GAR KNOW HOW LITIGATION

Japan

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Overview

1. Describe the general organisation of the court system for civil litigation.

Japan has a unified court system, independent from other branches of power and with the sole Supreme Court as the court of last instance. The Constitution requires no special court independent from the Supreme Court. There are eight High Courts in large cities, as well as six High Court branches, all of which exist as primary courts of second instance. There are 50 district courts in the capital cities of each prefecture, as well as 203 district court branches at other smaller cities and towns, which exist as primary courts of first instance. Civil claims with a value of no more than ¥1,400,000 are tried at summary courts in the first instance. Judges are generally appointed from among legal apprentices without experience as practising lawyers. Professional judges try cases, and no juries are available for civil cases. There is no stare decisis rule in Japan; nevertheless, court precedents have significant referential value for judges deciding similar cases.

2. Give an overview of basic procedural principles that govern civil litigation in your jurisdiction.

The court generally must hold oral proceedings to try cases, and the following principles govern the oral proceedings:

- the principle of publicity: the court shall try the case and render a judgment in a court open to the public;
- the principle of hearing from both parties: the parties shall be heard equally by the court in the presentation of their cases;
- the principle of orality: the parties shall make their arguments, and the court shall examine the evidence, orally; and
- the principle of immediacy: the judge who hears the case must also render the judgment.

The Code of Civil Procedure provides exceptions to these principles.

3. Describe the general organisation of the legal profession.

Only lawyers admitted to the Bar of Japan (bengoshi) are allowed to practise law. Generally, to be a lawyer it is necessary to go through one year of legal training as a legal apprentice after passing the bar examination. Engaging in the business of providing legal advice on Japanese law for the purpose of obtaining compensation without a licence is criminal and subject to imprisonment or monetary penalties. There is no distinction between barristers and solicitors. Foreign lawyers who register as registered foreign lawyers (Gaikoku-hô jimu bengoshi) are allowed to provide legal services concerning the law of the state or jurisdiction of their primary qualification. Registered foreign lawyers are not eligible to appear before Japanese courts; however, registered foreign lawyers may represent parties in international arbitration and mediation. Furthermore, foreign lawyers may represent parties in international arbitration and mediation: (i) if they are requested to undertake or undertook the matter in a foreign state, and (ii) if they are not employed to provide services in Japan based on their knowledge concerning foreign laws.

4. Give a brief overview of the political and social background as it relates to civil litigation.

Japan has a civil law system; the Japanese civil procedure system was originally based on German civil procedural law, which is an inquisitorial model; however, the Japanese system also possesses important characteristics of an adversarial system, which were derived from the US legal system, such as the method of witness examination. The Japanese Code of Civil Procedure was totally revised in 1996, and a new code, called the Code of Civil Procedure, Law No. 109 of 1996, was enacted. The government initiated judicial reform discussions in 1999–2001, and various new laws related to the judicial system have been enacted to provide better legal services in Japan thereafter. The Japanese judicial system has been behind in adopting

Information and Communication Technologies (ICT) in trying cases, but courts started to hold remote hearings for preparatory proceedings and scheduling conferences, and started to communicate online, more frequently during the covid-19 pandemic. In addition, courts started to allow parties to submit and exchange their submissions online, using a newly developed system, called 'mints.' However, to eliminate existing obstacles to using ICT to try cases online, the government submitted a bill to amend the Code of Civil Procedure. The bill passed the Diet in May 2022 and some parts of the amended Code have entered into force.

Japanese people are considered to be litigation averse. As the Japanese civil procedure system is not as pro-plaintiff as, for example, the United States, where pretrial discovery and punitive damages are available; other than certain activist shareholders or organisations related to consumer activities, the concept of the professional litigant is not common.

Jurisdiction

5. What are the sources of law and rules governing international jurisdiction in civil matters?

Articles 3-2, 3-3 (i)-(xiii), and 3-4 through 3-12 of the Code of Civil Procedure provide the rules governing international jurisdiction.

6. What are the criteria for determining the jurisdiction and venue of the competent court for a civil matter?

District courts have general jurisdiction, as the court of first instance, over civil claims with a value in excess of ¥1,400,000. Civil claims for no more than ¥1,400,000 are tried in summary courts as courts of first instance.

Regarding the issue of venue, that is, allocating the competent court within the country, it is a general rule that the plaintiff must file the lawsuit in the defendant's forum (the principle of actor sequitur forum rei), but there are exceptions to this rule promulgated in the Code of Civil Procedure, and generally plaintiffs can elect to choose a forum from among the available courts. The parties may agree on the applicable venue in writing if the agreement is concerned with a specific legal relationship and is not contrary to public order and morals.

