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Japan

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Efficiency of process

Japan is a civil law jurisdiction and there are fundamental differences between the civil law and the common law litigation practices. In contrast with the adversarial system, the inquisitorial approach of the Japanese civil law procedural system means that the judge largely controls the process and the collection of factual information, and the decision-making process proceeds through a series of oral hearings.

A new Code of Civil Procedure (Law No. 109 of 26 June 1996 (CCP)) was adopted in 1996. One of the key objectives of the reform was to speed up the course of trials. This goal was further emphasised through the enactment of the Law on the Expediting of Trials, Law No. 107 of 16 July 2003, which provides that the objective of expediting trials is to conclude the first instance proceedings as swiftly as possible, within two years of their commencement. First instance proceedings last eight months on average, but complex cases can take longer. The courts typically schedule the initial hearing within one to one-and-a-half months after the plaintiff has submitted a statement of claims, and require the defendant to submit an answer about a week before the hearing (Article 60-2 of the Rules of Civil Procedure provides that "[e]xcept when special circumstances exist, the presiding judge shall designate a date within thirty days from the date on which the action has been filed […]"). In general, the courts have succeeded in increasing the pace of the litigation process.

Information technology plays a role in the CCP: telephone conferencing and video-conferencing are possible for preparatory proceedings (Articles 170-3 and 176-3). Video-conferencing is also available for the long-distance examination of witnesses (Article 204); and the electronic processing of claims for payment demands (Article 397). A technical adviser asked by the court to participate in proceedings can be heard by audio conferencing (Article 92-3), and an expert may be heard using teleconference or videoconference services (Article 215-3) when they live in remote areas. Microsoft Teams is currently used by the courts as the videoconferencing tool.

The COVID-19 pandemic has had an impact on and accelerated the use of information technology for proceedings. The CCP had already been revised in 2004 to enable online petitions (Article 132-10) in connection with demand procedures, which are simplified proceedings especially designed for demands for payment of claims regarding the payment of money or other fungible assets or securities. In April 2022, Supreme Court rules came into effect to allow most court documents to be filed through an online system for regular civil litigations. Online filing is currently on trial and this method will be progressively introduced (the full-scale operation schedule at the Tokyo District Court is yet to be determined).

In June 2018, in response to the rapid worldwide development of digitalisation, the Japanese government announced that it would achieve full-scale digitalisation of court proceedings

of civil litigation gradually, taking the following three steps: (i) the use of web conferencing in specific courts including the Tokyo District Court to arrange issues and evidence under the current CCP (Phase 1, in operation since February 2020); (ii) online oral argument and arrangements regarding issues and evidence after the CCP revision (Phase 2); and (iii) online filing of lawsuits, etc. (Phase 3). Their goal is to achieve three "E"s, i.e., e-Filing, e-Court and e-Case Management, while securing information security and access to justice by those who do not have easy access to the internet. A bill to revise the CCP in order to implement Phases 2 and 3 is currently under discussion in the Diet as at April 2022 and the government aims to have the revisions come into force by fiscal year 2025.

There are no general fast-track proceedings but, for monetary claims not exceeding JPY600,000, special proceedings known as "petty claim actions" are available (Article 368). Cases must generally be concluded at the first hearing and the judge delivers a judgment immediately after the hearing. The defendant may object and start ordinary civil proceedings before the court.

Integrity of process

Integrity of process underpins the general acceptance of Japanese courts as a safe and reliable forum for commercial dispute resolution, sometimes in stark contrast with the situation prevailing in certain Asian jurisdictions. The professionalism, effectiveness, integrity, accountability and transparency of the courts are highly rated. The operation of Japanese justice relies on the existence of a highly trained, professional and independent judiciary. Japanese courts have been very successful in upholding integrity and judgments that impartially reflect the evidence, the arguments and the laws. Judges do not depart from the law and do not act from personal or political motives.

Japan is a society governed by the Rule of Law. The judicial system provides parties to a dispute with a reasonable opportunity to obtain relief when justified, and a reasonable opportunity to defend against unjustified, spurious, or malicious claims. The system attempts to implement these ideals through Constitutional provisions guaranteeing the defendant in criminal cases the right to counsel, privilege against self-incrimination, and a right to a speedy trial before an impartial tribunal (Constitution of Japan, Articles 37 and 38). The civil justice system provides the parties with a reliable means of resolving disputes by: being reasonably quick; being reasonably available (although cost is still an issue); providing a neutral forum; and offering a procedure for resolving disputes that gives a righteous plaintiff reasonable opportunity to be adequately compensated.

