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COMPARATIVE
GUIDES 2021**

The Legal 500 Country Comparative Guides

Japan

LITIGATION

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This country-specific Q&A provides an overview of litigation laws and regulations applicable in Japan.

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JAPAN LITIGATION



1. What are the main methods of resolving commercial disputes?

The main method of resolving disputes in Japan is litigation. However, arbitration is also used as a method of resolving disputes, especially in international cases. The parties may prefer arbitration to litigation because of confidentiality and expedition. In the case where the place of arbitration is in Japan, the arbitration procedures are governed by the Arbitration Act, which is principally based on the UNCITRAL Model Law on International Commercial Arbitration. The parties are free to agree on the procedure to be followed by the arbitration tribunal as long as the procedure is not in violation of the provisions of the Arbitration Act relating to public policy (Article 26 (1)). Arbitration awards have the same effect as final and binding court judgments, and their enforceability is guaranteed under the Arbitration Act (Articles 45 and 46). Other methods of resolving disputes including mediations are also used.

2. What are the main procedural rules governing commercial litigation?

The Code of Civil Procedure (the "CCP") is the main law which provides for the procedural rules governing litigation in general. While there is no special set of procedures which applies only to commercial litigation, the Companies Act provides for certain types of corporate litigation, such as derivative suits (Article 847) and suits to invalidate acts concerning the organisation of a company (Article 828), and serves as the procedural rules for these cases.

3. What is the structure and organisation of local courts dealing with commercial claims? What is the final court of appeal?

There are three levels of courts in Japan: the district courts, the high courts, and the Supreme Court. The district courts are local courts that function as the court of first instance for lawsuits. District courts in large

prefectures such as Tokyo and Osaka have courts that specialise in certain types of disputes, such as corporate, intellectual property, administration, labour and bankruptcy. Decisions of the district courts may be appealed to the high courts. One branch of the Tokyo High Court specialises in intellectual property matters. Decisions of the high courts may be appealed to the Supreme Court, which is the final court of appeal.

4. How long does it typically take from commencing proceedings to get to trial?

According to the statistics publicised by the Supreme Court, as of 2018, it takes an average of 9.1 months for civil legal proceedings of first instance to get to "trial" (excluding suits against moneylenders for the return of overpayments, which constitute around 30% of the total claims in Japan and are often concluded within a shorter period of time). However, more significant or complex cases often take longer to reach the "trial" stage. One reason for this short period is that civil proceedings in Japan do not have a US-style "trial" (Japan does not have a jury system for civil cases) or discovery (see #14 below). In addition, as part of the procedure for intensive hearings, in practice, witness examinations are conducted in one or just a few hearings, often during the final phase of the legal proceedings. In addition, witness examination is not always required before a court can make its decision.

5. Are hearings held in public and are documents filed at court available to the public? Are there any exceptions?

In principle, court hearings must be held in public (with some exceptions including preparatory hearings which are not open to the public). In addition, anyone may view documents filed at court, and a person who can show interest in the case may get copies of those documents (CCP, Article 91(1)). However, the court, at the petition of a party to a case and if it finds grounds to grant the petition, may order limited public access to certain

portions of the case documents that include private information or business secrets (Id., Article 92).

6. What, if any, are the relevant limitation periods?

The limitation period for contractual claims is (i) 5 years from when the claimant comes to know that it is possible to exercise his right, or (ii) 10 years from when it becomes possible for the claimant to exercise his right, whichever is shorter (Civil Code, Article 166(1)). The Civil Code and the Commercial Code used to provide for shorter limitation periods for certain types of contractual claims, but they were abolished and the varying limitations periods were unified under the amendments to the Civil Code which took effect on April 1, 2020.

7. What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?

In principle, pre-action conduct is not required under the CCP. However, there are certain types of disputes for which the plaintiff is required to first file a petition for mediation (such cases include those related to increases or decreases in rent for land or building under the Act on Land and Building Leases). Although not a legal requirement, in practice, a notification by content-certified mail is often sent to the defendant before a complaint is filed in court, to give the defendant the opportunity to resolve the dispute out of court.

8. How are commercial proceedings commenced? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?

Proceedings are commenced when a complaint is served onto the defendant. The service of the complaint is made by an authority of the court, and administrative affairs related to the service are handled by the court clerk (CCP, Article 98). When service has to be effected in a foreign country, it will be commissioned by the presiding judge to the competent government agency of that country or the Japanese ambassador, minister, or consul stationed in that country (Id., Article 108).

