ICLG

The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2018

11th Edition

A practical cross-border insight into litigation and dispute resolution work

Published by Global Legal Group, in association with CDR, with contributions from:

Arendt & Medernach SA
Ario Law Firm
ARNECKE SIBETH Rechtsanwälte Steuerberater Partnerschaftsgesellschaft mbB
Bae, Kim & Lee LLC
Baker Botts L.L.P.
Bär & Karrer Ltd.
Blake, Cassels & Graydon LLP
Borenius Attorneys Ltd
Clayton Utz
Covington & Burling LLP
Drinker Biddle & Reath LLP
Florent
Gün + Partners
Gürlich & Co.
Hamdan AlShamsi Lawyers & Legal Consultants
Jackson Walker LLP
JunHe LLP
Kammeradvokaten, Poul Schmith
Kennedys
Kubas Kos Gałkowski
Lennox Paton
Miller & Chevalier Chartered
Munari Cavani
Nagashima Ohno & Tsunematsu
Norburg & Scherp Advokatbyrå AB
Oblin Melichar
Oon & Bazul LLP
Polenak Law Firm
Potter Anderson & Corroon LLP
Richman Greer, P.A.
SBH Law Office
Soteris Flourentzos & Associates L.L.C.
SyCip Salazar Hernandez & Gatmaitan
Vieira de Almeida
Woods LLP
Zamfirescu Racoţi & Partners Attorneys at Law

CDR Commercial Dispute Resolution
glg global legal group

global legal group

Contributing Editors
Greg Lascelles and Tom Jackson, Covington & Burling LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Sub Editor
Jane Simmons

Senior Editors
Suzie Levy
Caroline Collingwood

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George
Print Group
February 2018

ISBN 978-1-911367-94-9
ISSN 1755-1889

General Chapter:

Country Question and Answer Chapters:

Continued Overleaf →

global legal group

Country Question and Answer Chapters:

EDITORIAL

Welcome to the eleventh edition of *The International Comparative Legal Guide to: Litigation & Dispute Resolution*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of litigation and dispute resolution.

It is divided into two main sections:

One general chapter. This chapter provides an overview of legal privilege in litigation, particularly from a UK perspective.

Country question and answer chapters. These provide a broad overview of common issues in litigation and dispute resolution in 40 jurisdictions, with the USA being sub-divided into eight separate state-specific chapters.

All chapters are written by leading litigation and dispute resolution lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Greg Lascelles and Tom Jackson of Covington & Burling LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Chapter 18

Japan

Nagashima Ohno & Tsunematsu

Koki Yanagisawa

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Japan is considered as a civil law jurisdiction and has adopted adversarial civil proceedings. No jury system has been adopted in the civil proceedings in Japan.

The Code of Civil Procedures mainly governs the civil procedures in Japan. It is generally considered that lower court judges are likely to follow the rules stipulated in the Supreme Court decisions.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The Japanese civil court system is structured as a system of three instances. In ordinary civil cases, a plaintiff can file a complaint with a competent district court as the court of first instance. A party has a right to file an appeal against a District Court judgment with a high court having jurisdiction over the case (*koso* appeal), and it is possible to further file an appeal against a High Court judgment with the Supreme Court (*jokoku* appeal, and a petition for admission of a *jokoku* appeal). A *jokoku* appeal and a petition for admission of a *jokoku* appeal to the Supreme Court can be made for limited reasons set forth in the Code of Civil Procedures.

If the amount of the claim sought is 1,400,000 Japanese yen or less, a plaintiff must file the claim with a competent Summary Court, as opposed to a District Court, as the court of first instance. A party has a right to file a *koso* appeal against a Summary Court judgment with a competent District Court and then file a *jokoku* appeal against a District Court judgment with a competent High Court.

