JAPAN

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1. COURT STRUCTURE

1.1 How is the court structured? Does a specific court or division hear commercial claims?

Japan has a uniform judicial system and the Supreme Court is the sole highest court. Unlike several European and Asian jurisdictions, but similar to the US, no special constitutional court exists in Japan.

Under 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 in other smaller cities and towns, which exist as primary courts of first instance. Civil claims of which the value is not exceeding JPY1,400,000 are tried at summary courts in the first instance. Family courts try family civil cases. For the three-tiered appellate system in Japan, see *Section 11.1* below.

A special division specialising in intellectual property litigation exists within the Tokyo High Court, called the Intellectual Property High Court. The Osaka High Court also has a special division for intellectual property litigation. Within district courts in large cities such as Tokyo and Osaka, special divisions treat special areas of litigation, such as corporation law related cases, administrative and tax cases, intellectual property litigation, labour cases, bankruptcy cases, corporate reorganisation cases, medical malpractice cases and construction cases, in order to expedite these special types of cases.

2. PRE-ACTION

2.1 Are parties to potential litigation required to conduct themselves in accordance with any rules prior to the start of formal proceedings?

No code or ethical rules for lawyers require the parties or their counsel to behave in a particular way prior to the start of formal proceedings. However, it is customary practice in commercial litigation for the party bringing a claim to send a demand letter to the opposing party before the commencement of litigation, in an effort to resolve the dispute amicably before going to court. Such exchanges between the parties are generally submitted to the court by either or both of the parties, as evidence to prove sincere efforts were made in good faith to resolve the dispute outside of court before commencing an action.

2.2 Are there any time limits for bringing a claim? If so, what are they?

Under Japanese conflict of law rules, time limits for bringing a claim (statute of limitations) are an issue of substantive law, not procedural law. Therefore, the governing substantive law determines the applicable statute of limitations. As such, even if a claim is brought to a Japanese court, a foreign jurisdiction's statute of limitations may apply.

Assuming, however, that Japanese substantive law is applicable, the statute of limitations for creditors' rights is generally ten years (*Article 167(1), Civil Code, Law No. 89 of 1896 (CC)*). If such a claim arises from commercial transactions, a five-year statute of limitations is generally applicable (*Article 522, Commercial Code, Law No. 48 of 1899*). A shorter statute of limitations is, however, applicable for claims in certain categories. For example, any claim regarding a person engaged in the design, execution or supervision of construction work has a three-year statute of

limitations, accruing from the completion of said work (*Article 170(ii), CC*). Damages under tort claims have a three-year statute of limitations, running from the time the victim (or the victim's legal representative) comes to know of the damages and the identity of the perpetrator, but no later than 20 years from the time of the tortious act (*Article 724, CC*).

3. PROCEDURE AND TIMETABLE IN CIVIL COURTS

3.1 How are proceedings commenced?

A plaintiff must file a complaint with the court to commence a civil action (*Article 133(1), Code of Civil Procedure, Law No. 109 of 1996 (CCP)*). In the complaint, the plaintiffs must specify, among other things:

- The parties' names and addresses.
- The kind of remedies they are seeking (*see Section 9.2 below*).
- In the case of a damages claim, the amount of damages being claimed.
- The facts which constitute the causes of action.

Both the claim amount and the name of the defendant must be specified in the complaint.

A court filing fee must be paid when filing a complaint, except where the court allows for the payment of the fee to be postponed due to the economic hardship of the plaintiff (*Article 3(1), Civil Litigation Costs Law, Law No. 40 of 1971 (CLCL); Articles 82(1) and 83(1)(i), CCP*). The fee depends on the amount of the claim, and is calculated based on a formula provided for in the CLCL. For example, in cases where the claimed amount is JPY100,000,000, the court filing fees are JPY320,000. In cases where the claimed amount is JPY1,000,000, the court filing fees are JPY10,000. This system intends to reduce the number of frivolous lawsuits and unreasonably inflated claims by plaintiffs.

If a plaintiff or defendant is a Japanese corporation, a certified copy of its corporate registration must also be filed with the court to prove the corporation's existence, along with the official address of its head office and the name of the company's formally listed representative. If a plaintiff or defendant is a foreign corporation, an equivalent corporate registration document is required, to prove the same. If the plaintiff is represented by counsel, a power of attorney declaring said representation must be filed.

