

Appeals

Contributing editors

Mark A Perry and Perlette Michèle Jura



2018

GETTING THE
DEAL THROUGH

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Mark A Perry and Perlette Michèle Jura
Gibson, Dunn & Crutcher LLP

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Preface

Appeals 2018

Second edition

Getting the Deal Through is delighted to publish the second edition of *Appeals*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria and Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Mark A Perry and Perlette Michèle Jura of Gibson Dunn & Crutcher LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
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Japan

Hironobu Tsukamoto and Eriko Ogata

Nagashima Ohno & Tsunematsu

1 Outline and explain the general structure of your country's court system as it relates to the commercial appellate process.

Japan adopts a three-tiered judicial system. Generally, concerning a commercial dispute, the first-instance court is a district court and a first-level appeal is filed with a high court; the final (second level) appeal is filed with the Supreme Court. For small claims, the first-instance court is a summary court, the first appeal is filed with a district court and the final (second-level) appeal is filed with a high court. In this chapter, the appeal process is explained based on the assumption that a lawsuit is initiated at the district court level, which is common for commercial disputes of substantial value.

For the purposes of jurisdiction, Japan is divided into eight regions; a high court sits in each region and branches are attached to some high courts. A high court hears appeals from district courts in the region in which it is located. As an exception, the Intellectual Property High Court, which is a part of the Tokyo High Court, hears appeals on intellectual property-related matters from all district courts in Japan (see question 5). An appeal to a high court is handled by a panel of three judges.

Parties dissatisfied with a high court's decision may make a final appeal against the same to the Supreme Court if the relevant statutory requirements are satisfied (see question 16). The Supreme Court does not examine the high court's fact-findings, and hears only questions of law, which indicates that the Supreme Court's important role is to unify the interpretation of law. At the Supreme Court, usually a petty bench consisting of five judges hearing matters, but under certain circumstances, such as where the Supreme Court decides whether a law, ordinance, order, regulation or disposition complies with the Constitution, cases are assigned to the Grand Bench, which consists of 15 judges. The independence of the judiciary is guaranteed by the constitution, in which it is stated that 'all judicial power is vested in the Supreme Court and in such inferior courts as are established by law' and 'all judges shall be independent in the exercise of their conscience, and shall be bound only by this Constitution and the laws.' The Supreme Court's judges are appointed by the Cabinet, and the Chief Judge of the Supreme Court is appointed by the Emperor as designated by the Cabinet. The appointment of the judges of the Supreme Court is subject to review by the electorate every 10 years.

The proceedings of civil matters are governed by the Code of Civil Procedure (CCP) and the Rules of Civil Procedure (RCP). Rules for proceedings concerning administrative matters, such as actions seeking the revocation of an administrative disposition or actions seeking the declaration of validity or invalidity of an administrative disposition, fall under the purview of the Administrative Case Litigation Act.

2 Are there appellate courts that hear only civil matters?

No. All appellate courts hear both civil and criminal matters, but each high court is divided into two divisions (ie, a civil division and criminal division). The civil division of the high court handles appeals for civil matters. As a special branch of the Tokyo High Court, there is the Intellectual Property High Court, which only hears appeals for intellectual property-related matters (see question 5).

3 Are appeals from administrative tribunals handled in the same way as appeals from trial courts?

A court specifically for administrative matters does not exist in Japan. In principle, at first instance, administrative matters are adjudicated in a district court, and an appeal against a district court's judgment is heard in the civil division of the high court. The proceedings for administrative matters are governed by the Administrative Case Litigation Act, which is a special provision of the CCP.

In addition, there are unique proceedings for actions to quash decisions of quasi-judicial agencies. For example, the Tokyo District Court has exclusive jurisdiction over actions for judicial review of cease-and-desist orders issued by the Japan Fair Trade Commission (article 85 of the Anti-Monopoly Act). The Tokyo High Court has original jurisdiction over actions to quash decisions of the Japan Marine Accident Tribunal (article 44 of the Act on Marine Accident Inquiry). The Intellectual Property High Court has exclusive jurisdiction over any actions against decisions made by the Japan Patent Office (JPO) (article 178(1) of the Patent Law and article 2(ii) of the Act for establishing the Intellectual High Court).

4 Is there a separate appellate bar or other requirement for attorneys to be admitted before appellate courts?

No. There are no particular requirements. All attorneys-at-law are allowed to appear before appellate courts (including the Supreme Court).