Regarding the issue of international jurisdiction (ie, allocating the competent court between Japan and other countries) the rule is that the plaintiff must file the lawsuit in the defendant's forum (again, the principle of actor sequitur forum rei). Exceptions to this rule are also promulgated in the Code of Civil Procedure, but as the defendants' burden to appear in the plaintiffs' forum is much harder in international cases than in domestic ones, the exceptions generally are more limited than those relating to venue. Even if any of the grounds provided in the Code of Civil Procedure exist in Japan, courts may deny Japanese jurisdiction, if exceptional circumstances exist, pursuant to which trying the case in Japan may harm the fairness of the parties, or prevent the achievement of a fair and speedy trial, considering the nature of the case, the degree of the burden placed on the defendant to respond to the litigation, the location of the evidence, and other circumstances. This exception is arguably similar to the US principle of forum non conveniens. The parties may consent to the jurisdiction of any particular country in writing if the agreement is concerned with a specific legal relationship, if the agreement is not grossly unreasonable, and if the agreement does not violate any laws related to the public order and morals of Japan. In terms of jurisdiction agreements between corporations and consumers, and civil disputes relating to labour matters, the forums that the parties may agree on are limited, to protect the interests of consumers and workers, respectively.

7. Does your jurisdiction commonly attract disputes that have a nexus with other jurisdictions?

No, Japanese courts determine jurisdiction over the case depending on the rules prescribed in the Code of Civil Procedure, and are not inclined to expand jurisdiction only because the dispute has some nexus with Japan. Furthermore, because Japanese courts are hesitant in handing down decisions awarding significant amounts of damages and restrained in issuing extensive document production orders, they are less attractive to potential claimants.

8. How will a court treat a request to hear a dispute that is already pending before another forum?

If a dispute is pending before another forum in Japan, the court dismisses the case. On the other hand, if a dispute is pending before another forum in a country other than Japan, it has been established that Japanese courts will not decline to hear the case merely because the same or related matter is pending before another forum. A Japanese Supreme Court judgment issued on 10 March 2016 took the view that a Japanese court may decline to hear the case at its discretion when a related case is pending before a US court, after balancing various interests, including fairness between the parties and circumstances where a fair and speedy trial may be impeded.

9. How will the courts treat a dispute that is, or could be, subject to an arbitration clause or an agreement to arbitrate, including in interim proceedings?

The Arbitration Law, Law No. 147 of 2004, materially follows the UNCITRAL Model Law. Therefore, Japanese courts will decline to hear the case if the matter is subject to an arbitration agreement, unless the arbitration agreement is null and void, cancelled, or invalid for other reasons, arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement, or the defendant has made statements on the merits of the dispute before the court. It is generally interpreted that national courts are allowed to issue provisional orders, so long as the general requirements are satisfied, regardless of whether an agreement to arbitrate exists.

10. May courts in your country review arbitral awards on jurisdiction?

Yes, if the arbitral tribunal renders an award where it does not have jurisdiction and the place of arbitration is in Japan, courts may set aside the arbitral award. For example, if the arbitral award contains decisions on matters beyond the scope of the arbitration agreement, or the claims in the arbitral proceedings relate to a dispute that cannot constitute the subject of an arbitration agreement under the laws of Japan, the Japanese court may set aside the arbitration award.

11. Are anti-suit injunctions available?

No, although the general rule for injunctions should be applicable, there is a common understanding that, in practice, Japanese procedural law does not recognise the concept of anti-suit injunctions in national courts, and no court precedent for such injunctions is known.

12. Which entities are immune from being sued in your jurisdiction? In what circumstances? In what circumstances can creditors enforce a court judgment or arbitral award against a sovereign or a state entity?

The Act on the Civil Jurisdiction of Japan with respect to Foreign States, Law No. 24 of 2009, governs the issue. This law generally follows the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which was signed by Japan in 2007 and ratified in 2010. The law provides that foreign states enjoy sovereign immunity, but it adopts a so-called restrictive theory of sovereign immunity.

Therefore, a foreign state is subject to a Japanese court's jurisdiction, if the matter is related to commercial acts (de jure gestionis), as opposed to government acts (de jure imperii). Whether an act is of a commercial nature is determined by referring to the nature of the act, not the purpose of the act. Furthermore, if a foreign state gives consent to a specific matter, the state is also subject to the jurisdiction of Japanese courts. Consent to civil proceedings, or an arbitration agreement, is distinguished from consent for civil execution by the foreign state. As such, a separate consent is required for civil execution of a judgment or an arbitral award. Property for other than government non-commercial purposes is not immune from civil execution.

Procedure

13. How are proceedings commenced? To what extent will a court actively lead the proceedings and to what extent will the court rely on the parties to further the proceedings?