The defendant is formally informed of the claim by being served a copy of the complaint, together with a summons (*Articles 94(1) and 138(1), CCP*). A court clerk conducts the service, as opposed to a party to the litigation as in the US judicial system (*Article 98(2), CCP*). Service is conducted either through the mail or by a court execution officer under the direction of the court clerk (*Articles 99(1) and (2), CCP*).

The prevailing interpretation is that the service of process on defendants, as opposed to its submission to the court, constitutes the formal commencement of the proceedings. However, for the purpose of tolling the statute of limitations, receipt of the complaint by the court is sufficient (*Article 147, CCP*).

3.2 What are the main steps to trial, once a claim has been formally commenced? What is the usual timetable to trial?

The court controls and is responsible for the procedure and its timetable. This is called the "principle of the court's power to manage proceedings".

The first oral proceeding is usually scheduled for within one or two months from the date of the filing of the complaint, and such date is specified in the summons (*see Article 60(2), Rules of Civil Procedure (RCP), Supreme Court Rule No. 5 of 1996*). The court generally designates a day, one week prior to the first oral proceeding, as the deadline for submission of the written answer from the defendant. The defendant may make a counterclaim at any time until the closing of the second appellate proceedings. Either party may file a separate lawsuit against the third party and can request the court to consolidate the two proceedings into one, but the court has discretion to decide whether to consolidate these two proceedings or not (*Article 152(1), CCP*). Prevailing views permit such consolidation only by the end of the first instance.

Once the proceedings commence, the court holds hearings every one or two months, and both parties submit briefs and documentary evidence to argue and establish the merits of the case. This process is called the "issue-evidence management procedure". In this process, judges identify genuine issues that require the examination of witnesses/parties/experts. The issue-evidence management procedure is generally conducted by holding a formal "plenary proceeding", which is held in a formal court open to the public, or a "preparatory hearing", which is held in a meeting room closed to the public.

After the issues have been clarified during the issue-evidence management procedure through these submissions of briefs and documentary evidence, the court holds hearings (just one hearing in many cases) to conduct intensive examinations of witnesses/parties/experts. There is no distinction between the pre-trial and trial stages in the Japanese civil procedure system, but the process of intensively examining witnesses/parties/experts can be seen to be functionally similar to trials in a foreign legal system. Therefore, this chapter treats this process as a trial and the issue-evidence management procedure as a pre-trial procedure in a foreign jurisdiction.

How many times the court holds oral proceedings (or preparatory proceedings) before the case reaches the stage of examining witnesses/parties/experts depends on the scale, complexity and nature of the litigation. Typical civil litigation between two parties will often take a year from the filing of the complaint to the case reaching the stage of examining witnesses/parties/experts because each party usually submits its written briefs at each hearing in response to the other party's allegations three times or more. The intervals between hearings are usually between one and two months, depending on the time period requested by counsel to prepare briefs.

The court may issue an interlocutory judgment if the court believes the case has ripened into a judgment for (i) a dispute of independent offence and defence, (ii) a dispute regarding a procedural matter or (iii) a dispute regarding the cause if both the cause and amount of the claim are disputed (*Article 245, CCP*). However, it is rare for the court to issue an interlocutory judgment.

The law provides that, as a general guideline, proceedings at the first instance court should be concluded within two years, and judges generally try to follow this guideline (*Article 2(1), Law concerning the Expedition of Litigation, Law No. 107 of 2003*).

3.3 Is it possible to expedite the normal timetable to trial? If so, how?

The CCP does not provide general fast track procedures for civil actions. However, for monetary claims of JPY600,000 or less, the parties may use special proceedings, called "actions on small claims" (*Article 368(1), CCP*). In this type of action, cases must generally be concluded at the first oral proceeding, and the judge renders judgment immediately after the conclusion of that hearing (*Articles 370(1) and 374(1), CCP*). The defendant, however, may object to these expedited proceedings, and request that the court move to ordinary civil proceedings (*Article 373(1), CCP*).

4. DOCUMENTARY EVIDENCE

4.1 Are the parties obliged to search for, retain or exchange documentary evidence prior to trial?

There is no general obligation for the parties to search for, retain or exchange documentary evidence at the beginning of the civil proceedings. However, if a party to a litigation has destroyed a document to prevent the opposing party from using it (one which the party is bound to provide to the court, as explained below in this section), the court may deem the allegations of the opposing party relating to the contents of such document to be true (*Article 224(2), CCP*).