5 If separate jurisdictions exist for particular territorial subdivisions or subject matters, explain their main differences as to commercial appeals.

First-level appeal (appeal to a high court)

As explained in the answer to question 1, in principle, a high court hears commercial appeals against judgments of district courts located in its territorial subdivision; however, there are the following several exceptions:

- the Tokyo High Court has original jurisdiction over actions to quash decisions of quasi-judicial agencies such as the Japan Marine Accident Tribunal (article 44 of the Act on Marine Accident Inquiry);
- the Intellectual Property High Court has exclusive jurisdiction over any actions against decisions made by the JPO (article 178(1) of the Patent Law and article 2(ii) of the Act for establishing the Intellectual High Court); and
- the Intellectual Property High Court has exclusive jurisdiction over appeals against a district court's final judgment concerning intellectual property rights such as patent or trademark rights (article 6(3) of the CCP).

Different from an ordinary high court, the Intellectual Property High Court is empowered to conduct court proceedings through a panel of five judges (a grand panel) for appeal cases relating to such matters as patents and suits against appeals or trial decisions made by the JPO related to a patent or utility model.

Second-level appeal (appeal to the Supreme Court)

The Supreme Court handles all final appeals against high court judgments. It examines certain limited cases that involve constitutional or important legal issues (see question 16 for details).

6 What are the deadlines for filing an appeal in a commercial matter?**First-level appeal (appeal to high court)**

An appeal against a first-instance court's judgment is required to be filed within 14 days after the appellant is served with the written judgment (article 285 of the CCP). As an exception, even after the right to appeal is extinguished, an appellee may file an incidental appeal until the court declares that oral arguments are concluded (article 293 of the CCP).

Final appeal (appeal to the Supreme Court)

A final appeal against a high court's judgment is required to be filed within 14 days after the appellant is served with the written judgment from the high court (articles 285 and 313 of the CCP). As with the first-level appeal, an appellee may file an incidental final appeal (articles 293 and 313 of the CCP).

7 What are the key steps a litigant must take to commence an appeal?**First-level appeal (appeal to a high court)**

An appellant must file a petition for appeal at the first-instance court (article 286(1) of the CCP). As the appellant need not describe the grounds for the appeal in the petition, it could be a simple, short document in which the appellant explicitly indicates its intent of appeal. If, however, the petition does not contain the grounds for the appeal, the appellant is required to submit a written statement of the grounds for the appeal to the second-instance court, as explained in question 18. The appellate court that receives the case record from the first-instance court serves the notice on the other party.

Final appeal (appeal to the Supreme Court)

An appellant is required to file a petition for final appeal or a petition for acceptance of final appeal with the high court within 14 days from the date on which the judgment was served. As with the first appeal, the petition need not contain grounds for final appeal. If the petition *prima facie* conforms to the requirements, the high court serves the notice on the respondent.

If the petition for final appeal does not contain the grounds, the appellant is required to submit a written statement of the grounds for final appeal to the high court (court of prior instance) within 50 days from the date on which the appellant is served with notice of filing of the final appeal issued by the final appellate court (article 194 of the RCP). The alleged grounds for final appeal are required to be sufficiently addressed in the petition or the written statement itself (merely referring to the brief submitted at the lower court is not regarded as sufficiently addressing the allegations for the grounds of final appeal), so that the Supreme Court may determine the case by only reviewing the briefs. If an appellant fails to meet this deadline, the high court may immediately dismiss the petition for final appeal or acceptance of final appeal (articles 316(1) and 318(5) of the CCP).

8 How is the documentation for appeals prepared?**First-level appeal (appeal to a high court)**

The district court in which petition for appeal is filed examines whether the requirements for an appeal are *prima facie* satisfied. If a defect in the petition for appeal is found, and it is obvious that such defect cannot be rectified, the district court will dismiss the appeal. After such review, if the requirements are met, however, a court clerk of the first-instance court compiles the case record of the first-instance court and forwards the same to a court clerk of the appellate court (article 174 of the RCP). The parties are not required to prepare or submit the record of the first-instance court.

Final appeal (appeal to the Supreme Court)

The high court in which the petition for final appeal or a petition for acceptance of final appeal is filed examines the petition as to whether it complies with formality requirements as set forth in articles 190, 191

and 199(1) of the RCP. Further, it examines whether legal grounds for final appeals are alleged.

