, appointed by the court (*Article 213, CCP*). Each party can challenge the appointment of third-party experts if their fairness and neutrality are doubted. Party appointed experts are still rarely used.

### Role of experts

Third-party experts are expected to provide independent advice to the court, to supplement the court's decision-making ability. Their opinions include determination or evaluation of technical matters, such as identity of handwriting, technical standards in a certain field at a certain date, and assessment of real estate. Generally their opinions are given high credibility if properly documented.

### Right of reply

The court can have third-party experts submit their opinions orally or in writing. In case of oral submissions, each party as well as

the court has a right to cross-examine the experts after they make an oral statement. In relation to experts' written submissions, each party has a right to reply in writing.

### Fees

The experts' fees are part of the litigation costs, and are paid by one or both of the parties. The court apportions the fees, at its discretion, on a case-by-case basis. Generally, the court requires the unsuccessful party to bear the fees (*see Question 22*).

## APPEALS

**20. In relation to appeals of first instance judgments in large commercial disputes:**

- **To which courts can appeals be made?**
- **What are the grounds for appeal?**
- **What is the time limit for bringing an appeal?**

### Which courts

A judgment given by the District Court can be appealed to the High Court and then the Supreme Court.

The eight High Courts in Japan (Tokyo, Osaka, Nagoya, Fukuoka, Sapporo, Takamatsu, Sendai and Hiroshima) each deal with appeals from the District Court judgment within its territory. (For the IP High Court in Tokyo, see *Question 3*.)

An appeal must be submitted to the original District Court. If an appealing party does not describe the reasons for appeal in the notice of appeal, the party must submit a brief with this description within 50 days of filing the appeal.

In addition to hearing appeals from District Court judgments, the Tokyo High Court has special and exclusive jurisdiction over appeals from:

- Decisions by the Japan Fair Trade Commission (JFTC) (relating to anti-trust violations).
- Decisions by the High Marine Accident Inquiry Agency (relating to maritime disputes).

The High Court considers the facts subject to appeal and determines the applicable law based on the arguments and evidence presented both in the District Court and in the High Court. Fresh evidence can be presented to the High Court. In this respect, the High Court conducts an appeal as if the District Court's proceedings were re-opened and continued.

### Grounds for appeal

The grounds for appeal of a district court's judgment are broad: error of fact or law, or both. The court of appeal is a court of second instance, where, in effect, the trial from the lower court is continued.

The grounds for appeal to the Supreme Court are limited to the following:

- An alleged misinterpretation or any other contravention of the Constitution in the judgment.
- The composition of the court rendering the judgment.
- A judge, who was prohibited by law from doing so, participated in the judgment.
- A breach of the provisions relating to exclusive jurisdiction.
- There existed some defect in the authorisation of the legal representative or advocate.
- A breach of the provisions relating to a public hearing.
- The judgment did not give reasons for the decision, or the reasons given are inconsistent.

Even if none of the grounds for appeal to the Supreme Court exists, a party can file a petition for *certiorari* (that is, an order by a higher court directing a lower court, tribunal, or public authority to send the record in a given case for review) if the judgment contradicts the precedent of the Supreme Court or if the case involves an important matter relating to interpretation of laws or ordinances.

### Time limit

The party wanting to appeal generally has two weeks from receiving the judgment to file the appeal. If a party does not appeal within two weeks, the judgment becomes final and binding.

The period from filing an appeal to a judgment depends on the nature of the case, but normally is about half the time of district court proceedings. For example, according to the recent statistics provided by the Supreme Court of Japan, it took about six to seven months for the High Court, and nine to ten months for the IP High Court to complete the appellate court proceedings.

## CLASS ACTIONS

**21. Are there any mechanisms available for collective redress or class actions?**

There is no class action system as used in some common law countries. However, multiple claimants can file a claim jointly if they have common rights or obligations in issue or they have the same factual basis or causes of action (*Article 38, CCP*).

Also, multiple claimants or defendants can authorise a part of the claimants or defendants respectively to proceed with litigation and wait for the outcome without substantially participating in the litigation (*Article 30, CCP*). However, the scope of the parties bound by the outcome is limited to those who proceeded with the litigation and those who authorised them to do so (this is more limited than in the US).

In 2007, a consumer class action system was introduced allowing a consumer entity accredited by the Prime Minister to seek an injunction to prevent certain acts harmful to consumers without authorisation by individual consumers for the benefit of consumers in general. The acts harmful to consumers subject to consumer class action include:

- Making any untrue statement of a material fact.
- Making a definite statement in relation to matters that may vary in the future.
- Omitting to state a material fact necessary in order to determine whether to enter into a contract.

