# CHAMBERS

## Legal Practice Guides

# Litigation

## Japan

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# Japan

# Doing Business In

*Doing business in a new territory you may encounter unexpected problems. In this section we offer some basic advice. The best advice, of course, is to instruct a law firm based in the territory which knows how local problems can be overcome.*

*Chambers & Partners employ a large team of full-time researchers (over 140) working in their London office. They interview thousands of clients each year. The advice in this section is based on the views of clients with in-depth international experience.*

## Country Profile

Japan is the world's third-largest economy and offers a substantial market for business. However, investment has dropped in the region, the economy has decelerated and Japan now has the highest sovereign debt in the developed world, with a figure exceeding 200% of GDP.

Nevertheless, sources assert that the jurisdiction is showing signs of "*recovery*" and positive GDP growth is forecast for 2014.

Businesspeople active in the region still consider Japan to be a "*safe place to conduct business*" due to the stable rule of law, minimal levels of corruption and a competitive corporate tax rate.

## Business Culture

Formality is part of the culture in Japan. Experienced sources recommend the use of honorific language in business and social interactions and suggest that seniority and the seating arrangement are paid attention to when meeting potential business partners.

Personal relationships are considered to be a "*significant factor in making long-term business connections*." The importance of face-to-face meetings is stressed by many interviewees as "*they promote and strengthen mutual trust*." Trust is perceived as being "*essential*" for successful business practices in Japan.

The decision-making process in Japan is often at variance with what foreign clients are familiar with. "*Consensus and harmony amongst members of the management is desirable as one single executive does not have decision-making power*," explains a source. Patience is required during negotiations as "*it is necessary to get the consent of more people than you would expect*."

Similarly, there is the perception that the Japanese are "*not as straightforward in negotiations as Western clients*" and "*information may not be disclosed*." Sources recommend that "*clients need to dig in to unearth the intentions of their counterparty*."

Japanese lawyers are generally regarded as possessing a good grasp of the English language, but it varies in business. It is politic to have an adviser who is fluent in Japanese.

## Legal Market

The legal profession in Japan is split between domestic and foreign specialists. Local lawyers, referred to as bengoshi (attorneys at law), are at the core of the Japanese legal community. However, they work alongside foreign lawyers who have obtained a licence to practise

law in Japan (attorneys at foreign law) and are usually involved in matters at the intersection of Japanese and foreign law.

Strong, local firms share the market with international brands and independent boutiques in Japan. Clients comment that it is possible to get the benefit of local experience and global expertise from the same firm now as "*there is an increasing number of international lawyers being hired by local firms, and vice versa*."

The Japanese legal market is considered to be "*Tokyo-centric*" by many sources. "*Everyone is in Tokyo*," says an interviewee, "*there are only a handful of firms in Osaka, and that is the second-biggest city*." Furthermore, businesspeople assert that for litigation work "*it is more efficient to engage lawyers in Tokyo, regardless of where the litigation is taking place*." It is thought that the "*high degree of respect for lawyers at all levels and the lack of a jury system*" mean that locality is not an issue.

Although sources assert that it is more likely to find lawyers "*who can speak English and who have experience with foreign clients*" in the major commercial centres, they caution that it can still be "*difficult to find a lawyer who is both able to communicate with foreign clients and who has experience before the courts*." English-speaking capability is reported to be "*inconsistent*" across the market and this can limit choice for clients. Although the larger domestic firms are generally considered to be more reliable for language ability, sources caution that "*you should not overlook the small to medium-sized firms, especially for the complex or unique cases*." It is possible to find "*gems*" in the firms that are not immediately visible for foreign clients entering the market.

Japanese litigators are thought to have a generalist practice. Due to the relatively small size of the legal market and the limited market for litigation, litigators "*cannot be specialised because you have to do all sorts to survive,*" according to experts. However, sources observe that there has been a change in the legal market: "*Formerly, there was an under-supply of lawyers and they were a rarefied breed in high demand, but they have significantly increased the intake at the Bar in recent years*."

Sources caution that Japanese lawyers are often "*opaque*" with their clients, which can be surprising and disconcerting for international businesspeople. "*Japanese clients are traditionally more in awe of their bengoshi*," a source explains, "*and therefore more likely to accept what they say without question*." Observers note that Japanese litigators "*don't like to explain the reasoning behind their actions or conclusions*," and suggest that foreign clients should either "*be very clear with exactly what you expect from your lawyer and the level to which you want your advice explained, or be prepared to hand yourself over entirely to their care*."

It has been suggested that Japanese lawyers bill in the region of JPY20,000 to JPY40,000 per hour, depending on their seniority and experience. However, litigators in Japan traditionally bill on a contingency or retainer and success fee basis. It has been noted that more lawyers are using hourly rates in the current market, especially in the larger firms, but the small domestic firms are reported to be unlikely to consider time-based billing.

### Judiciary

Judges in Japan are described as being "*talented and well-disciplined*." The Bar exam is considered to be "*notoriously difficult,*" and businesspeople trust in the capabilities of the judiciary. Judges are moved around the country during their career as part of a rotation system, but commentators note that the "*quality is fairly standardised*." Indeed, many interviewees praise the "*stability and consistency of judgments*."

Local sources applaud the active role that judges take in trying to encourage settlement during the process, but note that on occasion "*the adjudicator pushing people towards a better settlement offer can be uncomfortable for foreign parties*." However, businesspeople note that many cases are satisfactorily resolved in this manner. Judges are encouraged to "*take the lead and push cases forward, but they are not all proactive,*" according to market experts. Although the majority will be hands-on with a case, sources caution that there are justices that remain "*laid back and cause delays, preferring to leave it to the lawyers*."

There is no dedicated commercial court in Japan and therefore Japanese judges are not considered to have particular commercial expertise. Nevertheless, the judges in Tokyo and Osaka, especially at the high court level, are believed to be "*capable and experienced*" with business issues. There is considered to be more potential for specialisation in those courts due to a higher volume of cases and better staffing. Furthermore, there are attempts to improve the depth of commercial acumen in the courts; interviewees note that "*there is a move to send young judges to private companies to accumulate some work experience*."