Regarding specialist courts, the Japanese court system established family courts to handle the cases involving family matters such as those relating to inheritance and marriage/divorce. The IP High Court was established in 2005 to handle intellectual property cases as the court of second instance. In addition, the Tokyo District Court, Osaka District Court and other major district courts have special divisions which handle cases requiring certain expertise such as intellectual property law, commercial law, administrative law, medical law, bankruptcy and insolvency law, labour and employment law.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Japanese civil proceedings consist mainly of a series of hearing procedures and there is no clear distinction between a pre-trial stage and a trial stage.

On the first date of the hearing procedures, a plaintiff's complaint and a defendant's answer are officially submitted to the court. In subsequent hearing procedures, both parties submit their factual and legal arguments and evidence supporting their arguments to the court. While the facts admitted by the opposing party require no evidence and shall bind the court and both parties, the facts denied by the opposing party must be proved by evidence. Through such hearing procedures, the judge will identify the material issues in dispute for which the court should conduct fact-findings through the examination of witnesses and other evidence. For such purpose of identifying the issues, the court may take procedures to extensively discuss issues and evidence with the parties, if appropriate. The court then holds an examination of witnesses. In general, witnesses are subject to cross-examinations in relation to the matters raised during direct examinations. Even judges may supplementarily examine witnesses. Once the examination of witnesses has been concluded, the court closes the hearing procedures and then moves on to the rendition of judgment.

The Act on Expediting Trials provides that a period of two years should be a target period for the completion of the first instance of the civil proceedings. In practice, however, the duration of any given court proceeding will likely depend on the complexity of each case or the arguments and evidence submitted to the proceedings. On average, a court judgment in the first instance is rendered one-and-a-half to two years after the commencement of the lawsuit. If an appeal to the competent high court is filed, it would generally take an additional year to obtain the high court judgment. If an appeal to the Supreme Court is filed, it could further take at least six months for the Supreme Court to render the final judgment and, in some cases, it could take more than a couple of years.

Regarding expedited trial procedures, the Labour Tribunal Proceedings handle relatively small labour and employment disputes and the court must conclude the proceedings when or before three hearing sessions are held.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are considered valid under the Code

of Civil Procedures on condition that such clauses are agreed upon by the parties in writing and specifically cover lawsuits based on a certain legal relationship. In addition, for international cases, exclusive jurisdiction clauses set forth in consumer contracts and labour contracts will be valid only when certain requirements are fulfilled, for the purpose of protecting the interests of consumers and employees.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

A plaintiff must pay a filing fee when initiating civil court proceedings, the amount of which is determined based on the amount of the claim sought. A plaintiff may recover the filing fee and other minor expenses such as travel expenses for witnesses from the defendant pursuant to the final court judgment in favour of the plaintiff. On the other hand, the plaintiff may be required to pay minor expenses such as travel expenses for witnesses incurred by a defendant if the defendant prevails in the lawsuit. Each party has to pay its own attorneys' fees for civil court proceedings and may not recover such fees even if the party prevails in the lawsuit, in principle. There are no specific rules or regulations on costs budgeting under Japanese law.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

While the calculation formula for attorneys' fees solely depends on an agreement between the attorney and the client, it is relatively common in domestic cases that a client pays to its attorneys: (i) a retainer fee calculated by multiplying a certain percentage by the amount of claim sought in the lawsuit; plus (ii) a success fee to be calculated by multiplying a certain percentage by the amount of claim affirmed by the court. Attorneys can act for claimants on a contingency fee basis in Japan. Although 100% contingency arrangements are not specifically prohibited under Japanese law, the rules of ethics for attorneys may be interpreted to prevent such arrangements from being adopted and such arrangements are rarely used under Japanese practice. It is also possible and common among international law firms to adopt an hourly charge arrangement.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Under Japanese law, it is prohibited to assign a claim to a third party primarily for the purpose of having the third party file a lawsuit. On the other hand, there is no legislation prohibiting or specifically restricting litigation funding in Japan. As such, a plaintiff may file a lawsuit with third-party funding; however, it will be considered as a violation of the Attorneys Act if the third party who is not qualified as a Japanese attorney (*bengoshi*) provides legal advice to the plaintiff and takes a share of any proceeds from the lawsuit. It is also prohibited by the Attorneys Act to act as an intermediary between clients and attorneys for the purpose of obtaining remunerations therefrom.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Insurance firms provide a scheme under which a defendant may share its risk of receiving a monetary judgment from the court subject to the relevant regulations. For instance, it is common for directors to insure themselves against the risk of shareholders' derivative lawsuits.