Proceedings are commenced by the plaintiff's filing of a complaint. The complaint must be accompanied by a power of attorney (if the plaintiff is represented by counsel), a corporate certificate to prove the appropriate representative (if either party is a corporation), a filing fee calculated in accordance with the disputed amount (for example, where the claimed amount is ¥100 million, the court filing fees are ¥320,000) and postal stamps to be used for communications by the court to the parties. The plaintiff must specify the identity of the defendant, and a so-called 'John Doe' lawsuit is not allowed. The court clerk makes service of process of the complaint and summons on the defendant.

While judges hear the views of the parties with regard to the proceedings, they are generally proactive in instructing either party concerning further preparation for the case, in urging the parties to produce important documentary evidence, in encouraging settlement discussions, and sometimes in presenting preliminary views on specific issues of facts and law.

14. What are the requirements for filing a claim? What is the pleading standard?

The party who owes the burden of proof must specify the elements of the allegations. Therefore, the plaintiff is supposed to specify the elements of its claims, while the defendant is supposed to specify the elements of its defences, such as set-offs and statute of limitations. In that sense, Japanese courts request detailed substantiation, rather than mere notice pleading. The plaintiff must specify what relief he or she is seeking. Where the plaintiff is requesting the payment of money from the defendant, the amount of that request must be specified in the complaint.

15. What are the requirements for answering claims? What is the pleading standard?

The standard applicable to the statement of claim also applies to the defendant's statement of defence. Therefore, Japanese courts request detailed substantiation, rather than mere notice pleading. The defendant generally owes the burden of proof in terms of defences, such as set-offs and statute of limitations.

16. What are the rules regarding further briefs and submissions?

Generally, parties are allowed to submit briefs at least two or three times each, and as many as 10 times (or more) in large cases, before the examination of witnesses and parties in the court of first instance.

Amicus briefs generally are not permitted. However, a Japanese version of the amicus brief system commenced in April 2022 in a certain patent litigation by a revision of the Patent Act.

17. To what degree are civil proceedings made public?

Oral hearings in a courtroom generally are open to the public. TV cameras and photographers are not allowed in court during the proceedings. Substantial discussions among the judges and parties tend to be conducted in the preparatory proceedings in a meeting room, which is closed to the general public.

Civil court filings are publicly available for inspection; for those who show a prima facie interest in the case, copies of the court filings can be provided at their own cost. Inspection and obtaining copies of court filings are available only at a courthouse, not online. Parties who establish that any part of the court filings contains important personal information or trade secrets may request that the court issue an order prohibiting any third party from inspecting or reproducing the court filings.

A bill to amend the Code of Civil Procedure passed the Diet in May 2022, which includes a provision creating a new system to keep the domicile, residence and name of one party and his or her legal representative(s) secret from the other party. The part of the amended Code providing the measures to retain the secrecy of certain information explained above entered into force in February 2023. In addition, the amended Code allows parties to litigation and third parties who show a prima facie interest in the case to inspect and obtain copies of the court filings online. The part of the amended Code providing the inspection and obtaining copies of court filings online explained above still awaits its entry into force.

In judgments, parties are not anonymised, but for publication in private case reports, on official court websites or in legal databases, the parties' names are anonymised in many cases.

Pretrial settlement and ADR

18. Will a court render (interim) assessments about any factual or legal issues in dispute? What role and approach do courts typically take regarding settlement? Are there mandatory settlement conferences between the parties at the outset of or during the litigation?

To further settlement discussions, judges give interim assessments of factual and legal issues from time to time. In Japan, judges act as if they were mediators, and conduct caucus sessions (discussions with one of the parties in the absence of the other party); if the settlement discussions break down, the same judge hands down a judgment. The judge does not formally use information disclosed in the caucus session, but there is a concern that, psychologically, such information may impact the final decision. Settlement discussions at the outset of or during litigation are not mandatory, but it is common for judges to attempt to reach a settlement, for example, immediately before and after the examination of witnesses and parties.

19. Is referral to mediation or another form of ADR an option, or even mandatory, before or during the litigation?

The judge can refer the case to mediation before a judge of another division of the same court, but the system is not used frequently. Rather, the judge himself or herself attempts to achieve a settlement. Mediation and other forms of ADR are not mandatory, except for certain types of disputes, such as increases or decreases in rent.

Interim relief

20. What are the forms of emergency or interim relief?

The following three forms of interim relief are available in Japanese national courts:

- for monetary claims, potential plaintiffs may apply for an 'order of provisional attachment' to freeze the potential defendant's assets to secure collection of their claims;

- for certain categories of non-monetary claims, potential plaintiffs may apply for an order for appropriate measures to preserve their rights with respect to the subject matter in dispute ('provisional disposition with respect to the subject matter in dispute'); and
- another type of interim remedy, an 'interim remedy of a provisional disposition to determine the provisional legal relationship between the parties' is available to avoid substantial detriment or imminent danger caused by disputed legal relationships.