Once the review is completed, the high court complies and forwards the case record to the Supreme Court (articles 197(1) and 199(2) of the RCP).

9 In commercial matters, may litigants appeal by right or is appellate review discretionary?**First-level appeal (appeal to a high court)**

Litigants are entitled to make a first-level appeal (to a second-instance court, which is a high court, in principle) by right. The grounds for appeal are not limited and the appellant is allowed to avert any error in the judgment in either finding of facts or the application of law as grounds for the appeal.

Final appeal (appeal to the Supreme Court)

In contrast, regarding a final appeal to the Supreme Court, the CCP provides limited grounds for a final appeal by right (see question 16). If there are no grounds for a final appeal by right, litigants are required to file a petition for acceptance of a final appeal, and the Supreme Court finds whether to accept the same.

10 Can litigants appeal any ruling from a trial court, or are they limited to appealing only final judgments?

Litigants can appeal against a court's ruling that has dismissed a petition concerning court proceedings, without oral argument. For example, an appeal against a court's order to dismiss a petition for an order to produce documents is frequently filed.

11 In a typical commercial dispute, must a litigant post a bond or provide security to appeal a trial court decision?

A litigant is not generally required to post a bond or provide security for just filing an appeal against a decision but just required to pay filing fees in accordance with the Act on Costs of Civil Procedure (see articles 137(1) and 288 of the CCP) as explained below; however, where the losing party applies for a stay of a tentative execution order by first- or second-instance court, such losing party is required to provide security, the amount of which is usually equivalent to the amount of a claim granted by the judgment of prior instance.

Filing fees

In filing an appeal, an appellant is required to pay fees for filing such appeal in accordance with the Act on Costs of Civil Procedure (see articles 137(1) and 288 of the CCP). The amount of such fees varies depending on the quantum of claims. As an exception, an indigent person, who is defined as a person who lacks the financial resources to pay the expenses, can file a petition for judicial aid to grant a grace period for payment of fees and costs. Judicial aid is granted where it is determined that there is a likelihood that such person might win the case.

Court costs

In a case where a plaintiff of first instance does not have any residence, office or place of business within Japan, upon a petition from a defendant of the first instance, the court must order the plaintiff to provide security for court costs (eg, travel expenses, daily allowances for witnesses, interpreters) (article 75 of the CCP) and if the defendant fails to provide security within the designated period, the court may dismiss the action (article 78 of the CCP). At an appellate stage, if it is expected that the security provided by the plaintiff at the first instance would not cover the costs for appellate proceedings, a defendant of the first instance may submit a petition seeking for additional security for court costs to cover the future proceedings.

12 Are there special provisions for interlocutory appeals?

Yes. The proceedings related to interim orders are stipulated in the Civil Provisional Remedies Act (CPRA).

Under the CPRA, there are two types of appeals against interim orders:

- an objection to a provisional remedy (article 26 of the CPRA); and
- a petition to revoke a provisional remedy (articles 37 to 39 of the CPRA).

An appeal against a provisional remedy may be filed against a judicial decision on the filing of an objection to a provisional remedy or a petition to revoke a provisional remedy within two weeks from the date on which the judicial decision was served.

13 Are there special rules relating to injunctions or stays, whether entered in the trial court or on appeal?

No. There are no special rules relating to injunctions or stays. If the court considers it appropriate, it may grant tentative execution for injunctions or stays, as well, even if the losing party files an appeal. Execution of injunctions or stays is undertaken by means of indirect compulsion (ie, a court orders the losing party to pay a certain amount per day until it complies with the court's order).

14 If a litigant files an appeal in a commercial dispute, does it stay enforcement of the trial court judgment?

If a judgment of a first- or second-instance court allows provisional execution, an appeal does not automatically stay the enforcement process. The losing party is required to separately file a petition for stay of execution immediately after the judgment is rendered.

15 On an appeal from a commercial dispute, may the first-level appellate court consider the facts and law anew, or is its power to review limited?

Proceedings at the second instance are deemed to be continued from those at the first instance. In other words, the court of second instance may undertake proceedings for arranging issues and evidence, examining evidence and finding facts. The first-level appellate court is empowered to examine any facts (including new evidence) and review the application of law, to the extent of the appellant's claim for amendment of the judgment at the first instance.