Other factors, in addition to access to justice and the relative timeliness of justice delivery, include: the quality of justice delivery; the independence, impartiality and fairness of the judiciary; public trust in the judiciary; the absence of corruption; the stability and consistency of laws and regulations and their interpretation (even in the absence of a doctrine of binding precedent, decisions of the Supreme Court are generally consistently followed by the lower courts to the extent equitable); as well as the relative ease of retrieving past judgments and extracting data from court records.

In contrast with the handling of commercial disputes, Japan's criminal justice system has long been criticised abroad (and increasingly domestically) and, according to many critics, including legal practitioners, would need to be revamped, in particular in relation to the practice known as "hostage justice" (*hitojichi-shiho*). Detention is traditionally seen as a means to prevent suspects from fleeing or destroying evidence. The idea of holding suspects for a long time is to use that time to interrogate them and attempt to secure a confession to make a trial easier. According to Human Rights Watch, "the long-term detention in the

Carlos Ghosn case has triggered surprise and criticism overseas, leading to doubts about Japan's integrity as a democratic nation that guarantees human rights". Carlos Ghosn, the ousted chairman of Nissan Motor, was arrested in November 2018 and indicted on charges of financial misconduct to find himself in the throes of the Japanese legal system before fleeing the country in "one of the most brazen and well-orchestrated escape acts in recent history", to quote an assistant US attorney. His prolonged detention and other aspects (bail, defence rights) have put the international spotlight on the criminal justice system. This should not, however, undermine the trust one may have in the Japanese civil justice system.

Privilege and disclosure

Privilege

There is currently no concept of attorney-client privilege under Japanese law. However, the Japan Fair Trade Commission (JFTC) has established new procedures for administrative investigations to address concerns regarding the protection of communication (the law carefully avoids using the term "privilege") between an enterprise and its attorney, which became effective on 25 December 2020. Documents containing confidential communication between an enterprise and its attorney that address legal issues and satisfy certain conditions are protected in administrative investigations into unreasonable restraints of trade (cartels and bid-rigging) prohibited under Article 3 of the Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade (AMA). Confidential communications between the enterprise and its attorney that address legal issues and satisfy certain conditions cannot be accessed by the investigators and must be returned to the enterprise. The JFTC has established rules under Article 76 of the AMA and explanatory guidelines. Pre-existing materials created before the enterprise consulted its attorneys and materials indicating facts underlying confidential communication regarding legal advice between the enterprise and attorneys are primary materials/fact-finding materials and cannot be privileged. The enterprise must request the benefit of this system at the time of an order for submission. A determination officer will vet the materials earmarked as privileged by the enterprise and confirm whether these documents satisfy specific requirements.

Attorneys, doctors and other professionals and experts to whom confidential information has been disclosed may refuse to testify and give evidence (Article 197-1(2) of the CCP) or refuse to submit documents (Article 220 of the CCP) regarding facts that have come to their knowledge in the performance of their duties. However, Article 197-1(2) does not apply where the witness is released from his or her professional duty of secrecy under Article 197. The attorneys' obligation to keep secret information obtained in confidence in the course of their professional duties is also stated under Article 23 of the Lawyers' Act (Law No. 205 of 10 June 1949).

Disclosure

Under Japanese law, there is no disclosure obligation or extensive discovery process, in contrast with common law jurisdictions. Documents submitted as evidence by the parties are typically collected by the parties through their own efforts. Accordingly, in a product liability case, for instance, if a manufacturer is not cooperating, critical evidence may be concealed from the plaintiff, which is both relevant and admissible in a product liability case, including, but not limited to, notice to the manufacturer of the existence of a defect in one or more of its products, causation, the existence of a defect, and the feasibility of safer alternate designs.

It is nonetheless possible to petition a court to issue an order to submit documents after an action has commenced by providing valid reasons to compel the counterparty, or a third

party keeping certain documents listed in Article 220 of the CCP in his possession, to submit said documents (Article 221). The person filing a motion must indicate (insofar as possible) the document, the identity of the person holding it, its significance, what needs to be proven with it and the reasons why it is necessary. The obligation to produce documents has been recognised in the following situations: (i) documents a party has referred to for the purpose of presentation or assertion of proof; (ii) documents that a party submitting evidence has the right to require delivery or inspection of while in the possession of another person; (iii) documents showing a legal relation that support the rights or legal position of the person filing a motion, or documents showing a legal relation between the person filing a motion and the holder of the documents; (iv) documents that are not excluded (e.g., documents exclusively prepared for use by their possessor, documents that contain confidential, technical or professional information (e.g., confidential information held by professionals such as lawyers and doctors)); and (v) public officials' documents, disclosure of which would harm the public (Article 220-4). If the other party fails to comply with the court order to produce a document, the court may find the applicant's allegations concerning said document to be true (Article 224-1).