9. How does the court determine whether it has jurisdiction over a claim?

The basic rule is that the claim is subject to the

jurisdiction of the court that has jurisdiction over where the defendant is located, which in principle is determined by the domicile of the defendant, in the case of a natural person, and by the location of the principal office or business office if the defendant is a corporation (Id., Article 4). But there are additional jurisdictions for certain types of claims. For example, tort claims may be filed with the court that has jurisdiction over the place where the tort occurred (Id., Article 5(ix) and (xii)). If the claim is subject to several jurisdictions, the plaintiff may choose where to file the claim. However, the court may transfer the litigation to another court of competent jurisdiction if it finds it necessary to avoid any substantial delay in litigation or to ensure fairness for the parties (Id., Article 17). Parties entering into a contract may agree upon the court of first instance which has jurisdiction to settle disputes related to that contract (Id., Article 11(1)). Regarding international jurisdiction, the Japanese court basically has jurisdiction over claims that are brought against persons domiciled or having residence in Japan (Id., Article 3-2(1)). There are also additional claims where the Japanese court has jurisdiction over them, such as actions for the performance of contractual obligations if the contractually specified place for the performance is within Japan, or if the contractually agreed governing law provides a place within Japan as the place for the performance (Id., Article 3-3(i)).

10. How does the court determine what law will apply to the claims?

Basically, the formation and effect of a juridical act are governed by the law of the jurisdiction chosen by the parties at the time of the act (Act on General Rules for Application of Laws, Article 7). In the absence of this, in principle, they are governed by the law of the place with which the act is most closely associated at the time of the act (Id., Article 8(1)). Tort claims, however, are governed by the law of the place where the result of the wrongful act occurred; however, if the occurrence of the result at that place was ordinarily unforeseeable, then the law of the place where the wrongful act was committed will govern (Id., Article 17).

11. In what circumstances, if any, can claims be disposed of without a full trial?

As described in above, there are no US-style jury trials for civil proceedings in Japan, although witness examinations are conducted as part of the procedure for intensive hearings. However, it is not rare for the court to decide on the case without conducting witness examinations. Claims are also often settled in court, and

the court may induce the parties to settle anytime during the legal proceedings. Settlement can be reached out of court as well. In this case, the settlement agreement often includes a clause which obliges the plaintiff to withdraw the litigation, and the claim is then disposed by the plaintiff's withdrawal.

12. What, if any, are the main types of interim remedies available?

There are three types of interim remedies: provisional seizure, provisional disposition with regard to a disputed subject matter, and provisional disposition that determines a provisional status. Provisional seizure is the interim remedy that allows the obligor to temporarily seize assets of the obligee in order to secure the enforcement of a monetary judgement. Provisional disposition with regard to a disputed subject matter is the interim remedy to prohibit the transfer of the possession or change in the registration of real property. Provisional disposition that determines a provisional status is the interim remedy to temporarily determine the "legal status" or the legal right of the plaintiff (for example, in the case of an employment termination dispute, the legal status of the claimant to receive salary).

13. After a claim has been commenced, what written documents must (or can) the parties submit and what is the usual timetable?

After a claim has been commenced, the defendant submits a written answer, together with relevant documentary evidence. After the submission of the answer, usually both parties submit, in turn, written briefs and documentary evidence to support their arguments. After the court finds that both parties have submitted their claims adequately and the issues in the dispute have been adequately sorted out, then normally the examination of witnesses and the parties follows. Before any such examination, the party applying for such an examination must submit written statements of the persons to be examined. After the examination of witness and parties, the parties usually submit their final briefs. Overall, the timetable differs depending on the complexity and nature of the case. However, generally speaking, one hearing date is scheduled every one or two months, and the court instructs the parties to submit their briefs one week before each hearing date.

14. What, if any, are the rules for

disclosure of documents? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?

An extensive discovery process equivalent to that of the USA does not exist in Japan. Although the court may order the holder of a document to submit that document based on a petition of a party pursuant to Article 219 of the CCP, the petitioner must specify the document in the petition and persuade the court that the disclosure of the document is necessary to the case. Therefore, the scope of disclosure is limited compared to the so-called "discovery" process. The legal concept of attorney-client privilege does not exist in Japan. However, Article 220(4)(c) of the CCP stipulates that the holder of documents may refuse to submit the documents if the documents contain facts which professionals, such as lawyers and doctors, have learnt in the course of their duties and which should be kept secret.

15. How is witness evidence dealt with in commercial litigation (and, in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?

As stated in #13, witnesses and the parties may be examined, although there is no deposition in Japan. The party asking for the examination of a witness or itself usually submits the written statements of the witnesses or itself before the examination is conducted. Cross-examination is conducted after the direct examination. Questions that may be asked during the cross-examination is limited to matters mentioned in the direct examination and matters related to those matters, and matters concerning the credibility of the testimony. Questions which have been covered by the previous questions, are unrelated to the issues, seek an opinion, or seek statements of facts which the witness has no direct personal knowledge or experience are prohibited unless there are justifiable grounds. Questions which insult or confuse the witness are also prohibited. Leading questions are allowed in cross-examinations.