21. What must a petitioner show to obtain interim relief?

For (a) an 'order of provisional attachment' and (b) a 'provisional disposition with respect to the subject matter in dispute', the petitioner must establish a prima facie case for: (i) the existence of the petitioner's substantive rights; and (ii) the impossibility or difficulty of successfully enforcing the rights in the future in the absence of the provisional attachment or disposition. Judges use ex parte proceedings to issue orders in these categories, to avoid the potential defendant's attempts to frustrate enforcement. The respondent may commence objection proceedings upon receiving an order for such interim remedies. For (c) an 'interim remedy of a provisional disposition to determine the provisional legal relationship between the parties', a petitioner must establish a prima facie case that: (i) there exists a certain legal relationship that the opposing party is disputing; and (ii) there is a necessity to avoid substantial detriment or imminent danger to the petitioner. Because an interim remedy in this category has a serious impact on the respondent, the court generally conducts a hearing with both parties before issuing an order for this interim remedy. For each of the forms of interim relief described above, the court generally requests that the petitioner provide security, as a condition of issuing the requested interim relief.

Decisions

22. What types of decisions (other than interim relief) may a court render in civil matters?

In addition to a total judgment, a partial judgment is available, when a party brings multiple claims, and one of them is ripe for decision. A partial judgment is a final judgment and is appealable independently. Another type of judgment is an interlocutory judgment, as opposed to a final judgment. This is available when an independent defence or any other interlocutory dispute is ripe for decision. An interlocutory judgment is also available with regard to liability issues, when liability and quantum issues are disputed, and the court considers that the liability issue should be determined first, separately from the quantum issues. An interlocutory judgment is not a final judgment, and therefore not appealable independently. Partial and interlocutory judgments are not frequently used.

Final judgments include judgments on the merits and judgments dismissing a case as unlawful. A judgment to accept the claim on the merits includes: (a) a judgment for performance, (b) a declaratory judgment, and (c) a constitutive judgment. A judgment to dismiss the claim on the merits is classified as a declaratory judgment.

23. At what stage of the proceedings may a court render a decision? Are motions to dismiss and summary judgment available?

The court may render a decision when the court considers that the matter is ripe for judgment. The defendant may request that the proceedings be dismissed for lack of compliance with a procedural requirement, such as a lack of valid service of process of the complaint, lack of jurisdiction, lack of competency as a litigant, lack of standing, or lack of interest to sue, by a final judgment. No summary judgment is available.

24. Under which circumstances will a default judgment be rendered?

The Code of Civil Procedure does not allow a judge to render a judgment merely because a party is absent from the hearing. If the defendant does not appear at the first hearing without filing an answer in advance, after the complaint has been duly served on the defendant, the defendant is deemed to admit the facts in the complaint, and the judge renders a judgment based on the admitted facts. However, when the complaint was served on the defendant by publication, the facts in the complaint are not deemed to be true. Therefore, the judge must conduct an examination of evidence even if the defendant is absent from the hearing in such a case.

25. How long does it typically take a court of first instance to render a decision?

It depends on the scale and complexity of the case, but under the Act on the Expediting of Trials, Law No. 107 of 2003, judges generally attempt to conclude the proceedings in the court of first instance within two years.

Parties

26. How can third parties become involved in proceedings?

The parties may file a claim against a third party during the pendency of the litigation, but a consolidation is determined at the courts' discretion. If a third party insists that his or her interest will be harmed by the outcome of the pending lawsuit, or if the matter subject to the dispute between the current plaintiff and defendant belongs to him or her, then that party may make independent joinder claims against the plaintiff and defendant, by instituting his or her own claims. If a third party's legal position is affected as a result of a pending lawsuit, either in its conclusion or reasoning, the party may request to intervene in the case in order to assist one of the parties. On the other hand, the parties to the litigation can also issue a notice to such a third party, and if such a notice is issued, and even without actual intervention by the third party, the effect of the judgment may bind the third party, not only as to its conclusion, but also as to its reasoning. If a party's position is legally affected as a result of a pending lawsuit, the third party can intervene as a co-litigant.

Fact-Finding and Evidence

27. Describe the rules of fact-finding in your jurisdiction.

Under the principle of party presentation (Verhandlungsmaxime), the judge must treat the undisputed elements of the claim as a basis for the judgment. The judge determines the disputed elements of the claim based on the evidence presented by either party, or based on notorious facts or the entire content of the oral proceedings. With regard to documentary evidence, the court examines almost all of the evidence that the parties submit, as no hearsay rule exists. With regard to the examination of witnesses, the court carefully examines whether the witnesses the parties request to examine are necessary, and examines them only when the court deems that their testimony will influence the results of the case. The judge may evaluate the evidence freely based on the 'free evaluation principle', without following rigid fact-finding rules. If the judge cannot determine the existence of a disputed fact, the judge will treat it as not existing and decide in a manner unfavourable to the party that owes the burden of proof on the relevant fact.