Japanese judges are believed to be "*professional, honest, and looking to make decisions on the merits of a case*." Sources express trust in the integrity of the judicial profession overall, a view which is supported by a high ranking for judicial independence in Transparency International's Corruption Perceptions Index. However, some interviewees voice concerns over the presence of individual bias. "*National bias is not an issue*," according to interviewees, but there are judges that appear to be "*more protective of consumer interests*" or "*more government-friendly,*" for example. Furthermore, although "*judges are impartial, they are bureaucrats so there can be a slight bias with regards to public opinion*," according to local businesspeople.

### Court Process

Sources generally agree that the Japanese court process can be surprising for foreign clients, especially with regards to the lack of discovery, but "*there is trust in the system*." Experienced interviewees describe the process as "*reliable, efficient and fair*."

Practitioners remark that "*the differences between the courts in terms of geography are small and subtle and certainly not visible for clients*," thanks in part to the rotation of judges. However, it is generally acknowledged that the courts in Tokyo and Osaka are "*busier and better equipped to handle complex cases, although they don't have as much time to devote to cases as some of the smaller courts*."

The timeframe for cases in the court system has been improved, thanks to recent measures to expedite the process. The courts are reported to be taking a more active role in the management of cases and have become more "*time-sensitive and efficient*." The procedure at the high court level is considered to be particularly streamlined, with some sources suggesting

that judicial resolution can be achieved within six months to a year. However, much still relies on the individual judge, and interviewees maintain that waiting for a judgment in Japan can still be "*long and tedious*."

The lack of modernity in the system is criticised by experienced sources: "*Everything is done on paper – they don't even accept e-mails*." It is generally thought that although the system would benefit from technological improvements, changes will not be seen in the near future.

Businesspeople suggest that the "*fees for litigation are not necessarily expensive.*" However, it is worth keeping in mind that "*costs don't usually follow the event*" when it comes to possible reimbursement, and each party is responsible for their own legal fees. Furthermore, translation costs should also be kept in mind as "*there is no real concession to the English language in the courts, which is not unreasonable, but you will need to translate all documentation into Japanese and the translation costs can be substantial so you need to account for them.*"

### Alternative Dispute Resolution

It has been suggested that even though Japan is not a particularly litigious jurisdiction, it is more common for cases to go to court than it is for them to be resolved using alternatives. "*ADR is not the usual route for companies or individuals*," an interviewee remarks.

Experienced businesspeople affirm that they would consider arbitration for complex commercial matters due to the lack of specialised courts in the traditional system. However, many suggest that international arbitration would be preferable. The JCAA (Japan Commercial Arbitration Association) is not considered to be a "*much-used forum*." It is thought that it "*lacks experience and there are not many arbitrators that have handled international commercial transactions*." Furthermore, one interviewee notes that "*the use of technical experts in arbitration is undeveloped*."

Mediation is incorporated into the system for family cases, but it has been observed that discretionary mediation is not often used in Japan, despite the presence of a court-annexed system. Sources suggest that Japanese companies will suggest it before going to court "*in order to maintain good business relationships.*" However, this attitude also means that direct negotiation and settlement between parties is a frequent occurrence, thereby rendering official mediation unnecessary.

Furthermore, it has been observed that judges have a tendency to press for settlement during the process in cases where they think it is appropriate. "*The judges act almost like mediators, so this option is basically built in to the system, rather than being separate to it*," businesspeople explain.

# Law & Practice

*Contributed by Nishimura & Asahi*

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# Law & Practice

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**Nishimura & Asahi** is one of Japan's premier full-service law firms, covering all aspects of domestic and international business and corporate activity. The firm provides assistance by formulating settlement strategies and providing first class representation in litigation and arbitration. The firm can provide advice on civil and commercial disputes, transnational dispute settlement, tax disputes, IP disputes, administrative disputes and specialised disputes.

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## General Information

### 1.1 Structure of the legal system

Japan has a unified national legal system, and the codes promulgated by the national Diet apply nationwide. The modern Japanese legal system was created at the end of the 19th century, as part of the new Meiji government's efforts to establish a modern government and society after the Meiji Restoration in 1868. It was greatly influenced by the legal system of Germany, which was the developed constitutional monarchy country at that time, and in part, by that of France. After World War II, it was also influenced by the US legal system during Japan's occupation by the United States.

Japan has a civil law system, and it comprises a series of comprehensive national codes of substantive, procedural and administrative law. Even though there is no strict *stare decisis* rule as recognised in common law jurisdictions, court precedents play an important role in filling in the gaps or clarifying the meaning of a statute. Court precedents, especially those of the Supreme Court and high courts, have an important influence on the decision-making of the courts that handle similar legal issues thereafter.

The Japanese civil procedural system, to which this chapter is primarily dedicated, is originally based on German civil procedural law, which is an inquisitorial model; however, it is also equipped with important characteristics of an adversarial 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 (the "CCP"), was enacted. The new CCP adopted an "issue-evidence management procedure," combined with an "intensive examination of witnesses/parties/experts system," which changed court practice dramatically and contributed to accelerated case trials. "Issue-evidence management procedure" as well as

an "intensive examination of witnesses/parties/expert system" are important features of the new CCP.

There is no distinction between the Japanese civil proceeding stages of pre-trial and trial. After filing an initial complaint, the court schedules the first hearing about six to eight weeks from the filing of the initial complaint. The defendant is expected to file an answer one week before the first hearing. 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," the process in which judges identify genuine issues that require the examination of witnesses/parties/experts. The explanation below in this chapter treats the "issue-evidence management procedure" in Japan as if it were a "pre-trial" procedure in foreign jurisdictions. The "issue-evidence management procedure" can be 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. As the formal plenary hearing is not suitable for substantial discussions because of its formal nature, preparatory hearings are preferentially used by judges in order to have substantial discussions with the parties.