.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Aside from a few exceptions, there is no particular formality with which plaintiffs must comply before initiating the civil proceedings in Japan. Exceptions include requirements to file a petition for review of certain orders rendered by the governmental entities before filing a lawsuit with the court seeking a cancellation of such orders. Another example of exceptions is a requirement for a plaintiff to go through mediation proceedings before filing a lawsuit asserting a claim to increase or decrease the amount of rent of real estates against landlords.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Claims for compensation for damage caused by tort must be brought to the court within: (i) 20 years from the date on which the alleged tort occurred; or (ii) three years from the date on which the plaintiff first became aware of both the person who committed the alleged tort and the damage caused by the alleged tort, whichever period may elapse earlier. Other civil claims must be brought to the court within 10 years from the date on which the claim can be exercised, in principle. There are multiple exceptions for the aforesaid 10-year period, which includes a five-year limitation period for commercial claims.

Under Japanese law, the statute of limitations is treated as a part of the substantive law, in principle. The court may not uphold damage claims after the expiration of the 20-year period explained above regardless of whether or not the defendant brings the defence of statute of limitation. On the other hand, even after the expiration of the three-year period for tort claims and the 10-year period for other civil claims, including the five-year period for commercial claims, the court may uphold the claims if the defendant does not bring the defence of statute of limitation.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

A plaintiff must submit to the court a complaint with a description of the claim sought as well as the causes of action. A plaintiff must pay a filing fee, the amount of which is determined based on the amount of claim sought (e.g., a fee of 50,000 Japanese yen must be paid for a claim in the amount of 10 million Japanese yen).

In order for the civil proceedings to be commenced, the court must serve a summons and a copy of the complaint on the defendant. As a primary means of service, the court clerk in charge will send a

summons and a copy of the complaint to the defendant's domicile or principal office by special registered mail and the service is completed upon receipt of the documents by the defendant. If a defendant refuses to receive the aforementioned documents, the court clerk can then send the documents again and deem that the service is completed at the time when the documents have been sent out again to the defendant, regardless of whether the documents are actually received by the defendant. If the domicile or the principal office of the defendant is unknown, a summons and a copy of the complaint can be deemed to have been served when two weeks have passed since the date on which the court posts a notice on its bulletin board that the court clerk is ready to deliver the aforementioned documents to the defendant.

Regarding the service on defendants outside Japan, it should be noted that Japan is a signatory of the Hague Service Convention and the Hague Civil Procedure Convention. In addition, Japan has entered into bilateral treaties on service of process with several foreign countries. Accordingly, a summons and a copy of the complaint are typically served on the defendants in foreign jurisdiction in accordance with the aforementioned conventions or treaties.

Summons and other legal documents of foreign proceedings must be served on defendants located in Japan in accordance with the Hague Service Convention, meaning that the legal documents must be served on defendants in Japan through the Ministry of Foreign Affairs and the Supreme Court of Japan. It is generally considered that a service of legal documents on a defendant in Japan by means of direct international mail or courier shall be invalid.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

The Civil Preservation Act provides pre-action interim remedies such as provisional attachment and provisional injunction. A potential plaintiff can file a separate petition for such interim remedies with the court, typically in advance of filing a lawsuit on the merits. Generally, a plaintiff must demonstrate that they have claims to be preserved against defendant(s) and that there is a "necessity" for the interim relief, based on *prima facie* evidence, in order to obtain the interim remedies. In most cases, the court will require that a plaintiff provide security deposit in advance of rendering an order of interim relief.

