

Dispute Resolution Around the World



Japan

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1. Legal System

Japan is a civil law jurisdiction. The supreme law of Japan is the Japanese Constitution (“*Kempo*”), which came into force on May 3, 1947. Apart from the Constitution, the cornerstones of Japanese legislation are the Civil Code, the Code of Civil Procedure (CCP), the Criminal Code, the Code of Criminal Procedure and the Commercial Code. In addition to the six major Codes, there are individual laws which cover limited areas. Ministry circulars and local regulations are also regarded as sources of law. Case law also represents a significant part of Japanese law. In particular, Supreme Court judgments are regarded as one of the main sources of law in Japan. Since Japan’s Court system is inquisitorial rather than adversarial, judges play a major role in Japan’s judicial system. It should also be noted that in the past, administrative guidances (“*Gyosei Shido*”) also played a significant role.

2. The Courts

Japan has a three-tiered Court system. In ordinary civil and criminal cases the case is first heard by the District Court. The party may appeal against a judgment of the District Court to the Appellate Court. If the party is not satisfied with the judgment of the Appellate Court, it may appeal to the Supreme Court. Two levels of appeal are allowed against an original judgment.

District Courts

District Courts are the primary Court of first instance. District Courts have original jurisdiction over ordinary civil and criminal cases. The District Court also hears appeals against the decisions and judgments of the Summary Courts (see below) in civil cases. A single judge usually presides over cases brought before the District Court. In some significant cases, a bench of three judges must hear the case. Large District Courts such as Tokyo and Osaka have specialised divisions. For instance, the District Court of Tokyo has divisions specialising in

administrative, traffic, intellectual property, bankruptcy and labour cases.

Appellate Courts

Appellate Courts primarily handle appeals against judgments of the District Court and Family Court. Appellate Courts are located in eight major cities.

In addition, the Appellate Court is empowered to review the decisions of quasi-judicial bodies, such as the Fair Trade Commission, the Patent Office and the High Maritime Board.

The Supreme Court

The Supreme Court is the highest court in Japan. It is located in Tokyo and comprises fifteen justices, including the Chief Justice. The Supreme Court sits either in Full Bench with all fifteen justices, or Petit Bench with five justices. Each case is first assigned to the Petit Bench. However, the case must be transferred to the Full Bench where: (1) an appellant claims that a law, order, regulation or administrative decision is unconstitutional; (2) the Supreme Court considers a law, order, regulation or administrative decision to be contrary to the Constitution; and (3) the Supreme Court decides to deviate from one of its own precedents.

The Supreme Court is responsible for the consistent interpretation and application of law in Japan. It does not review factual findings made at a lower court. Therefore, a party appealing to the Supreme Court is required to indicate that the lower court's judgment is against the law or a Supreme Court judgment, or that the lower court has issued a ruling without reasoning or the reasoning is self-contradictory. As a court of appeal, it reviews mainly Appellate Court judgments. In exceptional cases, a judgment of the District Court can be appealed directly to the Supreme Court. For example, in civil cases both parties may agree to bypass the Appellate Court and appeal to the Supreme Court directly from the District Court.



Family Courts

The Family Court is a court specialising in family affairs and juvenile delinquency. Family Courts and their branches are located in the same places as District Courts.

Summary Courts

Summary Courts have jurisdiction over minor criminal and civil cases. In civil cases, Summary Courts handle cases involving claims not exceeding 900,000 yen. The procedure adopted by the Summary Court is identical to that of the District Court.

Language of the Courts

Court proceedings are conducted in Japanese. Translators are provided for witnesses who do not speak Japanese. All non-Japanese documents submitted to the court must be submitted with a Japanese translation.

However, if a party producing evidence in a foreign language would like to present only part of a document as evidence at the court, only that part must be translated.

3. Legal Profession

The “*hoso*”

Members of the Japanese legal profession are referred to as the “*hoso*”. Japanese judges are “career judges” who join the Court immediately after completing legal training. Public prosecutors are also recruited directly from the Legal Training and Research Institute.

Members of the “*hoso*” are required to pass the same National Bar examination and must undergo training in the Legal Research and Training Institute for a year. Regardless of their future profession, members of the “*hoso*” receive the same training at the Institute. However, upon completing training at the Legal Training and Research Institute, individuals may choose to become a judge, public prosecutor, or attorney.

Judges

The Cabinet appoints judges of the Appellate Courts, District Courts, Family Courts and Summary Courts from a list prepared by the Supreme Court. The Supreme Court assigns judges to specific Courts. Appellate Court judges are promoted from among District Court and Family Court judges.