After the issues have been clarified during the issue-evidence management procedure through these submissions of briefs and documentary evidence, the court holds a session (just one hearing in many cases) to conduct intensive examinations of witnesses/parties/experts. As the process of intensive examination of witnesses/parties/experts can be seen to be functionally similar to trials in a foreign legal system, the explanation below in this chapter treats this process as a "trial."

### 1.2 Structure of the courts

Japan has a unified court system, under the sole Supreme Court as the court of last instance. Under the Supreme Court, there are eight high courts in large cities (Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo and Takamatsu), 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 of which the value is no more than JPY1,400,000 are tried at summary courts in the first instance. There are 438 summary courts nationwide.

Family courts try family civil cases. Fifty family courts exist in the capital cities of each prefecture, as well as 203 branches and 77 sub-branches in other smaller cities and towns.

For civil claims, a three-tiered trial system is generally adopted. If the case commences at the district court (or a family court), then the losing party may appeal to the high court and then to the Supreme Court. If the case commences in a summary court, the losing party may appeal to the district court and then to the high court. In the latter case, if the case involves a constitutional issue, the losing party at the high court may file a special appeal to the Supreme Court, as the Supreme Court is the final court which may decide on the constitutionality of any governmental decision.

Formal plenary hearings (explained in **1.1 Structure of the legal system p.666**) in courts are open to the public. A court filing is also generally open to the public, but persons who

wish to have access to it must visit a court that maintains a court record, since they are not available on the internet, for example, as found in some foreign jurisdictions. The parties to the case, as well as those who show a *prima facie* evidence regarding interest in the case, may also request copies of the court filing (CCP, Art. 91(3)). Parties who establish that any part of the court filing contains important personal information or a trade secret may request a court to issue an order prohibiting any third party from inspecting or reproducing the court filing (CCP, Art. 92(1)(i) and (ii)). Not all judgments are published through a court website or official/private publications.

### 1.3 Costs

Regarding lawsuit costs, Japanese civil procedure does *not* follow the UK-style "costs follow the event" rule, which allows the prevailing party to seek recovery of its costs, including attorney's fees, from the losing party. The prevailing party is entitled to recover only limited expenses from the losing party, such as filing fees, daily allowance, lodging and travel expenses paid to witnesses/experts/interpreters, and remuneration paid to experts/interpreters, as provided by the Code of Civil Litigation Costs, Law No. 40 of 1971 (the "CCLC"). Courts render an award regarding the costs together with their judgments on the merits, but the actual expenses borne by each party are calculated by a court clerk upon motion by a party in accordance with the CCLC. Attorney's fees must be borne by each party, as the CCLC does not provide that attorney's fees are recoverable litigation costs.

### 1.4 Funding

No developed discussion exists in Japan regarding the permissibility of third-party funding. However, it should be noted that 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 acting as an intermediary between attorneys and clients, i.e. referring cases to attorneys to obtain compensation for his/her business activities, such a third party may be subject to criminal punishment (Attorney Act, Law No. 205 of 1949, Arts. 72 and 77(iii)).

Purely contingent fee arrangements were considered inappropriate by the bar until 2004, but they are now considered permissible. For litigation cases, many Japanese lawyers typically charge clients via an agreement combining a "retainer fee" upon engagement and a "success fee" upon the successful outcome of the case. Charging clients hourly is also used for litigation matters, especially among lawyers who do international work.

## Initiating a Lawsuit

### 2.1 Statute of Limitations

Under the conflict-of-law rules of Japan, time limitation issues arising from any applicable statute of limitations are considered to be an issue of substantive law (extinguishment of a substantive right), not procedural law (a prerequisite to filing a lawsuit). Therefore, the governing substantive law determines the applicable time limit for bringing a lawsuit. Even if a claim is instituted in a Japanese court, regulations regarding the time limit to bring a lawsuit in foreign jurisdictions may apply.

If Japanese substantive law is applicable to the case, the statute of limitations period for creditors' rights is generally ten years from the time when he/she can exercise the right (Civil Code, Law No. 89 of 1896 (the "CC"), Arts. 166(1) and 167(1)). If such a claim arises from

commercial transactions, a five-year statute of limitations period is generally applicable (Commercial Code, Law No. 48 of 1899 (the "CoC"), Art. 522). Shorter statute of limitation periods are applicable for claims in certain categories provided by the codes. For example, any claim regarding a person engaged in design, execution or supervision of construction work has a shorter, three-year statute of limitations period, accruing from the completion of the work (CC, Art. 170(ii)). Damages under tort claims also have a shorter, three-year statute of limitations period, running from the time the victim, or the victim's legal representative, comes to learn of the damage and the identity of the perpetrator, but not later than 20 years from the occurrence of the tortious act (CC, Art. 724). A party may toll (suspend the running of) the prescribed statute of limitations period for six months by sending a demand notice, if the claiming party institutes a lawsuit or other legal proceedings within six months from the demand notice (CC, Art. 153). Filing a conciliation at a court does not have the effect of tolling the prescribed period, unless the party files a lawsuit within one month from the date that the conciliation failed (CC, Art. 151). Further, a special rule exists for tolling a statute of limitation period where a conciliation proceeding is commenced within a certified ADR institution under the Act on Promotion of Use of Alternative Dispute Resolution, Law No. 151 of 2004 (the "ADR Act"), as explained in **Alternate dispute resolution p.679** below.

### 2.2 Filing

There are no prerequisites under the code of ethical rules for lawyers or civil codes to file a lawsuit, such as issuing a formal demand letter to an opposing party. However, it is typical practice to send a demand letter from a potential plaintiff to a potential defendant before filing a lawsuit, to show good-faith efforts to the court that the plaintiff tried to settle the matter before bringing the case to court.