3.3 What are the main elements of the claimant's pleadings?

A plaintiff is required to describe in a complaint a purport of claim sought, causes of action for the claim, and other facts relevant to the claim as well as legal arguments supporting the claim. It is particularly necessary for a plaintiff to plead the causes of action for the claim sought, namely, the facts constituting the elements of the claim. A plaintiff will further need to plead the facts constituting the elements of the rebuttals against the defendant's defence.

3.4 Can the pleadings be amended? If so, are there any restrictions?

While it is possible to amend the pleadings in principle, it would not be possible for a plaintiff to amend the pleadings of facts constituting the elements of the claim without obtaining the defendant's consent once the defendant admitted such facts. In addition, the court may consider, in its fact-finding, that the amended pleadings are not credible.

It is possible for a plaintiff to amend the claims in the same proceedings on condition that there is no difference in the basis of such claims and the amendment to the claims will not cause undue delay in the proceedings. When the defendant already submitted a response to the initial claims on the merits, it is necessary to obtain consent from the defendant in order to amend the claims.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

While it is possible to withdraw the pleadings in principle, it would not be possible for a plaintiff to withdraw the pleadings of facts constituting the elements of the claim without obtaining the defendant's consent once the defendant admitted such facts.

It is possible for a plaintiff to withdraw the claims until the judgment becomes final. When the defendant already submitted a response to the claims on the merits, it is necessary to obtain consent from the defendant in order to withdraw the claims.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In responding to a plaintiff's claims set forth in a complaint, a defendant is required to submit a response to the complaint, which includes a request to the court to dismiss the claims, admission or denial of each of the plaintiff's factual and legal arguments, and the defendant's counter-arguments against the plaintiff's factual and legal arguments, including defence of set-off. In order to seek an early resolution of the case, the defendant may request the court to dismiss the claims due to reasons other than those on the merits such as lack of jurisdiction and lack of standing. The defendant may file a counterclaim, which has connections with the claims brought by the plaintiff, with the same court.

4.2 What is the time limit within which the statement of defence has to be served?

Prior to the first hearing date (which is typically one week prior), a defendant is required to file a response to the complaint to describe whether to deny or admit the plaintiff's factual and legal arguments set forth in the complaint. If a defendant wishes to request the court to dismiss the claims due to reasons other than those on the merits such as lack of jurisdiction and lack of standing, the defendant must submit such defence at the same time as, or prior to, submitting its defence on the merits. Following the first hearing date, there will be a series of hearings held once a month or once every few months to exchange briefs and documentary evidence and the defendant can submit defence on the merits during the course of the hearings.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

There is a mechanism whereby a defendant gives a notice of lawsuit to a third party who has a legal interest in the result of the lawsuit in that the defendant could pass on the liability to, or share its liability with, such third party. It is possible for such third party who received the notice to join the lawsuit as an assisting intervener.

Once a third party receives such notice of lawsuit, such third party will not be allowed to dispute certain facts in a subsequent lawsuit with the defendant.

4.4 What happens if the defendant does not defend the claim?

If a defendant does not attend the first hearing date without submitting any response to a plaintiff's complaint, the court may deem that the defendant has admitted all the factual and legal arguments set forth in the complaint and may render a judgment in favour of the plaintiff.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, defendants can dispute the court's jurisdiction. If a defendant wishes to request the court to dismiss the claims due to lack of jurisdiction, the defendant must submit such defence at the same time as, or prior to, submitting its defence on the merits.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

There is a mechanism whereby a third party can join an ongoing lawsuit as an assisting intervener for the purpose of assisting one of the parties to the lawsuit if such third party has a legal interest in the result of the lawsuit (e.g., the defendant could pass on the liability to, or share its liability with, such third party in a subsequent lawsuit if the defendant loses in the ongoing lawsuit). Once the third party has joined the ongoing lawsuit as an assisting intervener, such third party will not be allowed to dispute certain facts in a subsequent lawsuit with the party whom the third party assisted.