- Inserting a clause in a consumer contract releasing a business entity from liability for any damage under a contract.
- Making a false representation that a product or service is significantly better than it is.

This consumer class action can lead to an injunction but damages are not available as a remedy.

At the end of 2010, there were nine consumer entities accredited by the Prime Minister, and the District Court granted a consumer entity injunction for the first time in 2009.

## COSTS

**22. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs?**

Generally, the successful party's costs are not fully reimbursed by the unsuccessful party.

### Attorneys' fees

Each party must pay its own attorneys' fees, and the unsuccessful party is generally not liable to pay the successful party's attorneys' fees. However, if the successful party claims its attorneys' fees as part of its damages under contract, in tort or in a derivative suit, and the court orders the payment, the unsuccessful party must pay them. The court does not often order the payment of the attorneys' fees, and even when it does, the payment is normally limited to "reasonable" attorneys' fees, which usually covers only a part of the actual fees.

### Other litigation costs

The unsuccessful party is liable to pay other litigation costs, such as stamp (filing) fees, postage and witnesses' travel expenses (*Article 61, CCP*), unless the successful party delayed, or conducted unnecessary activities in, the proceedings (*Articles 62 and 63, CCP*). If each party partly loses, the court apportions the litigation costs between them at its discretion (*Article 64, CCP*). A judgment includes the percentage division of litigation costs between the parties but does not fix the amount of litigation costs. To fix the amount, a party must file another petition to have the court determine litigation costs. However, as the litigation costs are usually relatively small, a party rarely files this petition.

**23. Is interest awarded on costs? If yes, how is it calculated?**

If attorneys' fees and costs are awarded to the successful party, interest can be awarded on both. Unless otherwise agreed by the parties, the interest rate is 5% for civil and 6% for commercial cases, which is the same for damages awards generally.

## ENFORCEMENT OF A LOCAL JUDGMENT

**24. What are the procedures to enforce a local judgment in the local courts?**

A party can enforce a local court's judgment by submitting to the execution court or the marshal (*shikkokan*) both:

- An original of the judgment.
- A certificate of enforceability (*shikkobun*) that is issued by a court clerk of the judgment court (*Articles 25 and 26, Civil Execution Law*).

The marshal handles the enforcement of judgments. He is an official of the District Court but also receives commission from the petitioner.

Enforcement differs for a monetary judgment and non-monetary judgment. Enforcement of a monetary judgment includes:

- Filing a petition for attachment or seizure.
- Seizure and judicial auction of immovable property, semi-immovable property (such as a car), and movable property.
- Attachment and execution of an unsuccessful party's rights against a third party.
- Conversion of the assets into money.
- Distribution of the money.

Enforcement of a non-monetary judgment includes, for example, vacating immovable property to secure a creditor's possession, and delivery of movable property.

## CROSS-BORDER LITIGATION

**25. Do local courts respect the choice of governing law in a contract? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?**

The Law on General Rule concerning Applicable Law (LAL), which is similar to the Rome Convention on the law applicable to contractual obligations (*1980/934/EEC*), became effective on 1 January 2007.

Generally, the local courts respect the parties' choice of law, whether explicit or implied (*Article 7, LAL*). However, certain mandatory rules apply irrespective of the parties' choice of law, for example:

- If the contract is a consumer contract, the mandatory rules of the law of the place where a consumer resides apply on the consumer's request (*Article 11, LAL*).
- If the contract is a labour contract, the mandatory rules of the law of the place that has the closest connection with the labour contract apply on the employee's request (*Article 12, LAL*).

The foreign law is not applicable if its application contradicts the public policy of the forum (*Article 42, LAL*).

**26. Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?**

A choice of jurisdiction clause which excludes the local court's jurisdiction and confers exclusive jurisdiction on a foreign court is valid, except if either:

- According to Japanese law, only Japanese courts can deal with the dispute.

- According to the relevant foreign law, the foreign court cannot hear the dispute.

**27. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction party to any international agreements affecting this process?**

Japan is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention), as well as the Hague Convention on Civil Procedure. If a foreign party is also from a signatory state to both conventions, the Hague Service Convention applies and supersedes the Convention on Civil Procedure (*Article 22, Hague Service Convention*).