Generally, there are no prerequisites for engaging in mediation; however, in some specific areas, such as divorce litigation and disputes regarding an increase or decrease in the amount of rent, relevant codes mandate the potential plaintiff to attempt mediation before filing a lawsuit (Code of Family Matter Procedure, Law No. 52 of 2011, Art. 257(1); Code of Civil Conciliation, Law No. 222 of 1951, Art. 24-2(1)).

### 2.3 Jurisdictional requirements for defendants

CCP regulates venue or jurisdictional requirements; therefore, the rules for these issues are uniform nationwide.

Regarding the issue of venue, i.e. allocation of the competence of courts within the country, it is a general rule that the plaintiff must file a lawsuit at the defendant's forum (CCP, Art. 4(1)). There are exceptions to this rule. For example, an action regarding property may be filed at the place of performance (CCP, Art. 5(i)). An action in tort may be filed at the place of the tort (CCP, Art. 5(ix)). The parties may agree in writing on the venue only for the court of first instance (CCP, Arts. 11(1) and (2)). If the plaintiff files a lawsuit at an improper court in terms of venue, the court may transfer the case to a proper court, without dismissing the lawsuit (CCP, Art. 16(1)).

Regarding the issue of international jurisdiction, i.e. allocation of the competence of courts between Japan and other countries, the rule is that the plaintiff must file a lawsuit in the defendant's forum (CCP, Art. 3-2(1)). Exceptions to this rule exist. However, as the defendants' burden to appear in the plaintiffs' forum is much harder than for domestic cases, the excep-

tions are more limited than those recognised regarding the issue of venue. For example, for actions to enforce the performance of contracts, or damage claims for non-performance of a contract, Japanese courts have jurisdiction over the defendant, if the place of performance provided in the contract is Japan, or the law chosen by the contract provides that the place of performance is Japan (CCP, Art. 3-3(i)). For actions in tort, Japanese courts have jurisdiction if the tort took place in Japan. However, Japanese courts will not have jurisdiction where the result of a wrongful act committed in a foreign country occurred in Japan and the occurrence of such a result in Japan was ordinarily unforeseeable (CCP, Art. 3-3(viii)). The parties may agree on the applicable jurisdiction of any particular country in writing (CCP, Arts. 3-7(1) and (2)), but if the agreed foreign court cannot legally, or actually, exercise jurisdiction, the party must not invoke that jurisdiction (CCP, Art. 3-7(4)). The effectiveness of the agreement on jurisdiction is restricted for agreements between corporations and consumers, and civil disputes relating to labour matters (CCP, Arts. 3-7(v) and (vi)). Even if any of the grounds provided by the CCP exist in Japan, the courts may deny Japanese jurisdiction, if exceptional circumstances exist, where equitable treatment between the parties is detrimentally affected, or a fair and speedy trial is prevented, when considering factors including the nature of the case, burden on the defendant, and the location of the relevant evidence (CCP, Art. 3-9). The function of this provision is similar to the principle of *forum non conveniens* in common law jurisdictions.

### 2.4 The initial complaint

A lawsuit is initiated by the plaintiff filing an initial complaint. The initial complaint must identify the parties by their names and addresses; therefore, a lawsuit against a defendant without specifying the identity of the defendant is generally not allowed. Further, the initial complaint must specify the claim sought against the defendant and the causes of action. The plaintiffs must also specify the amount, if the plaintiff makes a monetary claim against the defendant. Therefore, it is not permitted to file a non-quantified claim, if the claim is monetary. The plaintiff may split its claim and claim only part of the claim and defer the filing of the remaining part of the claim to save on the filing fee, but the prescribed statute of limitations period is not tolled for the remaining part of the claim. The causes of claims require specification of the legal ground that the claim invokes.

The initial complaint must be accompanied by the filing fee, and its amount is determined in accordance with the amount of the claim, calculated by a formula provided by the CCLC. For example, if the amount of the claim is JPY10,000,000, the filing fee is JPY50,000; if the amount of the claim is JPY100,000,000, the filing fee is JPY320,000; and if the amount of the claim is JPY1,000,000,000, the filing fee is JPY3,020,000.

The initial complaint must be accompanied by a power of attorney, and if the plaintiff and/or the defendant are a corporation, then a certificate of representative or a certificate of corporate registration (an equivalent certificate for a foreign corporation) is necessary to verify the representative of that corporation. The court may order that a power of attorney be notarised, but such an order is generally rare.

The initial complaint may be amended by filing a petition for the amendment of the claim, so long as the basis for the newly introduced claim has not been changed from the existing claim (CCP, Art. 143(1)).

### 2.5 Serving proceedings

The court clerk notifies the defendant of the lawsuit by service of process of the initial complaint and of any summons. Service of process of these documents is the responsibility of the court, not the plaintiffs. The service of process of these documents is generally made via postal mail, but the mailperson is deemed to be an assistant of the court clerk.

A party cannot be sued if the court does not have international jurisdiction over the case. However, such a party may be deemed to have agreed to the international jurisdiction of the court by appearing before the court without raising any objection (CCP, Art. 3-8).

### 2.6 Failure to respond to a lawsuit

Even if the defendant does not respond to a lawsuit, the court does not automatically render a judgment in favour of the plaintiff just because of this. If the defendant does not appear at the first hearing without submitting an answer, the court may deem that the cause of the action in the initial complaint is admitted by the defendant (CCP, Arts. 159(1) and (3)), and render a judgment, applying the law to the admitted facts. Such a rule regarding admission of facts due to failure to appear before the courts does not apply if the request for the defendant to appear before the court was by notice by publication (CCP, Art. 159(3)).