28. Will a court take or initiate the taking of evidence or will it rely on the parties to request the taking of evidence and to present it?

Under the principle of party presentation (Verhandlungsmaxime), it is generally prohibited for a court to rely on evidence that the parties have not submitted to the court. The exception is 'notorious facts', ie, publicly known facts and facts known to the court. Furthermore, a court may examine evidence ex officio in the following circumstances:

- the court may request necessary information from a governmental office and other entities;
- the court may examine the parties;
- the court may request an expert opinion from a governmental office and other entities;
- the court may refer to a relevant governmental office for questions about the authenticity of an official document;
- the court may order an expert to provide the judge with an expert opinion during the course of inspection of a tangible object;
- the court may order an evidence preservation procedure while the case is pending before the court; and
- the court may examine evidence relating to its competence.

29. Is an opponent obliged to produce evidence that is harmful to it in the proceedings? Is there a document disclosure procedure in place? What are the consequences if evidence is not produced by a party?

A party is not obliged to produce evidence harmful to himself or herself to the court and the opposing party. In that sense, the duty of zealous representation prevails over the duty of candour or honesty to the court. A party may request that the court order the other party or a third party to produce specific documents, if certain requirements provided in the Code of Civil Procedure are met. However, judges are generally careful about issuing document production orders, and, generally, judges urge the opposing party to produce requested documents voluntarily as much as possible. There are no general pretrial or US-type extensive pretrial discovery procedures. No 'fishing expeditions' are permitted.

If evidence is not produced by the party who owes the burden of proof, the disputed fact will be treated as non-existent and unfavourable to that party.

If a court orders a party to produce documents and the party does not, the court may deem the other party's allegations pertaining to the related evidence to be true. A third party may be subject to a non-penal fine for not complying with an order from the court.

30. Please describe the key characteristics of witness evidence in your jurisdiction. Is witness preparation allowed?

Witnesses owe a duty to testify under law. False statements are subject to perjury penalties. The duty to testify is exempted only in limited circumstances, such as where testimony would incriminate the witness or his or her family, involve official secrets of public officials, involve secrets obtained through performance of professional duties, such as those of a doctor or lawyer (including a registered foreign lawyer), or involve other technical or professional secrets. There are no US-type pretrial depositions. Before the examination of witnesses, it is common practice to circulate written witness statements among the judges and the parties to shorten direct examination and to prepare for cross-examination. The examination of witnesses follows a US-style adversarial system, in which the parties conduct direct examination, cross-examination, and redirect examination, followed by supplemental questions by judges. Witness preparation through meetings and rehearsal by counsel is allowed. Judges even expect that witnesses have been familiarised with the case through pre-examination meetings with the counsel who called them.

31. Who appoints expert witnesses? What is the role of experts?

Under the Code of Civil Procedure, courts are supposed to appoint experts, and if they do, the expert is supposed to submit an opinion verbally or in writing. If questioning is required, the judge asks the expert questions first, and then the parties are allowed to supplement the questions. The role of experts is to supplement the specialised knowledge and experience of the judges in special fields so that the judges can reach correct conclusions.

It is also common, as in US practice, for parties to retain their own experts and to request that the court examine them. If that happens, the relevant witnesses are not 'experts' as set forth in the Code of Civil Procedure, and the process used for witnesses for fact will be used for their examination.

32. Can parties to proceedings (or a party's directors and officers in the case of a legal person) act as witnesses? Can the court draw negative inferences from a party's failure to testify or act as a witness?

Parties can testify to facts in the same manner as regular witnesses under the Code of Civil Procedure. The Code of Civil Procedure provides that the parties should be examined after the examination of third party witnesses, but the judges may examine the parties first, if appropriate. Furthermore, the court may hear the parties' testimony ex officio. The failure of a party to testify without a justifiable reason for the refusal, may lead to the court deeming that the facts as alleged by the other party are true.

33. How is foreign law or foreign-language documentation introduced into the proceedings and considered by the courts?

A judge is supposed to know the law, as indicated by the legal maxim, iura novit curia. However, in practice, the parties submit authorities and expert opinions authored by experts to prove the foreign law. Foreign language documents are not accepted by courts. For documentary evidence written in a foreign language, the party must prepare Japanese translations of the part the party requests the court to examine as evidence. The party can challenge the accuracy of the translation submitted by another party, if he or she wants.

34. What standard of proof applies in civil litigation? Are there different standards for different issues?

'A high probability' is the required standard of proof. It was formulated in a Supreme Court judgment stating that '[p]roving causation in litigation … requires proof of a high degree of probability that certain facts have induced the occurrence of a specific result.... It is necessary and sufficient that the judge has been persuaded of the truthfulness to the degree that an average person would not have doubt.' With respect to certain specific matters, judges may affirm facts even though they have not been proven to the same degree of persuasion. For example, a lesser degree of proof is required to establish the requirements for interim relief, called prima facie proof.

