

# Japan

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Professor Hiroshi Oda & Herbert Smith (Tokyo)

## Litigation

### 1 What is the structure of the legal profession?

There are three branches of the legal profession in Japan: judges, public prosecutors and attorneys. Currently, candidates for all three branches go through 18 months of legal training before joining their chosen branch. The entire system has recently been reviewed and a US-style law school system was introduced in April 2004. From 2008, there will be a training period of one year after finishing law school.

Judges are appointed for 10-year terms by the state from the pool of legal trainees. These terms are usually renewed automatically until retirement.

Attorneys often practice alone, or in an office with two to three attorneys, although there is a growing tendency towards large firms.

### 2 What is the structure of the Court system?

There are three tiers of civil Courts: District Courts, Appellate Courts and the Supreme Court.

Civil cases are usually commenced in the District Court at the place where the defendant resides or has their main place of business. Larger District Courts may have specialist divisions for matters such as bankruptcy or intellectual property claims. In cases involving intellectual property, the District Courts of Tokyo and Osaka also have general jurisdiction. The District Courts of Tokyo and Osaka have exclusive jurisdiction over cases concerning patents, industrial models, rights on the design of semi-conductor circuits, and computer programs. Tokyo High Court (an appellate Court) has an exclusive jurisdiction on appeal from these Courts. Appeals from District Courts lie as of right to eight regional Appellate Courts. There is a further, but limited, right of appeal to the Supreme Court.

A single judge often hears cases in the first instance Court. Otherwise, cases are heard by three judges.

### 3 What is the role of the judge (and, where applicable, the jury) in civil proceedings?

Japanese litigation basically follows the adversarial system. The judge reaches a decision based on evidence and legal submissions from both parties. However, the judge is often more interventionist than in Anglo-American countries and will question witnesses and may encourage the parties to produce new evidence.

Japan is a civil law jurisdiction. Previous decisions are not formally binding on judges, but, in practice, decisions of the superior Courts are followed by lower Court judges.

There are no juries in Japan.

### 4 What are the time limits for bringing civil claims?

Generally, the prescription period for claims under the Civil Code is 10 years from the date it became possible to exercise the claim. There are shorter prescription periods for certain types of claims, eg, lawyers' fees. The Commercial Code provides for a general prescription period of five years for commercial transactions. Claims in tort must be brought within three years of the date when the defendant was identified, subject to an overall limit of 20 years from the date of the incident. Claims against sellers of goods must be brought within either one year or six months, depending on whether the transaction was between merchants or not.

## 5 How are civil proceedings commenced, and what is the typical procedure which is then followed?

The plaintiff begins proceedings by submitting a written complaint to the Court specifying the substance and factual grounds for the claim. An assigned judge examines the claim to ensure that it is properly formulated from a technical point of view. The Court then serves a copy of the complaint with a summons on the defendant, who is directed to provide a written reply to the claim.

The Court may hold a preparatory hearing in order to identify the contested issues and the evidence required. At the end of this preparatory hearing, the Court confirms the issues which are to be proved in a subsequent formal hearing. In cases where the parties live far apart, a preparatory procedure can be conducted in writing.

The formal hearing consists of a series of hearings held approximately once a month with the Trial Judge, who often handles more than 100 cases simultaneously. The rules of evidence are not complex, and there is no restriction on the evidence that can be produced. Admissibility of evidence is left almost entirely to the discretion of the Court. Parties are entitled to cross-examine their opponent's witnesses.

## 6 What is the extent of pre-trial exchange of evidence, and how is evidence presented at trial?

There is no provision for full pre-trial discovery of documents. However, the Court is under an obligation to assist the parties in collecting evidence even before the trial by requesting documents from the possessor, or by investigation by public agencies etc. Parties may also apply for an order that the opposing party produce documents. This is not limited to the pre-trial stage. The person holding a requested document is then obliged to produce it unless:

- (i) the possessor or a relative might then be exposed to prosecution; or
- (ii) production would involve unauthorised disclosure of an official secret. This applies only to documents held by civil servants in their capacity as civil servants, and where the production of the document would harm public interest or seriously inhibit the performance of public duties; or
- (iii) the document contains information acquired in circumstances imposing a duty of privilege or confidentiality, and it involves technological or professional secrets; or
- (iv) the document is to be used solely by the holder.