### 2.7 Class action

In Japan, there are no US-style class actions. In practice, plaintiffs bringing mass actions have been solicited through announcements on the internet, for example. However, 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, and this law is attracting public attention in Japan. Upon the implementation of the Collective Claims Act, organisations certified by the Prime Minister of Japan pursuant to the Consumer Contract Act, Law No. 61 of 2000 (a "Qualified Consumer Organisation") may bring a damages claim in relation to consumer contracts against business operators for recovery of loss incurred by consumers, with respect to (a) performance of a contract, (b) unjust enrichment, (c) a claim for damages due to breach of contract, (d) warranty against defects, and (e) 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. As the first step, the Qualified Consumer Organisation files a lawsuit to request confirmation of common issues among consumers, such as validity of contracts, 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, the Qualified Consumer Organisation then files a proceeding to start the second step, in which consumers may participate and request the trial of individual issues relating to each consumer and damages. Because of the limitation to the damages available in this proceeding, as explained above, the impact of implementation of the Collective Claims Act is likely to be limited. However, Japanese industries feel threatened by the implementation because the collection of small claims may enable consumers to file a lawsuit of a large aggregated amount against them, which was previously unlikely given the time and expense involved in comparison and the small size of an individual claim.

## Pretrial Proceedings

### 3.1 Dismissing the lawsuit

The defendant may argue that the lawsuit itself is procedurally defective and should be dismissed as improper, if the lawsuit does not fulfil legal requirements. Such requirements include, for example, that the parties do not lack legal competency, the parties chosen are suitable for the lawsuit, and the claim chosen is suitable to resolve the dispute. If the court finds that these requirements have not been met, the court must dismiss the claim as improper. For some of the requirements, such as venue or an international jurisdiction, if the defendant does not object to it in a timely manner, then the defect is remedied and the defendant cannot rely on such defect later to request a dismissal of the lawsuit (CCP, Arts. 3-8 and 12). Other than those requirements, the parties may move to dismiss a lawsuit before the conclusion of the case at any time. Judges are responsible for ensuring that the proceedings comply with procedural legal requirements, and therefore, judges must check the requirements *ex officio*. Therefore, theoretically speaking, the party who moves for dismissal for a lack of legal requirements does not bear the burden of proof, and the issue of the legal standard for such a motion does not exist. However, in reality, parties actively submit allegations and proof if a lack of legal requirements is disputed, as a matter of course.

### 3.2 Dispositive motions

Neither a motion to dismiss nor a motion for summary judgment, as in US court proceedings, exists in Japan. If the judge considers that no genuine issues exist which would require the examination of witnesses/parties/experts in the issue-evidence management procedure, the judge will conclude the proceeding and render a final judgment.

### 3.3 Joinder

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 parties (CCP, Art. 42), but the intervening party may not submit arguments which are inconsistent with the assisted parties (CCP, Art. 45(2)). If a party's position is legally affected as a result of a pending lawsuit, the third party can intervene as a co-litigant, and in this case, no limitation is imposed on the act of the intervener. The third party may request to intervene during the pendency of a lawsuit between the parties, up to the second appellate court. Such a request may be made orally or in writing.

If a party insists that his/her interest will be harmed by the outcome of the pending lawsuit, or the matter subject to the dispute between the current plaintiff and defendant belongs to him/her, then that party may make an independent joinder claim against the plaintiff and defendant, by instituting his/her own claims against the current plaintiff and/or the defendant (CCP, Art. 47(1)). The third party may make an independent joinder claim during the pendency of a lawsuit between the parties, but it is not allowed at the second appellate court (Ueda v. Ôtsuji, 23 Minshû 1532 (Sup. Ct., July 15, 1969)). Such a request may be made in writing, except in the summary courts where an oral request is permitted.

In practice, if a third party files a lawsuit relating to another pending lawsuit, the third party will request that the court consolidate his/her new lawsuit with the one pending (CCP, Art. 152(1)). The court trying the pending lawsuit will decide, at its discretion, whether the new one should be consolidated with it.

## Discovery

**(1) Document production order (DPO)**

In Japan, no extensive discovery process exists such as that in the United States. One party to the lawsuit may make a request for a DPO from an opposing party or a third party. In practice, judges are generally prudent in issuing the DPO; further, if they do, the scope of the documents required to be disclosed is limited. Therefore, the parties cannot expect much from the DPO system, but sometimes this system may have strategic value. In practice, judges urge the other parties to submit relevant documents voluntarily. The process regarding the DPO is administered by the judge. The exemptions to the duty for document production are explained in **4.1 Legal privilege p.674**.

Courts may decide not to examine documentary evidence if they deem it unnecessary (CCP, Art. 181(1)), and courts are generally strict when considering the necessity for issuing the DPO. The courts will decide whether to issue the DPO on the consideration of various factors on a case-by-case basis, such as the importance of the requested documents and the damage to the interests of the possessors of the documents.

A party may file an appeal to the higher court immediately if the party is dissatisfied with a decision as to whether there is an obligation to produce documents (see **4.1 Legal privilege p.647**). Such an appeal will suspend the trial and can prolong the case. On the other hand, a party cannot file an appeal to the higher court where a decision is made not to issue a DPO because it is unnecessary, even if a party is dissatisfied with the decision (Nishigaki v. Nippon Denshin Denwa K.K., 54 Minshû 1073 (Sup. Ct., Mar. 10, 2000)). This is the reason why in practice, judges are generally unwilling to decide the existence/non-existence of the obligations to produce documents immediately and instead prefer to urge the parties to voluntarily submit the requested documents or deny issuance of the DPO because it is unnecessary.

**(2) Interrogatory**

Before the lawsuit is instituted or while the lawsuit is pending, a party may enquire with the opponent to request any information regarding the matters necessary for preparing allegations or proof (CCP, Arts. 132-2 and 163). This system is analogous to the US interrogatory procedure, but in practice is not frequently used in Japan.

**(3) Deposition**

Depositions of witnesses/parties/experts are not available in Japan. The opposing party will only find out the testimonies that witnesses/parties will give before the judges, when the party who intends to rely on the testimonies of witnesses/parties submits these persons' written statements (see **5.1 Structure p.675**). Because the CCP provides that experts are appointed by the court (see **5.3 Expert testimony P.676**), no deposition is available to the (court-appointed) experts, as a matter of course.