Appeals

35. What are the possibilities to appeal a judicial decision? How many levels of appeal are there?

A party is allowed to appeal to the first appeal court, and then to appeal to the second appeal court. The courts to hear these appeals differ, depending on whether the court of first instance was a district court or a summary court. If the second appeal is made to a High Court (ie, where the court of first instance was a summary court, and not a district court) the party may make an additional special constitutional appeal to the Supreme Court, if there is an error in interpreting the Constitution or other constitutional errors.

36. What aspects of a lower court's decisions will an appeals court review and by what standards?

The first appellate court reviews the facts and law as a continuation of the proceedings in the court of first instance, and therefore, no deference is given to the lower court decisions. The second appellate court tries only errors in the interpretation of law. If the second appellate court is the Supreme Court (ie, where the court of first instance was a district court, and not a summary court), the appellant can appeal to the Supreme Court as of right, if the original judgment contains grave procedural errors as provided in the Code of Civil Procedure. Furthermore, the appellant can make a discretionary appeal, which was modelled after the US system of certiorari, if the original judgment contains errors involving the interpretation of law on important legal issues, or there are discrepancies from precedents of the Supreme Court (or High Court judgments, where a Supreme Court precedent is not available).

37. How long does it usually take to obtain an appellate decision?

In the majority of first appellate proceedings, the case is concluded at the first hearing, and no examination of witnesses will be conducted. Therefore, the period from the appeal to judgment is not very long – in most cases, within a year. For second appellate proceedings, especially those to the Supreme Court, it is impossible to anticipate the duration of the case. Some are dismissed swiftly, within several months after the appellant files the appellate brief, while other cases are prolonged for years before the final disposition.

Role of Domestic Courts In Arbitration Matters

38. In which conditions does your domestic arbitration law apply? Does it apply equally to purely domestic and international arbitrations, and to commercial and investor-state arbitrations?

The domestic arbitration law applies in the following circumstances:

- the provisions concerning recognition and enforcement of an arbitral award are applicable when the place of arbitration is in or outside of Japan;
- the provisions under which the court dismisses litigation due to existence of an arbitration agreement, and the provision regarding availability of interim measures by a court regardless of the existence of an arbitration agreement, are applicable when the place of arbitration is in or outside of Japan or when the place of arbitration is not designated; and
- the other provisions generally are applicable when the place of arbitration is in Japan.

The domestic arbitration law is applicable to purely domestic as well as international arbitrations, and to commercial and non-ICSID investor-state arbitrations.

39. Give an overview of instances in which state courts come into play in domestic and international arbitration proceedings.

A state court may come into play with regard to arbitration proceedings for, among other matters:

- service of a notice requested by a party, where it is difficult to obtain evidence for the delivery of the notice and in the absence of the parties' agreement to the contrary;
- interim measures requested by a party;
- appointment of arbitrators (including a third arbitrator) under certain circumstances;
- determination whether a tribunal's decision dismissing a party's challenge to an arbitrator was supported by sufficient grounds;
- removal of an arbitrator under certain circumstances;

- determination whether a tribunal's preliminary, independent ruling that the tribunal has jurisdiction is supported by sufficient grounds;
- assistance of examination of evidence requested by the tribunal or a party;
- setting aside an arbitral award; and
- recognition and enforcement of an arbitration award.

40. Describe the rules governing recognition and enforcement of arbitral awards in your jurisdiction. To what extent do domestic courts review arbitral awards on the substance?

The arbitration law generally follows the UNCITRAL Model Law, and only limited grounds for refusal of recognition and enforcement are provided. The court is allowed to examine these limited grounds, including whether the arbitral award is contrary to the public policy or good morals of Japan.

Special proceedings

41. Are class actions available?

US-style class actions are not available in Japan. However, a 'qualified consumer entity' (a consumer organisation certified by the Prime Minister) may bring an action, under the Consumer Contract Act, Law No. 61 of 2000, demanding injunctive relief against business operators that engage in conduct that is causing harm to, or may harm, consumers' interests. Furthermore, the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers, Law No. 96 of 2013 (the Collective Redress Act) provides for quasi-class actions for certain categories of monetary claims on behalf of consumers against business operators. Under the Collective Redress Act, a qualified consumer entity with additional certification from the Prime Minister (a 'specified qualified consumer entity') may bring a lawsuit on behalf of affected consumers to request the court to declare a defendant's common liability for monetary claims. Eligible claims under the Collective Redress Act are those relating to consumer contracts, for performance of a contract, unjust enrichment, a claim for damages relating to breach of contract, and a claim for damages arising out of tort. However, damages to property other than the subject matter of the consumer contract, lost profits, personal injury, and damages for pain and suffering are excluded from the scope of claims eligible to be brought under the Collective Redress Act. After the court renders a judgment declaring the common liability of the defendant to the affected consumers, each affected consumer may opt in to the next stage of proceedings to confirm his or her own claim through the specified qualified consumer entity. Since the Collective Redress Act came into force in October 2016, only a small number of cases were filed under the Act in its initial form. Thus, the Collective Redress Act was amended in May 2022 and the amended Act entered into force in October 2023. For example, the amended Act added damages for pain and suffering to eligible claims under limited circumstances, and allowed claims against individuals under limited circumstances.