Documents need not be identified specifically by title and content. It is sufficient for the applicant to present facts which enable the holder to identify the document. In the event of a party failing to comply with such a request, the Court has power to make findings of fact in favour of the requesting party, provided that the requesting party can prove that the document exists and is in the other party's possession.

There is no requirement for pre-trial exchange of witness statements. However, in practice, the Court often requires the parties to provide a summary of a witness' evidence in advance of a hearing. Although the Court has the power to order reluctant witnesses to attend a hearing, this seldom happens in practice.

Japan has a system of written interrogatories whereby a person who intends to bring an action is entitled to seek written replies from the prospective defendant concerning issues necessary for the preparation of litigation. This is provided that notice is given to this person that an action will be brought to Court against them within four months. The prospective defendant is entitled to the same rights against the prospective plaintiff. The Court may give assistance to the parties before the action has been brought to Court.

## 7 To what extent are the parties able to control the procedure and the timetable? How quick is the process?

The pace of proceedings is governed by the Court, although the parties are consulted. The Japanese Court system used to be renowned for lengthy delays, but steps have been taken recently to speed up procedures. The average time at the district Court level from filing the complaint to judgment is less than 12 months, although contested cases may take two years. Each level of appeal may take a year.

Under the 2003 amendments, a new system of case management has been introduced. Now the Court as well as the parties are under an obligation to ensure the progress of the procedure is in accordance with a plan. In complicated cases, the Court is required to prepare a plan which sets out the period for the identification of issues and evidence, the questioning of the witnesses and parties, and the timing of the end of the oral hearing as well as the rendering of judgment, in consultation with the parties.

## 8 What interim remedies are available to preserve the parties' interests pending judgment?

Interim remedies include:

- (i) provisional attachments, which have the effect of freezing a defendant's assets in order to secure a monetary claim;
- (ii) provisional dispositions to preserve property which is the subject of the claim; and
- (iii) provisional dispositions to establish an interim relationship, which are in effect interim declarations of legal rights coupled with orders to preserve those rights pending trial.

In all cases, the applicant will have to demonstrate a real risk that any eventual judgment will be rendered valueless without such provisional protection.

An order for provisional attachment may be made without notice to the defendant, but the order may be discharged if the defendant provides appropriate security. Orders for provisional dispositions are usually made only after hearing the defendant.

## 9 What substantive remedies are available?

The Court has powers to order any appropriate relief necessary to give effect to its judgment. This may include orders for monies or damages to be paid, declarations, an account of profits, the transfer of property and the granting of injunctive relief. Punitive damages are not awarded.

## 10 What means of enforcement are available?

Means of enforcement include:

- (i) attachment of property — the Court bailiff may take possession of movable objects, and the Court may declare that immovables and claims against third parties are attached. The asset may then be sold or transferred to the creditor;
- (ii) compulsory administration — the Court appoints an administrator who manages the property. Any profits derived from that property are paid to the creditor;
- (iii) substitute performance — the Court obliges someone to do something at the cost of the defendant; and
- (iv) indirect enforcement — the Court obliges someone not to do something and, for instance, imposes fines until the defendant complies.

## 11 Does the Court have power to order costs? Are foreign claimants required to provide security for costs?

Legal fees are generally not recoverable even if a party wins the case. There is therefore no concept of security for costs except in respect of Court fees.

## 12 On what grounds can the parties appeal, and what restrictions apply? Is there a right of further appeal? To what extent is enforcement suspended pending an appeal?

The first appeal is allowed as a matter of right, but must be filed within two weeks after service of the judgment. It may be based on any grounds. New evidence can be offered, but the Court may reject it if there was a delay in producing it at the trial.

For a second appeal to the Supreme Court, the sole statutory ground of appeal as of right is an error of interpretation of the Constitution, or other violation of the Constitution in the original judgment. The Supreme Court also has the discretion to accept appeals where the original judgment was contrary to the precedents of the Supreme Court, or involved other significant matters concerning the interpretation of law. Such appeals are usually handled on a documents-only basis.

Enforcement of a judgment will automatically be suspended pending the outcome of an appeal unless, as is common in practice, the Court orders otherwise.