16. Is expert evidence permitted and how is it dealt with? Is the expert appointed by the court or the parties and what duties do they owe?

Expert evidence is allowed, and the expert may be appointed either by the court or the parties. The court may appoint an expert witness based on the petition of a

party. An expert witness may give its opinion in writing or orally. Expert witnesses appointed by the court are obliged to swear under oath and give expert testimony. The parties themselves may also retain expert witnesses and submit the report of such expert witness as evidence. Expert witnesses retained by the parties are often subject to witness examinations.

17. Can final and interim decisions be appealed? If so, to which court(s) and within what timescale?

The judgement of a court of first instance can be appealed to the high court. The appeal to the high court must be made no later than 14 days after the day on which the service of judgment is received by the appellant.

In the case where a court issues an order for interim remedies, the obligor may file an objection with the court on the ground that the court erred in determining that the requirements for interim remedies were met at the time of issuance of the order. The said court may uphold, modify, or revoke the order. Basically, no time limitation is placed on the filing of an objection. The court's decision on the objection may be appealed to the high court. The appeal must be filed no later than 14 days after the day on which such decision is served, and this period cannot be extended. It should be noted that the filing of an objection will not stop the execution of the interim remedies; therefore, it is important to also file a petition to stay the execution of the interim remedies. The obligor may also ask for the revocation of the interim remedies if (i) the obligee fails to file an action on the merits within a certain time period, (ii) a change of circumstances occurs, or (iii) the interim remedies will cause damages which cannot be compensated, or (iv) other special circumstances exist. The court's decision on a petition to revoke an interim remedy may be appealed to the high court. The appeal must be filed no later than 14 days after the day on which such judgement is served, and this period cannot be extended. If the petition for interim remedies is rejected by the court, the obligee may immediately appeal the decision. The appeal must be filed no later than 14 days after the day on which such the obligee is notified of the decision, and this period cannot be extended.

18. What are the rules governing enforcement of foreign judgments?

Foreign judgements can be enforced when all the following requirements are met (CCP, Article 118): (i)

The jurisdiction of the foreign court is recognized under the Japanese laws or regulations or conventions or treaties; (ii) The losing defendant has been properly served with the necessary summons or order to commence the litigation, except service by publication or any similar service, or appeared in court without being so served; (iii) The contents of the judgment and the court proceedings are not contrary to public policy in Japan; and (iv) There is reciprocity between Japan and the country of the foreign court in relation to the enforcement of foreign judgments. Note that the Supreme Court has ruled in the past that the portion of the foreign judgment which ordered the payment of punitive damages under the laws of California cannot be enforced because claims for punitive damages are not allowed in Japan and permitting such enforcement is contrary to public policy in Japan.

19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side?

Under Article 61 of the CCP, court costs are borne by the losing party. When an expert witness is appointed by the court, the cost of such expert witness is considered court costs. On the other hand, the lawyers' fees are not included in court cost and are, therefore, only recoverable from the losing party in limited circumstances such as in tort cases. Accordingly, each party usually bears the cost of its lawyers in commercial litigations.

20. What, if any, are the collective redress (e.g. class action) mechanisms?

Generally, a class action system does not exist in Japan. However, the "Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers", which is often referred to as Japan's version of class action, was passed in 2013 and came into force in 2016. Under that law, a "Specified Qualified Consumer Organization" files a lawsuit asking for the confirmation of common obligations, which are obligations of companies to pay money to consumers based on factual and legal causes common to a group of consumers. If the court confirms the common obligations, then consumers can essentially "join" the procedure by delegating authority to the Specified Qualified Consumer Organization to file proof of their claims in court. That law only applies to certain types of contracts between a consumer and a company, and the types of damages that can be recovered are

limited.

21. What, if any, are the mechanisms for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings?

In general, parties who have certain interests in the outcome of a suit may join the ongoing proceeding to assist one party or as an independent party (CCP, Articles 42 and 47). The Companies Act permits a company to join derivative lawsuits to assist its directors, under certain conditions (e.g., approval of all auditors in the case of a company with auditor). The parties may ask the court to consolidate the two set of proceedings; however, any decision to allow or reject the consolidation is at the court's sole discretion.