**(4) Evidence preservation proceedings**

If the party establishes that any circumstances exist where it may be difficult to examine evidence in the future, including where the other party may spoil the evidence or an important witness is dying, then it may request the court to preserve the evidence immediately (CCP, Art. 234). This procedure is routinely used for preserving medical records in the hands of

doctors in medical malpractice cases, but it is also frequently used to preserve accounting records in commercial disputes, for example. This procedure is sometimes abused by a potential plaintiff to compel the other party to produce documents in its possession to the potential plaintiff. The order is granted for an *ex parte* hearing of the petitioner, and the opposing party is notified of such an order several hours before the judge executes the preservation order, in order to avoid another party spoiling the evidence, for example. To execute a preservation order of data efficiently and effectively where the data is stored on computer servers, it is important to arrange for an e-discovery vendor to provide assistance.

### 4.1 Legal privilege

It is recognised that legal privilege does not exist in Japan (see: JASRAC v. Japan, Court HP (Tokyo High Court, Sep. 12, 2013)). However, the CCP provides exemptions to the duty for document production, and such an exemption can function in a manner similar to legal privilege in foreign jurisdictions under certain circumstances.

The possessor of a document must not refuse to produce the document, if (a) as a party, the possessor has cited the document in his/her arguments in the action, (b) the party applying for the document production order (the "DPO") was otherwise entitled under the law to possess or inspect the document, (c) the document was executed for the benefit of the petitioner, or (d) the document was executed with respect to a legal relationship between the petitioner and the possessor (CCP, Art. 220(i)-(iii)).

In addition, the possessor of a document must not refuse to produce the document, if the document does not fall under any exemptions provided in the CCP (CCP, Art. 220(iv)). The exemptions referred to in the immediately preceding sentence are as follows: (i) documents containing information with respect to which the possessor would have the right to refuse to testify, as self-incriminating or incriminating to one's family; (ii) documents containing a secret in relation to a public officer's duties; (iii) documents containing professional secrets, including documents obtained by lawyers, registered foreign lawyers, patent attorneys, criminal defence attorneys or doctors through performance of their duties; (iv) documents containing technical secrets or secrets useful for an occupation; (v) documents held by the possessor exclusively for his/her own use; and (vi) documents relating to criminal proceedings or juvenile delinquency proceedings (CCP, Art. 220(iv)(a) through (e)).

The exemptions under (iii) above that provide for documents possessed by lawyers, for example, are considered to exist for the benefit of their clients. Therefore, if a client waives his/her interests, for example, the lawyer cannot rely on the exemption in asserting their own interests.

No work product doctrine exists in Japan (see JASRAC). However, an exemption of the DPO, which is a document solely for personal use explained in (v) above, may be invoked in a similar situation where the party would like to invoke the work product doctrine where it is available.

There is no distinction in the CCP between external and in-house counsel in terms of this treatment.

## Trials

### 5.1 Structure

As explained in **1.1 Structure of the legal system p.666**, no distinction between a pre-trial and a trial exists in Japan. The below is an explanation of the process of the examination of witnesses/parties/experts before the judges.

After the issues are identified through exchanges of briefs and documentary evidence in the issue-evidence management procedure, examinations of witnesses/parties/experts are conducted intensively before the judges in the following hearing(s).

Before the examination of the witnesses/parties, the parties are expected to prepare a written statement of their own witnesses and himself/herself if possible, and submit them to the court and the opposing party, for the purpose of advising on statements they anticipate will be made at the hearing. The opposing party can prepare for cross-examination in advance by receiving such a written statement. The parties can shorten the direct examination as well.

At the hearing, counsel mainly conduct the examinations rather than the judges. Therefore, as explained in **1.1 Structure of the legal system p.666**, the examination of witnesses/parties looks similar to the practice of the adversarial system, rather than that of the inquisitorial system, in this respect. For the witness/parties examinations, the party who called the witness/parties first conducts a direct examination, and then the opposing party conducts a cross-examination. Then a re-direct examination is allowed. A judge may intervene by injecting questions into the examinations by the parties, and he/she may supplement questions at the end of the examinations.

A word-for-word transcript is generally prepared for the examination of the witness/party, by translating the sound recording or stenographer.

The method of examination of experts is explained below.

No jury trial is available for civil cases.

### 5.2 Evidence

There is no strict rule governing admissibility of evidence in Japan in civil cases. Therefore, almost any statement, document and other tangible object may be admissible as evidence. Hearsay evidence is admitted as evidence. The only exception to this rule is the admissibility of evidence obtained through an illegal method. Some lower court decisions have allowed the admissibility of evidence, even if such evidence is illegally obtained, unless the court finds that the means and manner by which the evidence was taken were "flagrantly antisocial" (e.g. Nihon Eiga PR K.K. v. SS Seiyaku K.K., 867 Hanrei jihô 60 (Tokyo High Ct., July 15, 1977)). Under this standard, a secret recording, for example, is generally admissible as evidence.

The treatment of documentary evidence in foreign languages is also important, especially in cross-border litigation. The Court Law provides that the language used in a court proceeding be Japanese (Court Law, Art. 74). If documentary evidence that a party would like to request a court examine is in a language other than Japanese, the party must translate such parts into Japanese and attach the translation to the documentary evidence (Rules of Civil Procedure,

Supreme Court Rule No. 5 of 1996, Art. 138(1)). This translation requirement is frequently burdensome for litigants in cross-border litigation in Japan.

### 5.3 Expert testimony

The CCP adopts an approach where the court appoints an expert who will assist the judges in concluding the case (CCP, Art. 213). The judges appoint an expert at the party's request, or *ex officio*. The expert first provides his/her opinion in writing and is then examined orally before the judges and parties at the hearing.