Public Prosecutors

Anyone who has passed the uniform state examination and finishes his or her training at the Legal Training and Research Institute can be appointed as a public prosecutor. Judges and assistant judges, as well as law professors and associate professors, are qualified to become public prosecutors under certain conditions.

Attorneys

The present Law on Attorneys was enacted in 1949. Attorneys are registered with local bars that collectively form the Japan Federation of Bar Associations (“*Nichibenren*”).

The Japan Federation of Bar Associations has an ethical code modelled on the American Bar Association Canons of Professional Ethics. The Bar is given the power to admit its own members, and bring disciplinary actions against them. Disciplinary action can be taken against members who have violated the rules of the local Bar or the Japan Federation of Bar Associations, or have discredited or disrupted the order of the Bar.

Other Professionals

In addition to general practitioners, there are various other legal professionals who perform functions related to legal issues. Tax attorneys, patent attorneys, judicial scriveners as well as in-house legal counsel perform functions which, in some other common law countries, are normally performed by attorneys.



Foreign Attorneys

Foreign attorneys who are allowed to practice in Japan are called “foreign law solicitors” (“*gaikoku-ho jimubengoshi*”). In order to qualify as a foreign law solicitor, foreign attorneys must apply to the Ministry of Justice for a license. There are various requirements, including a sound financial basis on which they can conduct business properly and reliably; an adequate coverage for professional risks, and good legal or professional standing in the jurisdiction of primary qualification. The scope of practice of foreign law solicitors is generally limited to the law of their own country (the jurisdiction of their primary qualification) and does not extend to Japanese law.

4. Procedure for Claims

Commencement of Proceedings

A plaintiff initiates a claim by submitting a written complaint or petition to the District or Summary Court, depending on the value of the alleged claim. The court fee is paid at the time this document is submitted.

The fee is based on the value of the claim. The Court then reviews the claim and sends a copy of the claim to the named defendant, together with a notice to appear in Court by a certain date. If the defendant does not appear for the first hearing the Court will not necessarily enter a default judgment, but may do so in the case of minor disputes such as an application for a small claims order.

Discovery Procedures

Japan has introduced some discovery measures. First, there is an interrogatory-like discovery device called Inquiries Between Parties (*Toujisha Shoukai*), which entitles a litigating party to furnish the opposing party with questionnaires concerning relevant factual issues. Such interrogatory is also available prior to filing of civil action under certain conditions. However, this measure is a voluntary procedure which does not force each party to respond the other party’s inquiries.

Second, a litigating party may seek an order of the court for production of documentary evidence held by the opposing or third party, called Document Production Order (“*Bunsho Teishutsu Meirei*”). However, a party seeking this order is required to specify the document for production, and internal documents prepared for the other party may not be produced. With such restrictions, this production method is not so extensive as U.S. discovery. Finally, while Japan does not allow a deposition outside the courtroom, a litigating party may request the judge to summon witnesses from the opposing or third party, in addition to offering its own witnesses, for testimony in the court.

In the event that an unsuccessful party in an arbitration appeals to the Court to set aside the arbitration award on the grounds stipulated in the local arbitration law, such as material procedural errors or fraud (perjury, etc), everything contained in the arbitration case file may be produced before the judges.

Costs

Upon the conclusion of the proceedings the Court costs will be borne by the unsuccessful party. However, lawyer’s fees are not recoverable except in certain limited cases (e.g. traffic accident cases).

Time Frame

Commercial litigation in Japan usually takes six to twelve months to complete in the first instance at the District Court level. Cases involving complex issues or many parties may take longer, such as eighteen months or more.

Time Limitations

The general rule regarding time limitations is set out in Japan’s Civil Code. The Civil Code provides that certain rights will expire if not pursued within ten years from the date that the right arose. The right becomes void after ten years have passed from the date that the right first arose. The time period is calculated from the date that the right



holder demands performance or from when the provisional disposition is made, or from the date when the party owing the right acknowledges its obligation. A plaintiff must make a claim within this prescribed period. However, special provisions can apply in particular cases.

For example, a claim in tort must be brought within three years of the date that both the damage and the defendant was identified. However, the period cannot exceed twenty years from the date of the incident.

5. Remedies

Remedies for Breach of Contract

In the case of breach of contract the Civil Code provides for the following three types of remedies where an obligor fails to perform an obligation: (1) right to demand performance; (2) recovery of damages; or (3) rescission of the contract. The primary remedy is performance of the obligation (as well as an injunction to compel the performance of an obligation not to do something). However, recovery of damages is the most common remedy.