There is another mechanism whereby a third party can join an ongoing lawsuit as an independent intervener by bringing an independent claim against both or either of the parties to the ongoing lawsuit. It is possible for a third party to join as an independent intervener if such third party's rights may be infringed as a result of the ongoing lawsuit or if such third party's rights are the subject matter of the ongoing lawsuit.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Under the Code of Civil Procedures, if rights or obligations, which are the subject matter of the lawsuits, are common to two or more persons or are based on the same factual or statutory cause, these persons may sue or be sued as co-parties. The same shall apply where rights or obligations, which are the subject matter of the lawsuits, are of the same kind and based on the same kind of factual or statutory causes.

Moreover, under Japanese court practice, if multiple similar cases are filed with the same court, those cases tend to be assigned to the same division of the court so that the same judges can handle the similar cases, unless there are any circumstances that would give adverse effects on the efficiency of the procedures.

Similar actions could be grouped together for adjudication through "consolidation of hearing procedures" based on the discretion of the court depending on circumstances such as a timing of filing a complaint, whether the subject matter is common to the multiple lawsuits at issue, and whether the same counsel is representing the cases.

5.3 Do you have split trials/bifurcation of proceedings?

The Code of Civil Procedures allows the court to split the hearing procedures involving multiple claims and/or multiple parties at the discretion of the court. If multiple hearing procedures are illegally consolidated or if multiple parties are illegally involved in the same hearing procedures as co-parties, the court must split the hearing procedures.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Japanese civil courts typically have multiple civil affairs divisions that handle civil cases and the court has the discretion in allocating the cases to each division. Cases requiring certain expertise such as intellectual property law will be assigned to special divisions in some major district courts (e.g., Tokyo District Court and Osaka District Court).

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Japanese civil courts have the discretion to a certain extent in determining how to proceed with the hearing procedures. It is noteworthy that the civil courts can make an attempt to urge the parties to engage in settlement discussions at a time deemed appropriate during the course of the hearing procedures. Typically, the courts tend to suggest having settlement discussions immediately before moving to witness examinations or immediately after completing witness examinations. Parties may also ask the court to start settlement discussions at such times.

In some cases such as those involving complicated technical issues in construction disputes or medical malpractice disputes, the court may temporarily assign the case to the mediation division where certain experts can be involved in the procedures to give opinions to facilitate the parties to exchange arguments and conduct settlement discussions.

We do not believe that Japanese courts have the particular case management power that would affect the costs borne by the parties.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The Act on Maintenance of Order in Courtrooms imposes sanctions on a person who disobeyed the court's orders issued for the purpose of maintaining the order in the courtroom. However, there is no concept of contempt of court under Japanese law.

The Code of Civil Procedures provides sanctions imposed by the court against a party to lawsuit with respect to the court's orders or directions concerning evidence. For instance, in the event that a party to lawsuit does not follow the court's document production order, the court may deem that the opposing party's assertions concerning the document at issue are true.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Japanese courts have the power to dismiss a part of a claim or to dismiss a claim entirely by a final judgment. Japanese courts may render an interim judgment on preliminary issues such as the court's jurisdiction over the case prior to reviewing the issues on the merits.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Japanese civil court proceedings do not have a system of pre-trial procedures and Japanese civil courts do not enter summary judgment.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Japanese civil courts must or may discontinue or stay the civil proceedings in accordance with the Code of Civil Procedures.

For instance, in the event that a party to a lawsuit dies or is dissolved due to a merger, the court must stay the proceedings if no attorney for such party was appointed. In the event that a party receives a bankruptcy order, the court must stay the proceedings for a lawsuit relating to the properties subject to the bankruptcy procedures. In the event that a party to a divorce case dies, the court must discontinue the proceedings.