42. Are derivative actions available?

Derivative actions are provided for in the Corporation Act, Law No. 86 of 2005. A shareholder who owns a given company's stock for six months or more can file a lawsuit against the directors of the company to claim damages caused by the directors to the company. The company may intervene in the litigation to assist one of the parties, or as a co-litigant, if a lawsuit is filed.

43. Are fast-track proceedings available?

No general fast-track proceedings are currently available. However, for monetary claims of ¥600,000 or less, the parties may use special proceedings in a summary court, called 'actions on small claims'. In this type

of action, cases must generally be concluded at the first oral proceeding, and the judge hands down a judgment immediately after the conclusion of the hearing. In addition, a bill to amend the Code of Civil Procedure passed the Diet in May 2022, and it introduces general fast-track proceedings, except for some types of consumer and labour litigation. If the court decides to conduct these proceedings, the court must schedule a hearing session within two weeks, conclude the proceedings within six additional months, and hand down a judgment within one additional month. The part of the amended Code providing these fast-track proceedings awaits its entry into force.

44. Is it possible to conduct proceedings in a foreign language?

No, only the Japanese language can be used at court proceedings. Japanese translations or interpretation must be arranged if documentary evidence is written, or witness testimony is given, in foreign languages. As an exception, the court may exempt the applicant from submitting a Japanese translation of part or all of the arbitral award, or an order for interim measures, after listening to the respondent's opinion in the enforcement proceedings. In addition, in court proceedings under the arbitration law, the court may exempt a party from submitting a Japanese translation of documentary evidence written in a foreign language, after listening to the other party's opinion.

Effects of judgment and enforcement

45. What legal effects does a judgment have?

The parties to the case (ie, the plaintiff and the defendant) are generally the parties who are bound by the judgment. However, there are situations where the law extends the effect of the judgment to a third party, to ascertain the legal relationship. A typical example is a judgment regarding corporations, such as a judgment to confirm the invalidity of shareholders' meetings, where the effect extends to all third parties. Furthermore, if a third party who has an interest in the results of litigation between other parties has been given notice of the litigation, that third party may be bound by the relevant litigation, even if the third party does not join the proceedings as an intervenor. Only the conclusion of the judgment has res judicata effect; its reasoning does not. Exceptions exist for res judicata effect given to a defence relating to a set-off, though the judgment regarding the set-off is only related to the reasoning. Res judicata effect is given to the legal relationship that existed as of the closing of the oral proceedings in the instance where the facts were tried (ie, the proceedings in the court of first or second instance).

In addition to res judicata effect, enforceability attaches to a judgment ordering performance, and constitutive effect attaches to a constitutive judgment.

46. What are the procedures and options for enforcing a domestic judgment?

Enforcement procedures differ depending on the type of a judgment and the assets to be seized. For immovable property and movable property, the execution court administers proceedings, and the court will dispose of the assets, with the assistance of a bailiff, at an auction. For receivables, the execution court can issue an order, the effect of which is to transfer the receivables from the original creditor, the respondent, to the petitioner.

47. Under what circumstances will a foreign judgment be enforced in your jurisdiction?

For a foreign judgment to be enforced in Japan, an execution judgment from a competent court must be obtained. The petitioner must establish that the judgment is final. In addition, the judgment must satisfy the following requirements:

- the international jurisdiction of the court that rendered the judgment exists in accordance with the international jurisdiction rules of Japan;
- the losing party has received service of any summons or orders required to commence the proceedings (except for service through notice by publication), or has responded in the lawsuit, even if he or she has not received such service;
- the substance of the judgment and the proceedings of the lawsuit are not contrary to the public order or morals of Japan; and
- reciprocity exists.

The court issuing an execution judgment must not retry the whole case regardless of whether or not the foreign judicial decision was erroneous.

Costs and Funding

48. Will the successful party's costs be borne by the opponent?

The Japanese system does not follow the UK-style 'costs follow the event' rule, which allows the prevailing party to seek recovery of his or her costs, including attorney's fees, from the losing party. The prevailing party is entitled to recover only limited expenses from the losing party, including court filing fees, daily allowances, lodging and travel expenses paid to witnesses, prescribed translation costs, and remuneration paid to experts, as provided by the Law on Costs of Civil Procedure, Law No. 40 of 1971 (the LCCP). Courts hand down an award regarding the cost allocation together with their judgment on the merits. Attorney's fees must be borne by each party, except that very limited daily allowances and expenses paid to the counsel for the prevailing party for appearances at the hearing, as provided in the LCCP, shall be borne by the losing party. Furthermore, a part of a lawyer's fees may be recoverable as a component of damages, if the plaintiff's cause of action is in tort.