During the issue-evidence management procedure, typically a week before each hearing, the parties are expected to submit their written arguments and documentary evidence to the court and to the other party. By doing so, the courts and parties are expected to prepare discussions at the hearing in advance.

The Japanese judicial system does not adopt a US-type, broad discovery system. However, the parties may request that the court issue a document production order (DPO) to possessors of documents, whether or not they are a party to the lawsuit.

The court may issue a DPO to possessors of the requested documents, and the possessors may not refuse to produce them in the following circumstances provided for in the CCP (*Articles 220(i) to (iv)*):

- As a party, the possessor has cited the document in the arguments of the action.
- The party applying for the DPO was otherwise entitled under the law to possess or inspect the document.
- The document was executed for the benefit of the applicant.
- The document was executed with respect to a legal relationship between the applicant and the possessor.
- The document does not fall under any of the following exceptions:

    (i) A document containing information with respect to which the possessor would have the right to refuse to testify, based on the possessor's rights, including rights against self-incrimination or incriminating one's family, if the possessor were to be called upon as a witness (the same shall apply where the possessor's testimony relates to matters that would harm the reputation of such persons).

    (ii) A document containing a secret in relation to a public officer's duties, whose production would

harm the public interest or possibly seriously impede the performance of a public service.

(iii) A document containing professional secrets (*see Section 4.3 below*).

(iv) A document containing technical secrets or secrets useful for occupations.

(v) A document held by the possessor exclusively for the possessor's own use (except for documents possessed by the national or local governments that civil servants have used in their work within the organisation).

(vi) A document relating to criminal proceedings or juvenile delinquency proceedings and documents seized in these proceedings (*Articles 220(iv)(a) to (e), CCP*).

An additional important exception to the duty to produce documents is that the court will not issue a DPO if the court considers that the requested documents are not necessary to determine the merits of a particular case (*Article 181(1), CCP*).

4.2 Are there any special rules concerning the exchange of electronic documents?

No special rules exist concerning the exchange of electronic documents, including rules applicable to an e-discovery process, similar to those found in the United States.

4.3 Can any documents be withheld from the other side or from the court?

It is generally considered that there is no concept of attorney–client privilege or work–product doctrine in Japan. The 2013 Tokyo High Court judgment in *JASRAC v Japan, Court HP (12 September 2013)* affirmed that understanding. However, the exception to the duty to produce a document explained immediately below partially overlaps with the attorney–client privilege of other jurisdictions.

The CCP exempts possessors of the requested documents from the duty to produce the documents if the requested documents contain professional secrets (but only those facts that have not been exempted from the duty of secrecy) which lawyers (*bengoshi*), registered foreign lawyers (*gaikoku-hô jimu bengoshi*), patent attorneys or criminal defence attorneys obtained through performance of their duties (*Articles 220(iv)(c), 197(1)(ii), (2), CCP; see also item (iii), Section 4.1 above*). No established court precedents yet exist as to whether the same exemption rule is applicable to internal counsel. The exemption above applies to doctors, dentists, pharmacists, pharmaceutical distributors, birthing assistants, notaries and persons engaged in certain religious occupations, such as priests or other clerics (*Articles 220(iv)(c), 197(1)(ii), (2), CCP*).

Further, no established court precedents yet exist that exclude the duty to produce documents under a principle equivalent to the US work–product doctrine, but the exceptions explained in items (iii) and (v) in *Section 4.1* above may partially work as an equivalent to the US work–product doctrine.

5. WITNESS EVIDENCE

5.1 Do parties exchange witness evidence prior to trial? If so, how and at what stage in the proceedings?

Counsel are generally expected to interview the witnesses/parties on which they want to rely, and prepare and submit their written statements to the court and the opposing party. No system of conducting depositions exists to require the advance disclosure of witness evidence to the other party. Parties must exchange written statements usually at least a week before their examination, except where a difficulty exists, such as a potential witness refusing to cooperate with the party requesting examination. The purposes of exchanging the written statements of witness/parties prior to their examination are to shorten the time of direct examination and to enable the other party to prepare their cross-examination. The judges may request that the parties submit such written statements early enough to screen out the most important witnesses/parties to be examined to determine the disputed facts. The witnesses/parties are expected to describe what they have experienced, not their views, to the court.