In contrast, proceedings in the final appeal are *ex post facto* review of a lower court's proceedings. The Supreme Court only reviews the proceedings and the judgment of lower courts *ex post facto*. It only examines issues of law based on facts as found by the judgment of the first-appeal court.

16 If a party is dissatisfied with the outcome of the first-level appeal, is further appeal possible?

A final appeal by right

A final appeal may be filed on the basis that a judgment misinterprets the Constitution or on the basis of a breach of the Constitution (article 312(1) of the CCP). A final appeal may also be filed on the basis of any of the following grounds:

- the court that rendered the judgment was not constituted in accordance with relevant laws;
- a judge who was precluded from issuing the judgment under any Acts participated in making the judgment;
- the judgment is handed down in violation of the provisions concerning exclusive jurisdiction;
- the judgment was made in the absence of the authority of statutory representation, authority of representation in a suit or the delegation of powers necessary for performing procedural acts;
- the judgment was made in violation of the provision on open court proceedings; or
- the judgment is groundless, or the grounds of the judgment are inconsistent.

A petition for acceptance of a final appeal (article 318(1) of the CCP)

A party may file a petition for acceptance of a final appeal if:

- the judgment at the prior instance contains a determination that is inconsistent with precedents rendered by the Supreme Court; or
- the judgment at the prior instance is found to involve material matters concerning the construction of laws and regulation. If the Supreme Court finds the grounds to exist, it may accept a final appeal by order.

The Supreme Court does not have the power to re-examine the facts and it can only review the law of the case. If the Supreme Court finds that further examination of the facts is required for a final judgment, it may reverse and remand the high court's decision.

17 How long do appeals typically take from application to appeal to a final decision?

For a first-level appeal, it typically takes six to 12 months from application to appeal to a final decision; however, it may take longer than 12 months for complex cases.

For a final appeal, most cases are completed within approximately six to 12 months. If the Supreme Court decides to hold a court hearing and review the case, it may take approximately two to three years.

18 What is the briefing and argument process like in a typical commercial appeal?

First-level appeal (appeal to high court)

Within 50 days after filing a petition of appeal, an appellant is required to file reasons for appeal (article 182 of the RCP). In response, an appellee files an answer by a certain date designated by the court, which is usually one to two weeks before the court hearing. Soon after the answer is filed, a court hearing is held (although there are no statutory limits on the number of court hearings that may be held, in many cases, only one or two hearings are held at the high court). A party may be allowed to submit a supplemental brief.

Final appeal (appeal to the Supreme Court)

After a petition for final appeal or a petition to accept a final appeal is filed, the court serves a written notice of the filing of final appeal on the parties (article 189(1) of the RCP). Within 50 days after the said written notice is served, an appellant is required to file a reason for final appeal (article 194 of the RCP). The court may order an appellee to file a written answer (article 201 of the RCP). In practice, such order is issued where the Supreme Court decides to hear arguments from the parties.

19 Are appeals limited to the evidentiary record that was before the trial court, or can new evidence be introduced on appeal?

At a high court (ie, first-level appeal), parties are allowed to adduce new evidence (both documentary and oral) and the court decides whether it is necessary to examine this evidence, unless it is deemed that the party belatedly submits new evidence wilfully or by gross negligence and adduces such evidence will delay the conclusion of the suit. In practice, adducing documentary evidence is generally allowed, while adducing oral evidence at the high court is permitted in limited circumstances. In practice, concerning witness examinations, in principle, re-examination of a witness whose evidence was taken at the district court is not allowed and examination of a new witness is not allowed, unless the court finds that the evidence that could be potentially given by such new witness may alter the district court's decision.

At the Supreme Court (ie, final appeal), new evidence may not be adduced (article 321 of the CCP).

20 If litigants uncover new evidence of wrongdoing that they believe altered the outcome of a trial court judgment, can they introduce this evidence on appeal?

As explained in question 19, while at the high court litigants can introduce new evidence (including evidence of wrongdoing), at the Supreme Court, submitting new evidence is not allowed.

However, under exceptional circumstances, where, for example, it is uncovered that a piece of documentary evidence that was crucial for the court coming to its decision was forged or altered or that a witness gave false testimony, the parties may file an action for retrial against a final and binding judgment (article 338(1) of the CCP).