49. May a party apply for legal aid to finance court proceedings? What other options are available for parties who may not be able to afford litigation?

The Japan Legal Support Centre provides legal aid to finance court proceedings for those who cannot afford legal costs. Legal aid is available if: (i) the recipient's revenue is below a prescribed standard, (ii) it is impossible to consider that there is no prospect that the party will prevail in the case, and (iii) assistance is appropriate in the spirit of legal aid. The system is to loan money to the litigant without charging interest, with a duty to repay. Furthermore, certain insurance companies pay the costs of lawyers for specific categories of disputes. Whether the insurance may cover costs other than lawyers' costs and opponents' costs depends on the terms and conditions of the insurance. Furthermore, the parties may apply to the court for legal aid to postpone payment of the court filing fees if: (i) the party does not possess the means to pay costs necessary to prepare and conduct a lawsuit, or will incur extreme financial hardship by paying such costs, and (ii) it cannot be said that there is no prospect of success in the lawsuit.

50. Are contingency fee arrangements permissible? Are they commonly used?

Lawyers in Japan typically charge clients in litigation matters by receiving a retainer fee at the start of their engagement with their clients and a success fee upon the successful outcome of the case. Pure contingency fee arrangements are also permissible. Both the retainer fee and the success fee are typically calculated based on the amount of the claim. Charging clients on an hourly basis is also done, especially by law firms that perform international work.

51. Is third-party funding allowed in your jurisdiction?

Third-party funding is not yet common in Japanese litigation practice, but some cases where a third-party funder provided funding for Japanese domestic litigations have been reported. No equivalents to the common law concepts of maintenance, champerty and barratry, which prevented third-party funding, exist in Japan. No direct provision prohibiting third party funding in Japan exists. Therefore, depending on the scheme designed for the third-party funding, it may be permissible. For example, if a third party who funds the costs of a claim is not an attorney or a legal professional corporation, and its activities also include engaging in the business of providing legal services, or acting as an intermediary between attorneys and clients (ie, referring cases to attorneys to obtain compensation for his or her business activities), that third party may be subject to criminal punishment. In particular, the extent to which the third-party funder controls the case would be important in this respect. Furthermore, if the scheme involves the third-party funder engaging in the business of obtaining the rights of others by assignment and enforcing such rights through litigation, this also would be subject to criminal punishment. Additionally, if the scheme involves creating a trust for the primary purpose of having another person litigate a matter, this would not be permitted. New legislation is desirable to prescribe exactly to what extent third-party funding is permissible in Japan.

52. Are there fee scales lawyers must follow? Are there upper or lower limits for fees charged by lawyers in your jurisdiction?

Until 2004, there were fee scales that lawyers referred to in discussing fees with clients. There was not mandatory fee scale, even before 2004, but this practice was officially abolished owing to concerns about impermissible cartel activity by lawyers under the Japanese antimonopoly law. However, lawyers frequently refer to the abolished scale even now, to discuss fee arrangements with potential clients. No upper or lower limits for fees exist, but overly large remuneration will be deemed unethical and will be subject to discipline by the bar.

Akihiro Hironaka

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Akihiro Hironaka is a partner in the dispute resolution group at Nishimura & Asahi, the largest law firm in Japan. Mr Hironaka is renowned for his successful representation of clients in large-scale and complex disputes. For example, he succeeded in defending a client in six large, extraordinary parallel lawsuits with total damages claims amounting to Y48.3 billion, filed by claimants including an affiliate company of a US-headquartered investment bank and a US hedge fund. He also has a remarkable record of achievements in defending complex product liability and mass tort claims, cross-border disputes relating to M&A transactions and terminations of distribution agreements, and pursuing construction and tax disputes. Mr Hironaka is a graduate of the University of Tokyo (LLB, 1993) and Harvard Law School (LLM, 2003), and is admitted to the Bar in Japan and New York. He is a Fellow of the Chartered Institute of Arbitrators. He has served as a judge of the Yokohama District Court (1998–2000), and worked as a foreign attorney at Arnold & Porter, Washington, DC (2003–2004). Mr Hironaka has authored numerous books, book chapters and articles, including Yasuhei Taniguchi et al. eds, *Civil Procedure in Japan* (contributor, Juris Publishing, 2018). He is an individually ranked lawyer with *Who's Who Legal*, *Chambers* and *The Legal 500*. He was awarded "Dispute Resolution Lawyer of the Year" at the ALB Japan Law Awards in 2022.

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