In the event that a party cannot continue to engage in the proceedings for unavoidable reasons for an unlimited period of time, the court may stay the proceedings. The proceedings shall stay in the event that the court cannot continue its duties due to natural disaster and other unavoidable reasons.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Unlike in common law jurisdictions, there is no comprehensive discovery scheme (e.g., document production, depositions, and interrogatories) available in Japanese civil proceedings. While the civil proceedings are pending, a party may request the court to order the opposing party or a third party to produce particular documents, with certain limitations set forth in the Code of Civil Procedures. For instance, there is no obligation for a party to disclose: (i) a document relating to matters for which the holder or a certain related person is likely to be subject to criminal prosecution or conviction; (ii) a document concerning a secret in relation to a public officer's duties, which is, if produced, likely to harm the public interest or substantially hinder the performance of public duties; (iii) a document containing any fact which certain professionals (e.g., a doctor, an attorney at law, a registered foreign lawyer) have learnt in the course of their duties and which should be kept secret; (iv) a document containing matters concerning technical or professional secrets; or (v) a document prepared exclusively for use by the holder. In order to render a document production order against a third party, it is necessary for the court to ask such third party's opinion in advance.

Under the Code of Civil Procedures, a potential plaintiff may obtain a court order of preservation of evidence before filing a lawsuit if there are circumstances where it would become difficult to use evidence unless such evidence is reviewed in advance, which order essentially serves as an order of pre-action disclosure of evidence.

In addition, while any person is allowed to peruse the case record of the civil proceedings, including briefs and evidence submitted by the parties, at the courthouse pursuant to the Code of Civil Procedures, the party to the case is entitled to file a petition requesting the court to render an order to restrict the perusal of documents constituting private information and trade secrets by any third party.

In Japanese civil proceedings, there are no special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Unlike in common law jurisdictions, there is no concept of attorney-client privilege or other privilege to protect attorney-client communication or attorney materials under Japanese law. While attorneys have the right to refuse testimony concerning the communication with the client and are not obliged to produce the documents exchanged with the clients, clients are granted no right to protect their communications with their attorneys.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Please see question 7.1.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

Under the Code of Civil Procedures, each party must submit documentary evidence by itself, in principle, and the court provides assistance for disclosure for the parties to a certain extent. For instance, as explained in question 7.1, the court may render, at the request of a party to the lawsuit, an order against the opposing party or a third party to produce particular documents.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

A party to lawsuit who obtained the documents through the court's order of production of documents may submit a part of, or the whole of, such documents as documentary evidence to the

civil proceedings. Once the documents are submitted to the civil proceedings as documentary evidence, there is no restriction on the use of the documentary evidence by the parties unless the court renders an order of restriction on perusal of such documentary evidence, in which case the parties are obliged not to disclose such documentary evidence to any third party.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Evidence must be submitted to the hearing procedures by the parties, and evidence that has not been submitted to the hearing procedures shall not be taken into consideration in finding facts as the basis of judgment to be rendered by the court. Parties must submit evidence in order to prove that the alleged facts constituting the elements of the claim or the defence are highly probable. When rendering a judgment, the court shall decide whether or not the allegations on facts are true in light of the result of the examination of evidence and based on its free determination.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Authenticity of documentary evidence must be attested in order for the evidence to be admissible as the basis of the judgment. There are no particular limitations on the forms of evidence that may be admissible. No hearsay rules are applied to evidence in Japanese civil proceedings. There are no specific rules on admissibility of expert evidence.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A party to the lawsuit may make a request for witness examination to the court and the court determines whether or not such witness examination is to be conducted, taking into consideration whether it is necessary to conduct such witness examination for the purpose of finding the relevant facts. Upon making such request, a party usually submits a written statement of the witness to the court in order for the court to consider whether to call the witness. Depositions are not available in Japanese civil proceedings.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

A party to the lawsuit may submit to the court, as documentary evidence, an expert report prepared by an expert appointed by such party. In order to examine the credibility of such report, the opposing party may request the court to conduct cross-examination of the expert.

Furthermore, a party may request the court to appoint an expert to provide an expert opinion and the court then determines whether or not it is necessary to appoint such expert. Once an expert is appointed by the court, such expert is obliged to give an expert opinion, provided that he/she has expertise in the relevant field.