5.2 Do witnesses give evidence at trial? If so, how? Is it possible for the court to hear oral testimony from expert or ordinary witnesses via teleconferencing, or any other remote live connection system?

Though Japan is a civil law system jurisdiction, the CCP adopts US-style, adversarial methods of examination of witnesses/parties. Counsel that requested the examination of witnesses/parties first conducts direct examination; cross-examination by counsel to the other party follows; and finally, counsel that requested the examination of witnesses/parties re-directs. Judges also interject questions for the witnesses/parties and continue questioning after counsel for both sides have completed their own respective questions (*Article 202(1), CCP; Article 113(1), RCP*).

Judges can hear statements of a witness/party who appears remotely from another courthouse convenient to the witness/party by using a video conference system if the witness/party resides in a distant location or remote appearance is necessary to protect the witness/party's interests, such as where the witness/party is a victim of a crime (*Articles 204 and 210, CCP*). If parties do not object, witness examination by way of a written statement is also available (*Article 205, CCP*).

If a witness makes a false statement under oath, the witness may be sanctioned for perjury and imprisoned for three months or more, but not exceeding ten years (*Article 169, Penal Law, Law No. 45 of 1907*). If a party makes a false statement under oath, the party will be sanctioned with a non-penal fine not exceeding JPY100,000 (*Article 209(1), CCP*).

5.3 Can a witness be forced to attend court for the purposes of giving evidence?

A person who does not enjoy diplomatic or other extraterritorial immunity is obliged to appear before the court, swear under oath and provide testimony. If a witness fails to appear before the court without a justifiable reason, the court may charge the witness with the costs resulting from non-appearance, and impose detention and a penal/non-penal fine not exceeding JPY100,000 (*Articles 192(1), 193(1) and (2), CCP*). The court may issue a warrant for the arrest of an unjustifiably delinquent witness and have the prosecutor and police forcibly bring said delinquent witness before the court (*Articles 194(1) and (2), CCP*).

6. EXPERT EVIDENCE

6.1 Are parties permitted to use experts in the proceedings to give opinion evidence? If so, who appoints the expert?

Parties are permitted to use experts in the proceedings to give opinions on matters that require special knowledge or experience. The CCP provides that the court is authorised to appoint experts (*Article 213, CCP*). However, it is permitted, and is common practice, for the parties to also retain their own experts to provide opinions to the court, even if the court does not appoint the court-appointed expert. Additionally, the parties occasionally retain their own experts to impeach the opinion of a court-appointed or another party-appointed expert who gave an opinion that was unfavourable to them.

6.2 Do parties exchange expert evidence prior to trial? If so, how and at what stage in the proceedings?

The court-appointed experts usually provide their opinion in writing, but they are permitted to give such opinions orally (*Article 215(1), CCP*). The party-appointed experts usually provide their opinions in writing, and the parties submit such opinions as documentary evidence. No deposition exists for experts.

6.3 Do experts give evidence at trial? If so, how?

The method of examining court-appointed experts is different from that used with ordinary witnesses/parties explained in *Section 5.2* above. The order of examination of court-appointed experts is: first, the presiding judge; second, the party who requested the expert opinion; and finally, the other party (*Articles 215-2(1) and (2), CCP*). This order of examination is different from that used with ordinary witnesses/parties because it helps mitigate unnecessary tension caused by counsel's cross-examination of the experts; overly antagonistic behaviour by counsel would make it difficult for courts to find good experts who were willing to provide opinions to courts.

Parties may request that party-appointed experts be examined orally as witnesses; however, the court will determine if such examination is necessary. In case the court decides to conduct examination of party-appointed experts, the method of examining the expert is the same as that used with ordinary witnesses/parties explained in *Section 5.2* above.

6.4 How are experts paid and are there any rules to ensure that expert evidence is impartial?

Court-appointed experts are entitled to receive both compensation for their services and reimbursement of necessary out-of-pocket expenses (*Articles 18(2), 26, CLCL*). No rules exist for compensation paid to party-appointed experts. If the experts, whether appointed by the court or by a party, are required to appear before the court, they will receive travel and lodging expenses and a daily allowance in accordance with the same rules that are applicable to ordinary witnesses (*Article 18(1), CLCL*). Either party may challenge a court-appointed expert if circumstances exist that would prevent the expert from giving opinions faithfully (*Article 214(1), CCP*).