Right to Performance under Contract (“*riko seikyu ken*”)

In order to have performance of an obligation enforced, an obligee need only prove the fact of non-performance on the due date of performance. In principle, upon the obligor’s default the principal remedy is that of right of performance, while damages are regarded as a secondary remedy. However, seeking performance does not deprive the obligee of its right to seek damages simultaneously.

Right to Damages (“*son gaibaisho seikyu ken*”)

The second type of remedy available under Japan’s Civil Code system is the recovery of damages. In the event of an obligor’s non-performance, the obligee may obtain damages either as a substitute for the right of performance (e.g. cases of impossibility of performance) or in conjunction with an order for specific enforcement (e.g. cases of

delay in performance). Moreover, the damages remedy is also available when a contract is rescinded due to the obligor's default. The scope of liability of damages is subject to adequate causation.

Right to Rescission (“*kaijo ken*”)

The third type of remedy available to the obligee in the event of non-performance of a contract is rescission. When a contract is rescinded both parties are discharged of their contractual duties and the rescinded contract is deemed not to have existed from the beginning. Consequently, upon rescission a party who has received something from the other party loses the right to retain it. Having lost the right to retain the object of the dispute, the party who received the money or other property under the agreement, must return it to the other party to the contract. Essentially, this remedy is based on the doctrine of unjust enrichment (“*futoritoku*”).

Remedies Designated by Contract

The Japanese Civil Code classifies all statutory provisions into required rules and optional rules. Required rules are mandatory provisions from which the parties to the contract may not deviate. Optional rules are subject to modification by the parties. Matters concerning indemnification and warranties are optional, as long as a party does not act in bad faith. Thus, the parties are free to determine the scope of indemnification in their agreement. Whether or not the Court will enforce such indemnification clauses will depend on the Court's assessment of the reasonableness of the clause.

Tort Remedies

The Civil Code provides that the remedy for a tort is compensation for the loss. However, case precedents provide that in certain special circumstances, such as public nuisance and ongoing violation of privacy or human rights, other remedies such as an injunction may be granted.



Interim Remedies

A plaintiff may apply for the following types of interim remedies (orders):

- (a) provisional attachment (“*Kari Sashiosae*”) to freeze a defendant’s assets in order to secure a monetary claim;
- (b) provisional disposition (“*Kari Shobun*”) to preserve property which is the object of the claim; and
- (c) provisional disposition (“*Chii-Hozen No Kari Shobun*”) to temporarily establish an “interim relationship” e.g. interim declarations of legal rights, coupled with orders to preserve those rights pending trial and rendering an injunction order.

Whether or not the Court will award a particular interim remedy will depend on whether the plaintiff can demonstrate an underlying claim, and an imminent risk that any eventual judgment would be rendered valueless without provisional protection. An applicant will be required to make a substantial security deposit to the Court to obtain such interim orders.

6. Appeals

Appeals may be made on questions of law to the appropriate Court. An appeal may be made at any time prior to the expiry of the applicable appeals limitation period.

The Appeal Courts will review the case, including all the evidence submitted to the Court below. However, they tend not to call for witnesses who have already testified in the earlier trial, unless the appeal Court is especially doubtful of their previous testimony.

The availability and procedure for an appeal will depend on the level of the Court to which the appeal is made. In general, the losing party in the first instance may appeal to a higher Court with appropriate jurisdiction over the case. The appeal is taken in writing. The

document must be affixed with the appropriate fee stamps and filed with the Court of first instance within two weeks of the day of service of the judgment on the appellant.

In general, the availability of an appeal to the Supreme Court is limited to avoid burdening the Supreme Court with an excessive caseload. The Supreme Court accepts appeals at its own discretion. In criminal cases the only grounds for appeal to the Supreme Court are errors in the interpretation of the Constitution, breaches of the Constitution and deviation from precedents. In civil cases the grounds for appeal are errors in the interpretation of the Constitution and other breaches of the Constitution, provided however that the Supreme Court may accept certain appeals where there has been a deviation from precedents and where important issues concerning the interpretation of law arise

7. International Jurisdiction

Amendments to the Japanese Code of Civil Procedure regarding international jurisdiction of the courts of Japan were recently enacted to allow the Japanese courts to sustain jurisdiction to adjudicate in a wider scope of cases to the extent that such wider jurisdiction will not harm the interests of consumers and workers. The reform will become effective within a year from the promulgation on May 2, 2011.