There are no particular rules regarding concurrent expert evidence under Japanese law.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Japanese civil courts are empowered to render a formal judgment to affirm or reject a claim on the merits after the hearing procedures are concluded. Regarding monetary claims, the courts may render a declaration of preliminary execution along with the judgment in favour of a plaintiff, which enables the plaintiff to preliminarily execute the judgment even if the defendant files an appeal (however, if the defendant files a petition for a court order to suspend the preliminary execution of the judgment upon filing an appeal, the court is likely to render such order on condition that the defendant submits a security deposit, the amount of which is determined at the discretion of the court).

The courts are also empowered to render a judgment rejecting a claim which does not fulfil prerequisites for bringing the claim to the court such as the court's jurisdiction over the case.

Japanese civil courts are also empowered to render an order without going through the hearing procedures, which includes an order to produce documents described in question 7.1 and an order of provisional attachment under the Civil Preservation Act described in question 3.2.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Japanese courts have powers to make rulings on the delinquency charges and interests incurred for the claims on the merits in accordance with the relevant statute. They can also make rulings on which party shall bare the litigation costs, not including attorney's fees, when rendering a formal judgment on the merits.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments with "title of obligation" (*saimu-meigi*), which include a final and binding judgment and a judgment with declaration of preliminary execution, can be enforced by obtaining a certificate of obligation from the court.

Monetary judgments can be enforced by attaching the properties of the debtor. Judgments requiring conducts by debtor can be enforced by obtaining an indirect compulsory order under which the debtor must pay penalties for disobedience of the judgment.

A final judgment rendered by a foreign court can be enforced in Japan by obtaining an execution judgment from the competent Japanese court. In order to obtain such judgment, the foreign judgment must fulfil the requirements provided by the Code of Civil Procedures that: (i) the jurisdiction of the foreign court is admitted by laws and orders or by treaty; (ii) the losing defendant has, (a) received the service of the summons or orders necessary to commence procedures, excluding service by public notice and other similar service, or (b) responded in the action without receiving the service; (iii) the contents of the judgment and the procedure are not contrary to the public order or good morals of Japan; and (iv) there is a reciprocal guarantee regarding the recognition of judgments.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

No specific grounds for an appeal to a high court (*koso* appeal) are provided under the Code of Civil Procedures, and the grounds include error in fact-findings and the application of law in the judgment. An appeal to the Supreme Court (*jokoku* appeal) can be made on the ground that the High Court judgment contains a violation of the Constitution or on the ground that the procedures in the lower court contains any of the material illegalities set forth in the Code of Civil Procedures. In addition, parties may file a "petition for admission of a *jokoku* appeal" and the Supreme Court may accept the petition as a *jokoku* appeal if it deems that the case involves an important issue.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

During the course of civil proceedings, Japanese courts tend to seek an opportunity to suggest amicable settlement of disputes before the court (judicial settlement). It is common for the court to ask the parties whether there is any chance of judicial settlement immediately before moving to witness examinations or immediately after completing witness examinations (i.e., before concluding the proceedings to start preparing a judgment). Once the court considers that there is a chance of reaching judicial settlement, the judge tends to have a discussion with a plaintiff and a defendant respectively, and make an attempt to form terms and conditions agreeable by both plaintiff and defendant, persuading the parties to make concessions. When an agreement is reached, it is put into the court record and the record has the same effect as a final and binding judgment. Many civil cases are resolved by judicial settlements in Japan.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In Japan, mediations, particularly civil mediation procedures before the court, are frequently used as a method of alternative dispute resolution. Mediation committee members, as opposed to professional judges, are in charge of handling the procedures and facilitating settlement discussions between the parties. Both parties may terminate the procedures at any time. Once the settlement terms are agreed by the parties, the settlement terms have the same effect as the final and binding judgment rendered by the court through formal lawsuits.

Arbitrations are also frequently used as a method of alternative dispute resolution. In particular, agreements on international commercial transactions involving Japanese corporate entities usually include an arbitration clause.