7. ENDING A CLAIM/ALTERNATIVE DISPURE RESOLUTION (ADR)

7.1 What are the main ways in which a claim may be brought to an end before trial?

Japan has no equivalent to US-style summary judgment. A claim may be brought to an end prior to rendering a final judgment by the court under the following circumstances:

Abandonment/acknowledgement of a claim

A plaintiff may conclude a case by abandoning the claim, while a defendant may do so by acknowledging the plaintiff's claim. The statement of abandonment/acknowledgement of a claim entered into the official court record has the same effect as the final and irrevocable judgment (*Article 267, CCP*).

Withdrawal of a claim

A plaintiff may withdraw the entire claim or a part of the claim (*Article 261(1), CCP*). When a plaintiff effectively withdraws a claim, the action is deemed as if it never existed, and the plaintiff is therefore allowed to re-file the same action against the same defendant if the statute of limitations has not lapsed (*Article 262(1), CCP*). A plaintiff may withdraw a claim even after the court has rendered its judgment (for example, before the deadline of the appeal to the higher court), but in such a case, the plaintiff may not later bring the same action against the same defendant (*Article 262(2), CCP*).

Settlement

A judge may attempt to induce both parties to negotiate for a settlement with the judge's assistance (*Article 89, CCP*). As in the case with abandonment/acknowledgement of a claim, the settlement entered into the official court record has the same effect as the final and irrevocable judgment (*Article 267, CCP*).

7.2 What ADR procedures are available?

Court-annexed conciliation proceedings (conciliation) are the most popular ADR option. Conciliation is similar to mediation, in that a panel, typically consisting of a judge and two non-judge conciliators, facilitates amicable resolution of disputes between parties. The summary court has a general jurisdiction over conciliation, irrespective of the amount of the claims. Further, as explained in *Section 7.1* above, a judge frequently attempts to induce both parties to negotiate for a settlement, and may even open a caucus hearing with each party (that is, without the presence of the other party) as if the judge were a mediator. In doing so, the judge will try to find a mutually agreeable point of compromise to conclude the case by settlement. Even if settlement is not achieved by the discussions between the judge and the parties, the judge who acted as a mediator can nonetheless continue to sit as a judge and render a judgment.

7.3 Can the court compel the parties to use ADR?

For some categories of dispute, such as family matter disputes and rent disputes, conciliation is mandatory before an action can be brought to the court. Therefore, if no conciliation proceedings have been held prior to an action being brought to the court, the court will refer the case to conciliation (*Articles 257(1) and (2), Family Matters Procedure Law, Law No. 52, 2011; Articles 24-2(1) and (2), Civil Conciliation Code (CCC), Law No. 222 of 1951*).

Further, in addition to the categories of disputes where prior conciliation is required, a court may refer a case to conciliation at its discretion, whenever it deems appropriate (*Article 20(1), CCC*).

8. TRIAL

8.1 What are the main stages of a civil trial? How long would a significant commercial litigation trial last?

The process of examination of witnesses/parties is explained in *Sections 3.2 and 5.2* above. Judges tend to strictly screen out the most appropriate witnesses/parties for oral testimony/statements. Further, the direct examination of witnesses/parties can be shortened because witnesses/parties have submitted written statements in advance (*see Section 5.1 above*). Therefore, typically two or three persons per case are orally examined intensively on the same day.

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

Oral proceedings are open to the public, except where, for example, publicity would be dangerous to public order or morals (*Article 82(2), Constitution*). For cases of certain categories, such as cases involving intellectual property or privacy rights, in camera hearings are permitted. This is because open hearings for cases in these categories would deprive a party of substantive rights (*for example, Article 105-7(1), Patent Law, Law No. 121 of 1959; Article 22(1), Personal Status Litigation Act, Law No. 109 of 2003*). Preparatory proceedings are not open to the public; however, the court may permit an appropriate person to attend the hearing. If either party to the litigation requests permission from the court to have a specific person attend the hearing, the court must give permission, unless such attendance would cause inconvenience for the proceedings (*Article 169(2), CCP*).