More specifically, the following actions may be subject to the jurisdiction of Japanese courts under the new legislation:

- (a) Actions on property rights may be subject to the jurisdiction of Japanese courts if the property at issue is located in Japan.
- (b) Japanese courts may adjudicate actions claiming for monetary payment if the defendant's assets which may be subject to seizure are located in Japan.
- (c) Actions raised against enterprises with offices located in Japan or conducting business in Japan may be subject to the



jurisdiction of Japanese courts if such actions are related to the business conducted by such enterprises in Japan.

- (d) Contractual claims may be subject to the jurisdiction of Japanese courts if, for example, the parties to the dispute had designated Japan as the place of performance in the agreement.
- (e) Tort actions, including product liability actions, may be subject to the jurisdiction of Japanese courts if the place where the tort was committed or where the damage incurred was in Japan. However, if the damage resulting from a tort action outside of Japan is of a nature that was not foreseeable under normal circumstances, such a tort action may not be subject to the jurisdiction of the Japanese courts. For example, a product liability action for damages caused in Japan by a defect in a product manufactured by a company located outside of Japan may not be subject to the jurisdiction of Japanese courts if the product at issue was not widely distributed in Japan or the manufacturer was not actively engaged in marketing the product at issue in Japan.

Special Provisions on Consumer Contracts and Employment

The new legislation on international adjudicatory jurisdiction includes special provisions to protect consumers and employees in disputes related to consumer contracts and employment issues. Japanese courts have jurisdiction over claims raised by consumers who are domiciled in Japan concerning disputes arising out of consumer contracts.

Claims raised by employees against employers in labor disputes may be subject to the jurisdiction of the Japanese courts if, for instance, the employee had provided labor service in Japan. A secondeed who was secondeed to a Japanese subsidiary by a company located outside of Japan may file a labor law suit not only in the country of origin, but also in Japan.

Agreement on Jurisdiction

An agreement on jurisdiction is deemed to be effective if that agreement is (i) related to a claim based on a certain legal relationship; and (ii) made in writing, or in electromagnetic form. However, agreements on jurisdiction for disputes related to consumer contracts and labor are subject to more stringent requirements.

8. Enforcement of Judgments

The Law of Civil Execution provides several methods to enforce judgments. The methods of enforcement will differ according to whether the subject of performance is tangible property, and whether the subject is a monetary claim or not.

Attachment of Property

In the case of tangible property, the Court bailiff may take possession of movable objects. The Court may declare that immovable property be attached. In addition, claims against third parties can be attached. The asset may then be sold or transferred to the creditor.

Compulsory Administration

This method of enforcement is appropriate when enforcement of payment of money is sought. For this method of enforcement, the Court appoints an administrator to manage the property of the defendant and distributes any profits derived from that property to the creditor.

Substitute Performance

By this method of enforcement, the Court orders a third party to do something at the cost of the defendant. This method is available for the enforcement of performance where the subject of performance is a non-monetary claim.



Indirect Enforcement

There are also methods of indirect enforcement. In such cases, the Court may order a party to refrain from some action to do something (i.e. orders an injunction), and may impose fines until the defendant complies. This method is available for the enforcement of non-monetary claims.

Generally, the enforcement of performance is not available where performance has become impossible or where, in cases of improper performance, repairs or replacements cannot be made.

9. Recognition and Enforcement of Foreign Judgments

In order to enforce a foreign judgment in Japan, the plaintiff must seek a judgment for execution in a Japanese District Court. The requirements for the execution of a foreign judgment in Japan are set out in the CCP. Pursuant to Article 118 of the CCP, a foreign judgment will be considered valid in Japan if the following conditions are met:

- (a) the jurisdiction of the foreign Court is sustainable under international civil jurisdiction rules of Japanese law, ordinance or a treaty;
- (b) the defeated defendant has been properly served with a summons, or has appeared and presented the merits of the case;
- (c) the contents of the judgment, and the procedure in which the judgment is rendered, are not contrary to the “public order” or “good morals” of Japan; and
- (d) there is a reciprocal “guarantee”.

With regard to item (b), “service” refers to the service of process in accordance with the CCP. With regard to item (c), the Supreme Court of Japan has held that an order for punitive damages made by a foreign court is contrary to the public order of Japan. It should also be borne in mind that in relation to item (d), where there is no reciprocity agreement between the two countries with regard to the enforcement of judgments, the question of whether or not there is a “reciprocal guarantee” will be decided according to Japanese case law. The issue of “reciprocal guarantee” was discussed by the Kobe District Court (Judgment dated September 22, 1993) in a case regarding the enforcement of a Hong Kong judgment in Japan. In that case the Court held that since Hong Kong judgments were based on common law principles similar to the basic principles upon which Japanese

Court cases were decided, there existed a “reciprocal guarantee”. The Supreme Court of Japan subsequently upheld the decision of the Kobe District Court on April 28, 1998.