The Japanese Government has established administrative ADR bodies or systems providing opportunities for alternative dispute resolution in the field of labour and employment disputes, financial and insurance disputes, construction disputes and so forth.

In addition, certified dispute resolution business providers are providing various alternative dispute resolution procedures in specific areas of law and practice.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Civil Mediation Act governs the civil mediation procedures described in question 1.1. The Arbitration Act, which was enacted in 2003 in line with the UNCITRAL model law, governs the arbitration proceedings. The Act on Promotion of Use of Alternative Dispute Resolution was enacted in 2004 and provides the requirements for qualification of certified dispute resolution business providers.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Arbitration can only be used for disputes which can be settled amicably. In the area of labour and employment law, arbitration agreements for individual labour relationship shall be void under the Arbitration Act. Arbitration agreements for contracts between consumers and business operators can be terminated by consumers under certain circumstances. There still remain discussions on arbitrability in Japan.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Japanese courts provide assistance to parties who wish to utilise alternative dispute resolution in various ways.

For instance, the court will force the parties to arbitrate by rejecting a claim brought to the court by the parties who have entered into an arbitration agreement. The Arbitration Act allows the court to issue interim orders such as provisional attachment under the Civil Preservation Act even before the arbitral tribunal is established and during the course of arbitration proceedings. The Arbitration Act also empowers the court to assist an arbitral tribunal and parties in taking evidence if the arbitral tribunal finds it necessary.

In addition, the court may order the parties to mediate in the civil mediation procedures in certain cases where it is necessary to obtain experts' opinions in order to further analyse the issues in dispute and facilitate settlement discussions between the parties.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Arbitral awards are final and binding and, therefore, there are no rights of appeal from arbitral awards under the Arbitration Act; provided that a party may file a petition for a court order to set aside arbitral awards if there are exceptional reasons specifically set forth in the Arbitration Act.

If parties reach a settlement through the civil mediation procedures, the settlement terms have the same effect as a final and binding court judgment rendered through formal lawsuits. Even if a petition for civil mediation is filed by a petitioner, a respondent is not obliged to attend the mediation procedures and the procedures will terminate if the respondent does not attend (while the Civil Mediation Act provides that an administrative fine is imposed on a party who did not attend without due reasons, it is unlikely that such fine is actually imposed).

Koki Yanagisawa
Nagashima Ohno & Tsunematsu
JP Tower, 7-2 Marunouchi 2-chome
Chiyoda-ku
Tokyo 100–7036
Japan

Tel: *+81 3 6889 7250*
Email: *koki_yanagisawa@noandt.com*
URL: *www.noandt.com*

Koki Yanagisawa is a partner in the Litigation Group of Nagashima Ohno & Tsunematsu. His practice focuses on dispute resolution in the areas of commercial law, antitrust law, and employment law. He has represented a variety of Japanese and foreign companies in a wide breadth of industries in litigation, arbitration and other dispute resolution procedures.

He earned his LL.B. in 2000 from the University of Tokyo and his LL.M. in 2007 from Columbia Law School, where he was a Harlan Fiske Stone Scholar. He engaged in the practice of international arbitration at Debevoise & Plimpton LLP from 2007 to 2008.

He was named as one of the top 40 antitrust lawyers under 40 by *Global Competition Review* in 2012. He was also named as one of the recommended Japanese lawyers by *The Legal 500 Asia Pacific* 2017 in the areas of Labour and employment and Antitrust and competition law.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The most major arbitration institution in Japan is the Japan Commercial Arbitration Association (JCAA) for both domestic and international cases. For domestic cases, arbitration centres established by local bar associations are frequently used. For disputes involving specific areas of law, Japan Intellectual Property Arbitration Centre (JIPAC) handles intellectual property disputes. The Japan Sports Arbitration Agency (JSAA) handles sports related disputes and Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange (TOMAC) deals with commercial and maritime matters.

In order to initiate the civil mediation proceedings, a petitioner is required to file a petition with a competent summary court in principle; provided that it is possible to file a petition with a district court agreed upon in writing by the parties.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com