For examinations of experts, overly hostile cross-examinations have made competent experts hesitant to assume responsibility as court-appointed experts, and the number of competent experts who cooperate with court proceedings has decreased. To address this problem, the method of examination of experts in the CCP was modified in 2003. Under the revised code, the expert first submits a written report, and the judge then asks supplemental questions to the expert. Thereafter, both parties are allowed to impose questions on the expert. It was expected that the change of the order of examination would make the process of examination less controversial to experts.

In reality, it is also regular practice for parties to find an expert who will support their view, and such a privately appointed expert submits his/her expert opinion in writing to the court as documentary evidence; thereafter, the parties request that the expert be examined orally before the court. Such a privately appointed expert is not the "expert" provided in the CCP, as he/she is not appointed by the court. Nevertheless, such a privately appointed expert also plays an important role especially in complex and specialised lawsuits. The method of examination of a privately appointed expert follows the rules of examination of the witnesses explained in **5.1 Structure p.675**.

No strict regulation exists regarding the admissibility of statements for the opinions of a court-appointed expert or a privately appointed expert. Therefore, even though the credibility of experts may be challenged by parties, no foundation is necessary to admit such expert opinions as evidence.

In 2004, the CCP was further revised to introduce an expert commissioner, which enables the court to receive assistance from experts in the issue-evidence management procedure. The expert commissioner is not expected to provide a conclusive view on the disputed issues; rather, he/she is expected to assist the courts to clarify issues and evidence only.

## Settlement

### 6.1 Court approval

A settlement concludes the lawsuit without a judgment. If a court settlement is entered in the court record, a certified copy of the settlement terms and conditions has the same legal effect as that of a final judgment, which is enforceable against the opposing party. Though the court does not review the appropriateness of the settlement in depth, a settlement that is illegal or contrary to public order or morals will not be allowed before the judges. If the subject of the settlement is an interest that the parties cannot dispose of freely, then settlement is not allowed. A non-party to the litigation may be a party to the settlement as an interested party.

### 6.2 Confidentiality

The settlement conditions are recorded in the court record and generally anybody can see them, unless the party obtains a court order to prohibit it in accordance with the proceeding explained in **1.2 Structure of the courts p.667**. The parties may also agree to settlement outside the court proceeding, if the parties do not want to disclose their settlement terms and conditions to any third party, and the plaintiffs withdraw the lawsuit with the defendant's consent after the agreement.

## Damages & Judgment

### 7.1 Rules relating to damages

There is a rule that only monetary damages should be awarded in the case of a breach of contract, unless otherwise agreed (CC, Art. 417). The same applies for damages for tort. However, for defamation claims, an appropriate disposition to restore reputation, such as publishing an apology in major newspapers, is allowed (CC, Art. 723). Punitive damages are not available in Japan. Furthermore, even if they are awarded by a foreign court, the award will not be enforced in Japan as such enforcement would be a violation of public policy (Northcon I, Oregon Partnership v. Mansei Kôgyô Co., Ltd., 51 Minshû 2573 (Sup. Ct. Jul. 11, 1997)). There is no rule limiting maximum damages recoverable. The parties may agree to liquidated damages under Japanese law for the purpose of enabling them to easily establish the amount of damages. However, if the claiming party partially has contributed to the loss suffered, the principle of contributory negligence will work to reduce the amount of recoverable damages to the claimant (Komuro v. Sugiyama Kensetsu K.K., 172 Saibanshû minji 379 (Sup. Ct., Apr. 21, 1994)). If it is extremely difficult for the party to prove the amount of damages due to their nature, judges may determine a proper amount of damages at their discretion (CCP Art. 248).

### 7.2 The collection of interest

Substantive law, not procedural law, governs the interest of the claim. Regardless of whether it is before or after the judgment, a party is entitled to receive the interest provided by law, or agreed between the parties. Interest is included in the claim for lending moneys between merchants, or a merchant's making an advance payment within its business (CoC, Arts. 513(1) and (2)). 6% is the statutory interest rate for commercial transactions, unless otherwise agreed by the parties (CoC, Art. 514). 5% is the statutory interest rate for other cases (CC, Art. 404).

### 7.3 Non-monetary relief

Injunctive relief can be granted when a party has agreed to request certain actions from another party in certain circumstances. For example, injunctive relief is granted if a former employee starts working at a competitor of the former employer, by violating the prohibition of working for a competitor for a certain period of time after he/she leaves the company. Further, injunctive relief can be granted if the law grants such a right to a party. For example, Patent Law provides such injunctive relief for a patent infringer (Patent Law, Law No. 121 of 1959, Art. 100(1)). If a petitioner provides *prima facie* evidence that the order is necessary in order to avoid any substantial detriment or imminent danger occurring to the petitioner, a provisional order of injunctive relief may be issued by an expedited proceeding against the respondent, in most cases, after a hearing for both parties and ordering the petitioner to

provide bonds to secure potential damages to the respondent in case the provisional order is revoked later (Civil Provisional Remedy Code, Law No. 91 of 1989, Arts. 14(1) and 23(2)).

### 7.4 Enforcement procedure

In order to enforce a judgment from a foreign country, it is necessary to obtain an execution judgment from a competent district court in Japan. The petitioner must establish that the judgment is final (Code of Civil Execution, Law No. 4, 1979 (the "CCE"), Art. 24(3)). Further, the petitioner must also establish that the judgment satisfies the following requirements: (a) the international jurisdiction of the court which has rendered the judgment exists in accordance with the rules of the international jurisdiction of Japan; (b) the losing party has received service of summons or orders required to commence the proceedings (except for service by notice by publication), or has responded in the lawsuit even if he/she has not received such service; (c) the substance of the judgment and the proceeding of the lawsuit is not contrary to the public order or morals of Japan; and (d) reciprocity exists (CCE, Art. 24(3); CCP, Art. 118). The requirement (a) follows the rules explained in **2.3 Jurisdictional requirements for defendants p.669**. The court issuing an execution judgment must not reinvestigate whether the foreign judicial decision was appropriate (CCE, Art. 24(2)).