Court documents and documents produced in litigation are open to public inspection (*Article 91(1), CCP*). The parties to the case, and only those third parties who make a prima facie showing of interest in the case, may request that the court provide them with a copy of the court documents at their own cost (*Article 91(3), CCP*). A party to the litigation may request that the court order a prohibition on inspection or copying of the court documents by any third party if sections of said documents contain important personal information or trade secrets (*Articles 92(1)(i) and (ii), CCP*).

9. REMEDIES

9.1 What are the main remedies available prior to trial? In what circumstances can such remedies be obtained?

For monetary claims, potential plaintiffs may apply for an "order of provisional attachment" to freeze the potential defendant's assets to secure their collection of 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"). For example, when the applicant intends to file a lawsuit to claim repossession of real property, it is necessary for the applicant to freeze the potential defendant's possession. Without such a freeze, the defendant may easily escape enforcement by transferring the possession to a third party before the judgment becomes enforceable against the defendant. For these two categories of interim relief, the applicant must establish

a prima facie case of: (i) the existence of the applicant's substantive rights; and (ii) the impossibility or difficulty of successful enforcement of the rights in the future without the provisional attachment/disposition (*Articles 13(1), (2), 20(1) and 23(1), Civil Provisional Disposition Law (CPDL), Law No. 91 of 1989*). Judges generally uses an *ex parte* proceeding to issue orders of these categories, to avoid the potential defendant's attempts to frustrate enforcement. The respondent may commence objection proceedings upon receiving the order of such interim remedies.

Another type of interim remedy, an "interim remedy of the provisional disposition for determining the provisional legal relationship between the parties", is available to avoid substantial detriment or imminent danger caused by disputed legal relationships. For example, if an employee challenges the validity of dismissal, the employee can apply for a provisional disposition of this category, seeking a payment after the discharge, arguing that discharge would endanger the employee's living. For this category of interim relief, an applicant 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 applicant (*Articles 13(1), (2), 23(2), CPDL*). Because an interim remedy of this category has a serious impact on the respondent, the court generally conducts the hearing with both parties before issuing its order of this interim remedy (*Article 23(4), CPDL*).

9.2 What final remedies are available at trial?

Judgments may be (i) for performance, (ii) declaratory or (iii) constitutive, depending on the plaintiff's request. Judgments for performance include judgments to pay a certain sum of money to the plaintiff, judgments to surrender a certain piece of land to the plaintiff and judgments to transfer a land registration to the plaintiff. An order of specific performance is also available under this type of remedy. Declaratory judgments include judgments confirming that the plaintiff owns a certain piece of land and judgments confirming that the debt alleged by the defendant against the plaintiff does not exist. Constitutive judgment is available when substantive law authorises the court to create or transform a legal relationship, such as in the case of a divorce judgment.

10. ENFORCEMENT

10.1 How is an award of damages enforced if a party fails to make payment voluntarily?

There are three methods available for enforcement of judgments:

Direct compulsion

This is a method of enforcement by which the property of the debtor is seized and sold or taken from the debtor to surrender it to the plaintiff.

Execution by substitution

This is a method of execution by which a court execution officer directly enforces the judgment, for example, demolition of a building, and requests that the defendant pay the plaintiff's costs.

Indirect compulsion

This is a method of execution by which the defendant is urged to perform its obligation confirmed in the judgment by being obliged to pay a certain sum of money to the plaintiff, for example, calculating a certain amount multiplied by the number of days in default.

If the judgment is regarding money, direct compulsion is available. For a judgment regarding surrendering specific property, direct compulsion and indirect compulsion are available. If the obligation confirmed in the judgment can be performed by a person other than the defendant, the plaintiff may choose execution by substitution or indirect compulsion as the execution method. If the obligation confirmed in the judgment cannot be performed by a person other than the defendant, the plaintiff may choose indirect compulsion. If the obligation confirmed in the judgment is to indicate a certain intention, such as that required for the transfer of the owner's land registration, such indication is deemed to be made at the time when the judgment has become final and irrevocable. Therefore, no actual enforcement proceedings for this category of obligation are necessary. This method of enforcement is categorised as a variation of execution by substitution. Certain categories of judgment are impossible to enforce, such as an artist's obligation to produce art. Compulsion by imprisonment is not allowed.

11. APPEALS

11.1 Is it possible for a defeated party to appeal a decision after the close of trial? In what circumstances will a party be allowed to appeal?