## 13 To what extent can domestic and/or foreign state entities claim immunity from civil proceedings?

There is no immunity for domestic state entities. With regard to foreign state entities, Japan still formally adheres to a principle of absolute immunity from suit. However, the relevant Supreme Court decision dates from 1920 and, more recently, Japan has concluded bilateral treaties on the basis of the more restrictive international standard of immunity only for prerogative acts. There are some lower Court decisions which demonstrate this shift to the more restrictive standard.

## 14 What procedures exist for recognition and enforcement of foreign judgments?

A foreign judgment must first be changed into a Japanese judgment of execution. It may then be enforced in the usual way. The primary requirements for recognition are:

- (i) the Japanese defendant received proper service (personal service on a Japanese defendant within Japan is never valid);
- (ii) the terms of the foreign judgment are not contrary to the public order or good morals of Japan; and
- (iii) reciprocity for a judgment rendered by a Japanese Court in the Courts of the relevant foreign country.

If all of these requirements are met, an enforcement judgment will be rendered. The Japanese Court does not review the foreign judgment on its merits.

The Supreme Court has refused enforcement of a judgment which ordered payment of punitive damages, on the ground that it was against public order.

Japanese defendants commonly block enforcement of a foreign judgment by filing parallel litigation in a Japanese Court. If proceedings are commenced against a Japanese defendant in a foreign Court, the Japanese defendant seeks a local declaratory judgment which absolves him of liability to the foreign plaintiff. An enforcement judgment will not be issued if there is a prior final judgment on that matter rendered by a Japanese Court.

## 15 Is it permissible for lawyers to charge contingency or conditional fees, or other fee arrangements based on the result of the litigation/arbitration?

Contingency or conditional fee arrangements are permitted. However, they are rare in major international disputes, where lawyers tend to charge on the usual time-cost basis.

# Arbitration

## 16 Is the arbitration law based on the UNCITRAL Model Law?

Yes. The new Arbitration Law promulgated in the Japanese Diet on 1 August 2003 broadly adopts the UNCITRAL Model Law. It became effective as of 1 March 2004. The Law is available online at <http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf>.

## 17 What are the main national arbitration institutions?

The main Japanese arbitration institutions are the Japan Commercial Arbitration Association (<http://www.jcaa.or.jp/e/index-e/html>) and the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange Inc. (<http://www.jseinc.org/en/tomac/index/htm>).

## 18 Are there any restrictions on who may represent the parties to an arbitration?

In addition to Japanese lawyers, foreign registered lawyers (ie, foreign lawyers registered to practise in Japan with the Ministry of Justice, known as *gaikoku-jimu-bengoshi*) may represent parties to an international arbitration with its seat in Japan.

## 19 What are the formal requirements for an enforceable arbitration agreement?

An enforceable arbitration agreement must be in writing. This may be evidenced in the form of a document signed by all parties, or by an exchange of letters, telegrams, facsimiles “or other communication devices for physically separated parties and which provide the recipient with a written record of the content so transmitted.”

In addition, the arbitration agreement may be recorded in electromagnetic form. This is defined to include any method “incapable of recognition by human perception, and used for data-processing by a computer.”

## 20 Can the Court refuse to stay litigation if there is a valid arbitration clause?

The Court must stay litigation unless:

- (i) the arbitration agreement is null and void or invalid on other grounds;
- (ii) the arbitration agreement is incapable of being performed; or
- (iii) the defendant's request for a stay was made after they provided argument in the Court proceedings sought to be stayed.

## 21 If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed, and who is the appointing authority?

The number of arbitrators may be decided by agreement between the parties.

Failing agreement between the parties as to the number of arbitrators:

- (i) if the total number of the parties to the arbitration is two, the number of arbitrators shall be three;
- (ii) if the total number of parties to the arbitration is three or more, the number of arbitrators shall be determined by the Court.

Failing agreement as to the appointment of the arbitrators, procedure in an arbitration:

- (i) with two parties and three arbitrators, each party shall appoint one arbitrator each and the appointed arbitrators shall appoint a third arbitrator. Where either party or the arbitrators fail to make an appointment, the appointment shall be made by the Court;
- (ii) with two parties and a sole arbitrator, or in an arbitration with three or more parties, appointments shall be made by the Court.

## 22 Are restrictions placed on the right to challenge the appointment of an arbitrator?

Parties may challenge an arbitrator if the arbitrator does not possess the necessary qualifications agreed between the parties or if circumstances exist that give rise to justifiable doubts as to impartiality or independence. A party may only challenge an arbitrator appointed or recommended by them where they became aware of the relevant facts after such appointment.