## Appeal

### 8.1 Grounds for appeal

If a party loses totally or in part, the party is allowed to make an appeal to the higher court. The party who prevailed in the lawsuit cannot appeal, even if he/she is dissatisfied with the reasoning of the judgment.

**First appeal (kôso-appeal)**

The first appeal, called a *kôso*-appeal, is an appeal from the first instance court to the second instance court. As explained in **1.2 Structure of the courts p.667**, if the case commences at the district court or family court, the first appeal is handled by the high court. Furthermore, if it commences at the summary court, the first appeal is handled by the district court. The court of second instance tries cases based on all allegations and evidence submitted to the first instance court and the second instance court. Therefore, the court of second instance is called a "continuous examination" system, as opposed to the adjudication *de novo* (adjudication of cases anew as if no trial had occurred in the lower court) or *ex post facto* examination (only materials presented to the lower court are reviewed). The court of second instance determines issues of both fact and law. The filing fee for the first appeal is 1.5 times that for the court of first instance.

**3. Second appeal (jôkoku-appeal)**

The second appeal, called a *jôkoku*-appeal, is an appeal from the second instance court to the court of last instance. As explained in **1.2 Structure of the courts p.667**, the second appeal is handled by the Supreme Court, if the original court is a high court. If the original court is a district court then the appeal is handled by the high court. The court of second appeal determines issues of law only. The filing fee for the second appeal is twice that for the court of first instance.

The party is allowed a second appeal as of right, if the original judgment contains errors of interpretation of the Constitution or grave procedural errors provided in the CCP (CCP, Arts.

312(1) and (2)). If the second appeal is made to a high court, the high court may accept it if there is a breach of law that apparently affects the judgment (CCP, Art. 312(3)).

If the second appeal court is a Supreme Court, the party is allowed to make a discretionary appeal where the original judgment contains important legal issues, such as a discrepancy when compared to precedents of the Supreme Court (or of the high courts if no Supreme Court precedent exists) (CCP, Art. 318(1)). This system was introduced at the time when the new CCP was enacted in 1996 and was modelled on US *certiorari*.

As explained above, the court of second appeal handles legal issues only, and the court cannot revoke the lower court's judgment because of erroneous fact-finding. However, if the error in the fact-finding by the lower court is extraordinarily grave, the court of second appeal can consider that issue a matter of law, under the theory that "the canons of logic or of common experience" (the rules of logic induced from ordinary human experience and relied upon in determining facts) can be treated as law, and that the lower courts applied such canons erroneously (e.g. Numata v. Satô, 15 Minshû 2005 (Sup. Ct., Aug. 8, 1961)).

### 8.2 Time limits and triggering events

The deadline for an appeal is within two weeks of the service of process of the certified copy of the judgment on the losing party.

## Alternative Dispute Resolution

The Arbitration Law, Law No. 138 of 2003, is the law governing arbitration in Japan. The Arbitration Law generally follows the UNCITRAL Model Law on International Commercial Arbitration, with some exceptions. Japan is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention); therefore, it follows this Convention regarding the requirement and procedure for the recognition or enforcement of foreign arbitral awards, if this Convention is applicable. Japan declared that it will apply the Convention only to the recognition and enforcement of awards made in the territory of another contracting state. For arbitration awards to which any conventions, including the New York Convention, are not applicable, the Arbitration Law applies to their enforcement; further, the petitioner must obtain an enforcement ruling from a competent district court in accordance with the Arbitration Law (Arbitration Law, Arts. 45(1), 46(1) and (4)).

Arbitration agreements between consumers and corporations are given limited effect, and arbitration thereunder must follow a special proceeding (Arbitration Law, Supplementary Provision, Art. 3). Arbitration agreements relating to labour matters are void (Arbitration Law, Supplementary Provision, Art. 4).

### 9.1 Relevant law

Reflecting the widely recognised litigation-averse characteristics of Japanese nationals, and practical difficulties in resorting to lawsuits in terms of costs and time, the ADR system has been traditionally important to the resolution of disputes in Japan. In particular, court-annexed conciliation is widely used, especially by summary courts. Conciliation is typically a proceeding in which a judge and two non-judge conciliators facilitate an amicable settlement between the parties.

Other than court-annexed conciliation, the ADR Act was enacted in 2004 to facilitate the use of the ADR systems, and it has provided some measures. For example, if a settlement is not reached during the conciliation proceedings at the certified ADR institution, the lawsuit is deemed to have been filed at the time of the request for dispute resolution at the certified ADR institution, so long as the lawsuit is filed within one month from the failure of the settlement, in applying the prescription period (ADR Act, Art. 25(1)). As of March 2014, 128 ADR institutions have obtained certification and provide ADR services. ADR institutions that have not obtained certification also play an important role in ADR.

A relatively recent development regarding ADR in Japan was the introduction of a new ADR system in 2010, which mandates that financial institutions use ADR administered by organisations designated by the Financial Services Agency for disputes with those financial institutions' customers. Further, a new ADR system called the ADR Centre for Damages from Nuclear Accidents was introduced in 2011, to resolve an enormous number of claims against Tokyo Electric Power Company, Inc. (TEPCO) resulting from the nuclear accidents at the Fukushima First and Second Nuclear Power Plants, caused by a massive earthquake that hit northeastern Japan on March 11, 2011.

Arbitration is not a popular method of dispute resolution in Japan, compared to conciliation or litigation in courts. One of the reasons is that Japanese court judges are believed to be competent and impartial. As a matter of course, in certain transactions, an arbitration clause is inserted into the agreement for expedited and confidential dispute resolution; however, Japan is not frequently chosen as the seat of international arbitration. The number of newly accepted arbitration cases at the Japan Commercial Arbitration Association (JCAA) in 2010 was 25; in 2011, it was 22; and in 2012, it was 15.