The document to be served under the Hague Service Convention is first sent to the Ministry of Foreign Affairs (MoFA). The MoFA reviews the document to determine whether the document satisfies all procedural requirements (for example, whether the request and the summary of the document to be served are appropriately filled in, and whether the complaint is translated). If the MoFA concludes that the requirements are met, it sends the document to the Supreme Court of Japan. The Supreme Court further reviews the document, and, if satisfied, sends the document to the District Court that has jurisdiction over the addressee. The District Court then serves the document on the addressee by a special type of mail service (*tokubetsu sotatsu*) (*see Question 9, Notice to the defendant and defence*). Once the document is delivered to the addressee, the District Court executes the certificate of service which is sent to MoFA through the Supreme Court.

**28. What is the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction? Is your jurisdiction party to an international convention on this issue?**

Evidence can be taken from a witness in Japan for use in foreign proceedings, provided it does not infringe Japan's sovereignty. Japan is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970, but is a signatory of the Hague Convention on Civil Procedure (*see Question 27*).

There are three methods of obtaining evidence from a witness in Japan for use in foreign proceedings:

- Request a Japanese court through the MoFA to obtain evidence under the Hague Convention on Civil Procedure, for example, through letters rogatory (that is, a formal request to a foreign court). This method can only be used if the foreign country is party to that Convention. Under the Convention, the District Court that has jurisdiction over a witness obtains evidence from the witness.
- Request a Japanese court to obtain evidence under a bilateral agreement or with approval from the Japanese government secured through diplomatic channels on a case-by-case basis. The District Court that has jurisdiction over a witness obtains evidence from the witness.
- Obtain evidence at the foreign country's consulate in Japan under a bilateral agreement. For example, under the US-Japan Consular Convention, a deposition can be taken from a willing witness for use by a court in the US, if the deposition is both:
  - presided over by a US consular officer under a court order or commission; and
  - conducted on the US consular premises.

**29. What are the procedures to enforce a foreign judgment in the local courts?**

A foreign judgment is recognised if it is final and satisfies all of the following requirements (*Article 118, CCP*):

- The foreign court had jurisdiction over the case based on Japanese law or a treaty to which Japan is a party.
- The process was duly served on the unsuccessful party, or the unsuccessful party voluntarily answered the complaint.
- The foreign judgment and the foreign court proceedings are not incompatible with public policy in Japan.
- The foreign country recognises a similar judgment rendered in Japan (reciprocity).

To enforce a foreign judgment in Japan, the successful party must obtain an enforcement judgment in the court in Japan which has jurisdiction over the unsuccessful party or its assets. The enforcement judgment is granted if the foreign judgment is final and satisfies the above four requirements (*Article 24, Civil Execution Law*).

One Tokyo District Court case established reciprocity between Japan and England and Wales (*31 Jan 1994, Hanrei Jihou 1509-101*). This judgment is not an established precedent, but the judgments of courts in England and Wales are likely to be enforceable, provided the three other requirements above are satisfied.

## ALTERNATIVE DISPUTE RESOLUTION

**30. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Is ADR used more in certain industries?**

### Main ADR methods

ADR methods in Japan include arbitration, mediation, conciliation and, broadly, negotiation. The ADR providers include courts, and administrative and civil organisations. The Law on the Promotion of the Use of Alternative Dispute Resolution (ADR Law) was enacted in 2004 and became effective on 1 April 2007. This law aims to ensure fair and efficient ADR mechanisms by limiting ADR providers to only those who are certified by the government.

Arbitration is the most frequently used ADR mechanism to resolve large commercial disputes. The new Arbitration Law, which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law) and which was passed to encourage arbitration, became effective in 2004. As a result,

arbitration has become more popular, particularly in relation to large international commercial disputes. However, in practice, arbitration is still uncommon.

Other methods of ADR are not frequently used to settle large commercial disputes in Japan. Court-annexed mediation, which is mandatory as a first instance for family disputes and certain rent disputes, is rarely used successfully for large commercial disputes. This is partly because court-annexed mediation is generally considered inappropriate for complex business transactions or IP disputes.

### Applicable procedures and rules

The key principles under the Japan Commercial Arbitration Association (JCAA) Commercial Arbitration Rules 2006 (CAR) applicable to large commercial disputes include the following:

- A petition to start arbitration proceedings must be submitted to the JCAA with the relevant application fees (*Article 14*).
- Unless otherwise agreed by the parties, the number of arbitrators is one (*Article 24*).
- The arbitral tribunal must give the parties sufficient opportunity to present their cases (*Article 32*).
- The arbitration proceedings and the records are confidential (*Article 40*).
- The arbitral tribunal can take interim measures at a party's request (*Article 48*).
- The arbitral tribunal must render an award within five weeks after closing of the hearing. It can extend the period to eight weeks if necessary, depending on the complexity of the case and other factors (*Article 53*).
- The arbitral award is final and binding (*Article 54*).