The parties are free to agree the challenge procedure but failing agreement the tribunal shall decide. Such a decision is appealable to the Court.

## 23 Does the domestic law contain substantive requirements for the procedure to be followed?

Japanese law requires that the arbitral procedure should be in accordance with the parties' agreement subject to certain mandatory provisions contained in the new Arbitration Law. The parties have a wide discretion in this regard. Failing such an agreement, the tribunal can decide on the procedure at its discretion. The tribunal may appoint experts.

## 24 On what grounds can the Court intervene during an arbitration?

The Japanese Courts may, on the request of one or more of the parties, intervene during an arbitration to:

- (i) determine the number of arbitrators to be appointed in an arbitration involving three or more parties, if the parties fail to do so (Art. 16 of the new Arbitration Law);
- (ii) appoint a sole arbitrator or co-arbitrator if one or more parties fails to do so or a third arbitrator if the two arbitrators appointed by the parties fail to do so (Art. 17);
- (iii) determine an unsuccessful challenge by a party to the arbitral tribunal as to whether grounds exist to challenge the arbitrator, provided the parties have failed to agree a procedure for challenging an arbitrator (Art. 19);
- (iv) hear a request by one or more parties to remove an arbitrator for being *de jure* or *de facto* unable to perform his functions or for failing to act "without undue delay", and may duly remove the said arbitrator (Art. 20);
- (v) determine whether an arbitral tribunal has jurisdiction following a preliminary independent ruling by the tribunal that it does have jurisdiction (Art. 23); and
- (vi) provide assistance in the taking of evidence for the arbitration (Art. 33).

In addition, the Court may, on the request of a party, intervene after the arbitration in respect of an application to enforce (Art. 46) or set aside (Art. 44) an arbitral award.

## 25 Do arbitrators have powers to grant interim or conservatory relief?

Yes.

## 26 When and in what form must the award be delivered?

The award must be in writing, dated and signed by the arbitrators and it must, unless agreed otherwise by the parties, state the reason for the award. Copies of the award must be served on the parties.

## 27 On what grounds can an award be appealed to the Court?

An application to the Court to set aside an award may be made where:

- (i) the arbitral award is not valid due to the limited capacity of a party;
- (ii) the party making the request was not given the required notice under the laws of Japan;
- (iii) the party making the request was unable to present their defence;
- (iv) the arbitral award deals with matters not falling within the terms of the arbitration agreement;
- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the laws of Japan;
- (vi) the claims made in the arbitral proceedings relate to a dispute which is not capable of being the subject of arbitration under the laws of Japan; or
- (vii) the arbitral award is in conflict with the public policy or good morals of Japan.

## 28 What procedures exist for enforcement of foreign and domestic awards?

Japan is a signatory to the New York Convention, subject to the reciprocity reservation. However, the new Arbitration Law adopts the provisions of the Model Law on recognition and enforcement. As a result, Japan's New York Convention reciprocity reservation is now redundant.

For enforcement one needs a certified copy of the award, together with a translation of the award into Japanese (assuming it was made in a foreign language). Applications for enforcement may be made with no oral hearing.

## 29 Can a successful party recover its costs?

The arbitral tribunal may, upon the parties' agreement, determine the division of costs incurred in the course of the arbitral proceedings.

# Alternative dispute resolution

## 30 Are the parties to litigation or arbitration required to consider or submit to any alternative dispute resolution before or during proceedings?

Parties to litigation can be ordered by the Court, either of its own motion or on application of one of the parties, to undergo a conciliation process before the formal proceedings. Mandatory conciliation before the formal proceedings applies mainly to family cases.

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### **Professor Hiroshi Oda, Professor of Japanese Law, University College, London**

in collaboration with Herbert Smith, Tokyo office

Contact	<b>Peter Godwin, Partner, Head of Dispute Resolution</b> Toranomom 2-chome Tower, 2-3-17 Toranomom, Minato-ku, Tokyo 105-0001, Japan
Phone	+81 3 3508 4508
e-mail	<a href="mailto:peter.godwin@herbertsmith.com">peter.godwin@herbertsmith.com</a>
Website	<a href="http://www.herbertsmith.com">www.herbertsmith.com</a>

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