22. Are third parties allowed to fund litigation? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

There are no rules for funding litigations. Parties can fund litigations and a third party funder is not liable for the costs incurred by the other side. Third party funding is not widely used in Japan. Although theoretically there are no limitations on third party funding, depending on the scheme of the funding, it may be contrary to the Attorney Act. For example, it should be noted that it is illegal for a person who is not a licensed lawyer or a legal professional corporation to intermedate between a client and a lawyer in relation to any lawsuit in exchange for compensation (Attorney Act, Articles 72 and 77(3)).

23. What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction (and in particular, have the courts adopted remote hearings and have there been any procedural delays)?

During the first state of emergency in April and May 2020, courts throughout Japan cancelled many hearings, causing severe delays to the affected proceedings. After the state of emergency ended, courts resumed the proceedings by utilizing teleconference and video conference systems to the extent possible. As stated in #26 below, a pilot run of "e-court" (remote hearings via a video conference system) started in February 2020 in major district courts. Although "e-court" was already planned prior to the COVID-19 pandemic, its use was

accelerated due to the pandemic which coincided with the pilot run.

24. What, in your opinion, is the main advantage and the main disadvantage of litigating international commercial disputes?

One advantage of litigating international commercial disputes in Japan is the relatively low court filing fees. For example, if the amount being claimed is JPY 100 million, the filing fee is only JPY 320,000, and if the amount being claimed is JPY 1 billion, the filing fee is only JPY 3,020,000. Another advantage is that, in general, throughout Japan, the quality of judges is relatively high and judges are free from corruption. This is due to the rotation system in which judges are transferred to different courts on a three- to four-year basis. On the other hand, one disadvantage is that foreign documents must be translated into Japanese for submission in court, which costs both time and money. Also, it takes a relatively long time to effect service in a foreign country because of the procedure described in #8. Also, as described in #14, the limited form of document disclosure is an aspect that should be considered before commencing litigation in Japan. This can be either an advantage or a disadvantage, depending on the type of material evidence in question.

25. What, in your opinion, is the most likely growth area for disputes for the next five years?

In April 2021, the Japanese government declared a third state of emergency. The economy and businesses still continue to face a great deal of uncertainty caused by the spread of COVID-19 and it is still unclear when Japan would be able to overcome the COVID-19 crisis. Therefore, disputes associated with the COVID-19 crisis are likely to continue to increase, although it is difficult to predict the future with certainty. While some companies such as tech companies are doing better than before, a large number of companies continue to face financial difficulties, are restructuring their business, and are terminating workers. It is still not clear at this stage how long this crisis will continue as is the case worldwide and we expect to see a rise in disputes relating to the COVID-19 pandemic in the near future, particularly on issues relating to labour law (e.g. wrongful termination); breach of contractual obligations (e.g. issue of force majeure); and bankruptcy, civil rehabilitation, and corporate rehabilitation. In addition, as the the Japanese government is forced to take more restrictive measures, such as having local governments

order restaurants and bars to restrict operations to contain the COVID-19 infection, actions challenging the legality of such administrative measures could be brought as well.

26. What, in your opinion, will be the impact of technology on commercial litigation in the next five years?

The Supreme Court is currently considering implementing an IT system for court procedures which consist of three aspects: (i) e-filing (submitting documents via internet), (ii) e-case management (accessing court documents and organizing court schedules via internet), and (iii) e-court (holding court hearing by video conference). A pilot run of "e-court" started in February 2020, and some court hearings in major district courts are currently held by video conferencing. As of April 2021, "e-court" cannot be held for certain types of hearings due to regulations under the current CCP, and "e-filing" and "e-case management" are still in the initial discussion phase. A bill to amend the CCP is expected to be submitted to the National Diet in 2022. The Supreme Court is currently aiming to fully implement the IT system in or after 2023 under the amended CCP and relevant regulations.

27. What, if any, will be the long-term impact of the COVID-19 pandemic on commercial litigation in your jurisdiction?

As stated in #23, the COVID-19 pandemic has been causing severe delays in a number of proceedings resulting in a significant delay in the resolution of disputes. Especially, travel restrictions and social distancing measures imposed by governments around the world are proving to be major obstacles when witnesses in other countries are called to be examined. If this trend continues, it could encourage companies to avoid using the court system to resolve disputes and instead choose to settle disputes through discussions or turn to alternative forms of dispute resolution such as mediation and arbitration which have more procedural flexibility, particularly when it comes to disputes which have an international aspect.

As for the procedural aspect, as stated in #23, major district courts are now actively utilizing "e-court" (remote hearings via video conference system) to hold hearings in order to minimize the risk of infection, and lawyers and judges are getting used to utilizing "e-court" to proceed with litigation. In addition, courts are now utilizing procedures which do not require the appearance of parties such as preparatory proceedings based on documents, which were rarely used prior to the COVID-19 crisis.

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