10. Arbitration Law

Arbitration Procedures

In general, arbitration is not a popular method of dispute resolution in Japan except for marine and construction-related disputes. However, arbitration is recognized as a method of dispute resolution under the CCP. Under the CCP an arbitration agreement may be concluded, with or without a present dispute, as to matters that are left to the parties’ disposal to resolve.

In international cases, the Japan Commercial Arbitration Association (“JCAA”) and International Chamber of Commerce (“ICC”) are the relevant arbitral associations in Japan. The JCAA has traditionally handled more arbitral cases than the ICC. The JCAA has a list of arbitrators to be recommended if both parties cannot reach an agreement to appoint the arbitrator.



Role of the Arbitrator

An arbitrator's role is to conduct a hearing to question the parties prior to making its award, and also to have other hearings, to the extent the arbitrator deems necessary, to investigate and resolve the dispute. An arbitrator can examine witnesses and experts who voluntarily appear before him, but is not empowered to administer an oath to a witness or an expert.

Investment Disputes

Japan is party to a number of bilateral investment treaties, including a treaty with China that provides for the resolution of investment disputes by arbitration. Japan is also a party to the 1965 Convention on the Settlement of Investment Disputes (ICSID).

11. Role of Courts in Arbitration

In Japan, the role of the Courts in arbitration is very limited. If the Court determines that the arbitration clause in the agreement is valid, it will generally refuse to accept a motion by one of the parties to proceed with litigation.

Where the arbitration is successful and an arbitration award is made to a party, the Court will normally issue an enforcement judgment automatically on the basis of the award rendered by the arbitration tribunal.

Courts do not intervene with arbitration procedures and will only cancel an award in the rare case that significant procedural defects are found in the process of the arbitration. Court cases ordering the cancellation of an arbitration award are very rare.

Although there has been a case in which a Japanese Court granted interim relief in respect of a proceeding in Korea, there is no definitive legal foundation in Japan supporting the availability of such ancillary relief in connection with foreign arbitration.

12. Institutional and Ad Hoc Arbitration

The most commonly used arbitration rules for arbitration in Japan in international disputes are the JCAA rules. Even so, the JCAA only handled some seventeen new cases in 2001. As of June 2002, sixteen Japanese local Bar Associations have established arbitration rules and services.

Arbitration under the UNCITRAL Rules is rarely used in Japan. The JCAA can apply UNCITRAL Rules where all parties agree to do so.

13. Enforcement of Arbitration Awards

An arbitration award is only legally effective upon the successful party obtaining an execution judgment from a Court. The basis upon which the Court decides whether or not to provide an execution judgment is whether the arbitration award was made validly in accordance with the arbitration rules and Japanese law. The Court does not judge whether the arbitration award is fair or reasonable.

Foreign arbitration awards are enforced in accordance with multilateral conventions such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 as well as bilateral treaties such as The Treaty of Friendship, Commerce and Navigation between Japan and the United States of America. However, the party seeking to enforce such an award must follow the execution procedures discussed above. It is generally accepted under Japanese law (which does not expressly provide for the enforcement of foreign arbitration awards) that a foreign arbitration award should be enforced in Japan regardless of whether the country in which the award was made is a party to the New York Convention.

Although the Convention provides that a signatory state may refuse to enforce foreign judgment awards if the enforcement of the award is repugnant to the public policy of that state, such arguments by Japanese defendants have rarely succeeded. Foreign arbitration awards are generally enforced in Japan.



14. Power to Appeal and/or Set Aside Award

The parties may not challenge the subject matter on which the arbitrator has already rendered a decision, except where a party makes a motion for cancellation of the award based on the reasons listed in the CCP.

At the execution stage the Court that receives the plaintiff's application for an execution judgment may refuse to enforce the award if it finds that the award is invalid, or if the basic facts upon which the case was decided have changed. As discussed above, it is generally not the Court's role to judge whether the award is fair or reasonable.

15. Mediation

Mediation ("Choutei") is recognised as a method of dispute resolution. This method of dispute resolution is often used in family dispute resolution cases (e.g. divorce cases). However, it is rare for this type of dispute resolution to be adopted in international cases.

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