If the first instance court proceedings commenced at a district court (that is, for civil cases involving a disputed value of more than JPY1,400,000), the defeated party may appeal to a high court and then to the Supreme Court. If the first instance court proceedings commenced at a summary court (that is, for civil cases involving a disputed value not exceeding JPY1,400,000), the defeated party may appeal to a district court and then to a high court. Therefore, the parties to civil actions generally have the right to try their cases at three different levels of court.

A party who was rendered an award less than the requested relief may make an appeal. A party who was rendered a requested relief fully but was not satisfied with the court's reasoning generally cannot make an appeal.

11.2 What is the basic procedure for an appeal?

The period for appeal is two weeks from the day on which the written judgment is formally served on the party. The first appellate court proceedings are a continuation of the first instance court proceedings. Therefore, the first appellate court may review the first instance court judgments on issues of both fact and law. This means that the first appellate court is able to conduct examination of witness/parties/experts. However, it does not occur very often, and the majority of cases at first instance courts are concluded at the first hearing. The first appellate court is able to accept new documentary evidence as well.

The second appellate court only reviews alleged errors of interpretation and application of law. Therefore, the court determines the case only by examining written submissions. The second appellate court may hold an oral proceeding, but such a hearing is ceremonial, at best, as the second appellate court determines to hold it, almost invariably, only when it determines that the lower court judgment should be reversed. As such, the parties can

almost invariably predict the outcome of the case through receipt of a notice from the court that such a hearing be held.

The scope of review at the second appellate court is different depending on whether the court is the Supreme Court or a high court (that is, whether the case commenced at a district court or a summary court, as explained above). Either the Supreme Court or a high court may vacate a lower court judgment if (i) any misinterpretation or other contravention of the Constitution or (ii) any grave procedural error provided in the CCP as an "absolute ground for second appeal" exists (*Articles 312(1) and (2), CCP*). "Grave procedural errors" are defined in Article 312(2) of the CCP as follows:

- The adjudicating court was not constituted as prescribed by law.
- A judge precluded by law from participating nonetheless participated in the judgment.
- Provisions on the exclusive competence of the court were violated.
- There was a defect in the powers of the legal representative or counsel, or in the authority of such counsel to perform specific procedural acts.
- Provisions for holding oral proceedings in public were violated.
- The judgment lacks reasons, or the reasons provided are inconsistent.

In addition, a high court may vacate the lower court judgment if (iii) any errors in interpretation or application of law exist that have apparently resulted in the conclusion of the case (*Article 312(3), CCP*). Items (i) to (iii) above are grounds for an appeal as of right.

As explained above, the Supreme Court can only intervene at this second appellate stage if (i) or (ii) above is applicable, but the defeated party at a high court, as the second instance court, may petition for acceptance of a second appeal (that is, may make a discretionary appeal), when:

- The high court judgment contains a determination that is inconsistent with Supreme Court rendered precedent (or a precedent by the Great Court of Judicature (the highest court in Japan prior to WWII) or a high court, if such Supreme Court rendered precedent does not exist).
- The case involves any other important issues concerning the interpretation of laws and ordinances (*Article 318(1), CCP*).

Petition for acceptance of a second appeal is modelled after the US system of *certiorari*.

12. COSTS/FUNDING

12.1 How are legal fees ordinarily charged to a client? On an hourly rate?

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" at the successful outcome of the case. Both the retainer fee and the success fee are typically calculated based on the amount of the claim. Charging clients on an hourly rate basis is also widely used, especially among law firms which do international work.

12.2 Are there any restrictions on lawyers entering into "no win, no fee" agreements with their clients?

The Basic Rules on the Duties of Practicing Lawyers of the Japan Federation of Bar Associations (BRDPL), Associations Rules No. 70 of 2004, provide professional ethical codes for Japanese lawyers. Under the BRDPL, the remuneration lawyers receive from their clients must be appropriate and reasonable, considering the economic benefit, the difficulty of the case, the time and labour involved and other circumstances (*Article 24, BRDPL*). Previously, pure contingency fees (that is, without retainer fees) were interpreted as inappropriate; however, they are now interpreted by the Bar as permissible. Therefore, "no win, no fee" agreements with clients are allowed.