The new Arbitration Law sets out procedural rules, but if the parties specifically agree on other procedural rules (for example, JCAA's CAR or ICC arbitration rules), the selected rules override the Arbitration Law, and the Arbitration Law acts only to fill any gaps.

Japan is a signatory state to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). An arbitral award in Japan can, therefore, effectively be enforced in a foreign country that is also a signatory state, and a foreign arbitration award from another signatory state can be effectively enforced in Japan.

**31. Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?**

As ADR is based on the parties' agreement, it generally only applies if the parties agree to it. However, the law requires that certain disputes, such as family disputes and certain rent disputes, be first submitted to mediation before going to court. In addition, one of the judges in litigation often informally tries to mediate a settlement of the dispute at a later point in the proceedings, after the material issues are well understood.

**32. How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?**

There are no detailed or general provisions relating to the production or admissibility of evidence in ADR. The parties can agree on the methods of giving the evidence. In practice, these procedures are usually covered by the applicable ADR rules chosen by the parties, and supplemented by the Arbitration Law. If the arbitrators are Japanese, the proceedings tend to be similar to Japanese civil litigation proceedings.

The arbitral tribunal or a party (with the arbitral tribunal's consent) can request court assistance in collecting evidence, such as obtaining witness and expert testimony, document production orders and inspection (*Article 35, Arbitration Law*).

Although ADR is recognised as confidential, this does not mean that documents or admissions produced or made in ADR can be later protected from disclosure by privilege or confidentiality. Documents or admissions produced or made in court-annexed mediation are often submitted as evidence in the subsequent proceedings.

There are no specific provisions that provide generally for the confidentiality of ADR. However, the ADR Law requires a civil ADR provider to have regulations on how to deal with the confidential information of a party or a third party contained in materials submitted to the ADR provider (*Article 6, ADR Law*).

It is widely recognised that ADR should be confidential unless otherwise agreed by the parties. Most institutional ADR rules therefore provide for confidentiality. For example, the JCAA's CAR provide that the arbitral proceedings and their record must be confidential, and that the parties, their attorneys and arbitrators have a duty of confidentiality and cannot disclose facts related to the arbitration case or those learned through the arbitration case (*Article 40, CAR*).

**33. How are costs dealt with in ADR?**

Generally, each ADR provider has its own rule on costs and fees (*Article 6, ADR Law*) and allocation of costs and fees. The costs and fees can vary significantly depending on ADR providers, the claim amount and the complexity of the case, and the number of arbitrators or mediators involved.

One example of costs for ADR in Japan is the schedule of costs for JCAA arbitrations published both in English and in Japanese on its website (*www.jcaa.or.jp/e/arbitration-e/kisoku-e/kisoku-e.html*). The JCAA's costs include filing fees, administrative fees and arbitrators' remuneration.

**34. What are the main bodies that offer ADR services in your jurisdiction?**

A variety of institutions conduct arbitration, but the JCAA is the leading institution in Japan, followed by the ICC. They are relatively frequently used for large commercial disputes. Other arbitral institutions that handle international commercial disputes in Japan include the:

- International Centre for Dispute Resolution (ICDR).
- International Court of Arbitration (ICA).
- Tokyo Maritime Arbitration Commission (TOMAC).
- Japan Federation of Bar Associations.
- Individual bar associations.
- Japan Intellectual Property Arbitration Centre.

The bodies that provide mediation services include:

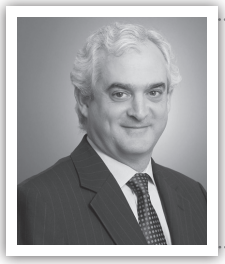
- Courts.
- Administrative organisations.
- Most of the bodies above that provide arbitration services.

## PROPOSALS FOR REFORM

**35. Are there any proposals for dispute resolution reform? Are they likely to come into force?**

In Japan, there are provisions on jurisdiction and venue over domestic litigation cases (*Articles 4 to 22, CCP*), but there are no clear provisions applicable to jurisdiction over international litigation cases. Court precedents have accumulated, concluding generally that a Japanese court has jurisdiction over international litigation cases if the Japanese court has such jurisdiction under the CPP (*any of Articles 4 to 22*), unless the exercise of jurisdiction is inconsistent with the fairness between the parties or an appropriate and speedy trial. The Ministry of Justice prepared a bill on jurisdiction over international litigation cases to provide higher predictability and clearer guidance as to which court has jurisdiction over international litigation cases. The bill was submitted to the National Diet of Japan in 2010, and is likely to come into force in 2011 or 2012.

## CONTRIBUTOR DETAILS



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