21 May parties raise new legal arguments on appeal?

Yes. Parties may raise new legal arguments on appeal to the extent that it relates to the judgment of prior instance of which either party seeks modification (articles 296 and 313 of the CCP); however, if a party belatedly submits new allegations wilfully or by gross negligence, the court, on finding that such allegations will delay the conclusion of the suit, may make an order of dismissal, either pursuant to a petition or of its own accord (article 157(1) of the CCP).

22 What are the rules regarding attorneys' fees and costs on appeal?

In principle, each party bears its own attorney's fees, provided, however, that in a tort matter the court may order a tortfeasor to pay

reasonable attorney fees incurred by victims as a part of the damages caused by the tortious act.

Regarding court costs, in its judgment, the court usually orders the losing party to bear the same.

23 Can parties enter into a settlement agreement to vacate the trial court judgment after an appeal has been taken?

Yes. If the court considers it appropriate, the judge often encourages the parties to settle the case, and acts as a mediator at the court. If parties reach an agreement, they enter into an in-court settlement agreement, which has a same effect as a final binding judgment.

24 Are there any limits on settlement once an appeal has been taken?

No. Parties may settle any time until a final judgment is rendered. In addition, the court may attempt to arrange a settlement irrespective of the stage to which the suit has progressed (article 89 of the CCP).

25 May third parties fund appeals?

Litigation funding is not common in Japan and there is little discussion of it. Theoretically, while there is a debate as to whether third-party funding is appropriate from an ethical point of view, there are no laws or regulations that directly prohibit or regulate litigation funding.

26 If litigation funding is permitted in an appeal, must funding sources be disclosed to the court or other parties to the litigation?

As mentioned in question 25, since there are no rules regarding litigation funding, the disclosure of funding sources is not explicitly required under the CCP or RCP.

27 Must appellate courts in your country write decisions explaining their rulings? Can the courts designate the precedential effect of their decisions?

Yes. Appellate courts are required to write decisions explaining their rulings. Under the laws of Japan, high court decisions do not have precedential effect, and are not legally binding on lower courts. Only the Supreme Court's decisions bind lower courts and the court can clearly or implicitly limit the scope of the precedential effect.

28 Will the appellate courts in your country consider submissions from non-parties?

There are no rules that explicitly allow a non-party to submit its brief, unless it participates in the lawsuit (which is allowed where the participant has an interest in the result of the litigation). The only path is through a non-party presenting its view to the court as a party's evidence.

29 What are the ordinary forms of relief that can be rendered by an appellate court in a civil dispute?

High courts

After examining the fact findings and application of law in the first-instance judgment, a high court renders a judgment. If the high court comes to the same conclusion as the district court, it renders a judgment dismissing the appeal. If the high court's conclusion is different from that of the district court's judgment, it reverses the original judgment and renders its own judgment.

Supreme Court

If the Supreme Court finds that:

- the final appeal is unlawful, it renders a judgment dismissing the final appeal (articles 290, 313, 316 and 317(1) of the CCP);
- the final appeal is groundless, it renders a judgment dismissing the final appeal (articles 302, 313 and 319 of the CCP); or
- the final appeal has grounds (as prescribed in article 312(1) or (2) of the CCP) or there is violation of laws or regulations that apparently affect a judgment, it renders a judgment quashing the judgment at prior instance (ie, a high court) and remands the case to the high court or the court equivalent to the same (article 325 of the CCP).

In the following cases, the Supreme Court itself will make a judicial determination in cases:

- where the final appellate court quashes the judgment on the grounds that the judgment has erred in applying the Constitution or any other laws or regulations relevant to the determined facts and the case is at the stage at which a judicial decision can be made based on such facts; and
- where the final appellate court quashes the judgment on the grounds that the case is subject to the jurisdiction of no court.

The Supreme Court may render a judgment based upon briefs only, without hearing oral arguments. In practice, it is said that if the Supreme Court considers that the high court's decision includes an error in law or constitutional issue that might affect the conclusion of the case, it generally hears oral arguments and renders a judgment.

In principle, in a case where the Supreme Court quashes the high court's judgment, it remands the case to the prior instance court (ie, a high court) rather than making its own decision. The high court to which a case is remanded re-opens the proceedings (continues the prior proceedings, but the judges who were involved in making the prior judgment cannot participate in the proceedings after the case is remanded) and renders a judgment based upon additional oral arguments being heard in accordance with Supreme Court's judgment. In this case, the factual or legal basis upon which the Supreme Court decided to quash the judgment is binding on the high court in question.

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