12.3 Is it permissible for a third party to fund a claim? Are there any restrictions on the use of such funding?

A third party may fund the costs of a claim. However, if the third party is not an attorney or a legal professional corporation, and its activities include acting as an intermediary between attorneys and clients, that is, referring cases to attorneys to obtain compensation for its business activities, the third party's activities may be subject to criminal punishment (*Articles 72 and 77(iii), Attorney Act*).

12.4 Is it possible to obtain insurance which will cover the costs of bringing the claim?

Certain insurance companies pay the costs of lawyers for specific categories of disputes, such as to defend claims relating to performance of duties as corporate officers, to defend from product liability, whether domestic or overseas, for goods, or to bring a claim for damages from vehicle accidents. Whether the insurance may cover costs other than lawyers' costs and opponents' costs depends on the terms and conditions of the insurance.

12.5 Can the court order a losing party to pay a winning party's costs? If so, in what circumstances and to what extent?

The court may order the defeated party to pay specific items of litigation costs that have been paid by the prevailing party within the scope, and to the extent, that the CLCL provides (*Article 61, CCP*). For example, the defeated party is ordered to pay the following items of expenses to the prevailing party: filing fees, daily allowance, lodging and travel expenses paid to witnesses/experts/interpreters, and remuneration paid to experts/interpreters. Lawyers' fees for the prevailing party are not provided as litigation costs under the CLCL, and therefore the defeated party does not have to pay the opposing party's lawyers' fees. However, in tort cases, the court may order the defeated defendant to pay reasonable lawyers' fees to the prevailing plaintiff as a part of damages (*for example, Hayashi v Uchiyama, 23 Minshû 441 (Sup. Ct, 27 February 1969)*).

12.6 Can the court make an order providing security for costs prior to permitting a claim to proceed? If so, what are the circumstances in which such an order is possible?

The defendant may request security for costs when a plaintiff does not have a domicile, office or place of business in Japan (*Article 75, CCP*).

13. COLLECTIVE ACTIONS

13.1 Can claimants with similar claims bring a collective action against an alleged wrongdoer?

US-style class actions do not exist. However, a "qualified consumer organisation" (a consumer organisation certified by the Prime Minister) may bring an action demanding injunctive relief against business operators which are either soliciting or are likely to solicit consumers to contract in an improper manner or to contract with improper terms, as provided in the law (*Articles 12(1) to (4) and 13(1), Consumer Contracts Law, Law No. 61 of 2000*).

Further, a new law, entitled the Act for Special Measures with respect to Civil Proceedings to Collectively Restore Damages to Assets of Consumers, Law No. 96 of 2013 (the Collective Claims Act), enabling quasi-class actions for certain categories of claims on behalf of consumers, was promulgated in 2013 and is awaiting implementation, which is scheduled to occur in 2016. Upon the implementation of the Collective Claims Act, a qualified consumer organisation with additional certification from the Prime Minister (a "specified qualified consumer organisation") may bring a damages claim in relation to consumer contracts against business operators for recovery of losses incurred by consumers, with respect to:

- Performance of a contract.
- Unjust enrichment.
- A claim for damages due to breach of contract.
- Warranty against defects.
- A claim for damages arising out of tort.

However, damage to property other than the subject matter of the consumer contract, lost profits, personal injury, and pain and suffering are expressly excluded from the scope of the claim that can be brought under the Collective Claims Act.

Proceedings under the Collective Claims Act are in two parts. As a first step, the specified qualified consumer organisation files a lawsuit to request confirmation of common issues among consumers, such as the validity of contracts, the illegality of the acts of the defendant, and the intent or negligence of the defendant. If the court finds that the defendant is responsible or that the defendant's act is illegal, then the specified qualified consumer organisation as a second step files a proceeding called a "summary confirmation proceeding". In this step, individual consumers may opt in to the summary confirmation proceeding, and can verify the existence of their own claims and amounts thereof. Therefore, the proceedings under the Collective Claims Act are classified as "opt-in"-type proceedings, as opposed to the "opt-out"-type proceedings of US class actions.

13.2 Is the procedure for bringing a collective action different to the procedure for a normal claim?

See *Section 13.1*.

14. OTHER SPECIAL FEATURES

14.1 Are there any other special features of the commercial litigation regime that litigants should be aware of?

No.

14.2 Are there any forthcoming changes to commercial litigation practice in your jurisdiction or any proposals for reform?

See *Section 13.1*.