Before filing an action, if the future plaintiff has given advance notice of the filing to the future defendant, the plaintiff or recipient of the notice may, within four months of the date of the notice, make inquiries to the other party on matters necessary to substantiate his allegations or collect evidence (Article 132-2 of the CCP). In addition, the court may order the submission of documents and the commissioning of examinations when a motion is filed by a party and it is difficult for that party to collect documentary evidence from the other side that would be clearly necessary to prove his case (Article 132-4).

The absence of extensive discovery may to some extent inhibit litigation in Japan. The Japanese legal system has a fact-pleading requirement that obliges a plaintiff to plead facts sufficient to be successful at the start of the case. The means for compelling the production of facts before the initiation of a lawsuit described above are relatively limited and inefficient, and plaintiffs also have little opportunity to obtain meaningful factual discovery even after the suit has begun.

Costs

The general rule is that court costs are borne by the losing party (court costs consist of court filing fees, the costs associated with service of process, documentary fees (preparation and submission of documents, including petitions, briefs, copy of evidence, translation of documents), the costs incurred for the examination of evidence, accommodation and travel expenses and daily allowances paid to witnesses and interpreters, and the remuneration of experts, as provided for under the Law on Costs of Civil Procedure (Law No. 40 of 1971)). Court costs do not include legal fees (attorneys' fees) that are borne by each party respectively in the absence of an attorneys' fees clause. Apart from these court costs, the general rule is that litigation costs are borne by the party incurring the expense, even if the party prevails in the dispute. In the context of tort claims, the court may nonetheless award a usually small part of the prevailing party's attorneys' fees as part of the damages when there is a reasonable causal nexus between a tort and the fees (in such case, the court would tend to limit the recovery of attorneys' fees to 10% of the other recoverable damages). The allocation of court costs is ordered as part of the court's decision.

Attorneys' fees may be freely agreed upon between attorneys and clients, and lawyers are allowed to charge part of their fees on a contingency basis under Bar Association rules.

Many law firms continue to determine their fees based on a combination of retainer fees and success fees based on the now repealed legal fee table of the Japanese Federation of Bar Associations.

The Japan Legal Support Center, an independent public institution, provides civil legal aid services including free legal consultations and loans for attorneys' fees for people who require the assistance of legal experts but who, for economic reasons, are unable to pay for attorneys' fees and court costs; although, in practice, this is irrelevant for international commercial disputes. To obtain public funding, the applicant must have financial resources below a certain amount, have a reasonable chance of success, and pursue aims consistent with the purposes of legal aid. Criminal matters are excluded from the scheme.

Litigation funding

Third-party funding is not yet common in the Japanese litigation practice. Its lawfulness is still a moot point, although it does not appear to be prohibited *per se*. The assignment of claims or causes of action is generally permitted, but the entrustment of a claim for litigation purposes is prohibited under the Trust Law (Law No. 108 of 2006). Depending on the circumstances, there is still a risk that third-party funding could be regarded as a criminal act under the Lawyers' Act, which prohibits any person who is not an attorney from engaging in legal business (including lawsuits, arbitration and conciliation) and also prohibits them from "acting as an intermediary in such matters" (i.e., referring cases to attorneys to obtain compensation for their business activities) (Article 72 of the Lawyers' Act).

Confirmation that third-party funding schemes are lawful could be welcomed by some in Japan, as litigation before the courts can be very costly. For example, the Japanese legal system's practice (no longer a requirement) of paying a substantial part of lawyers' fees upfront, inhibits litigation. The now defunct Bar Association courts' filing fee system, which for most cases has a graduated fee that increases with the size of damages sought regardless of the actual work completed by the attorney, increases the cost of getting one's case before the court. Legal fees are generally borne by each party respectively, as explained above. Also, under rules applicable to security for costs, the parties must pay litigation expenses in advance to cover the cost of handling the case to be incurred by a court, as well as a *per diem* expense allowance and transportation costs needed for witnesses, experts and interpreters, etc. Those persons benefitting from legal aid who would have financial difficulties in paying such costs can be exempted (Article 82-1 of the CCP). A party seeking interim measures may also have to pay a security deposit.

There are currently no US-style class actions in Japan, but making access to justice easier and more affordable through collective/mass actions was the main thrust behind the introduction of the special procedure known as the Japanese class action system. The Act on Special Provisions of Civil Procedure for Collective Recovery of Property Damage Suffered by Consumers (Law No. 96 of 2013) introduced a system that provides for a two-tier, opt-in procedure. During the first stage, a qualified consumer organisation files a lawsuit requesting the court to confirm the liability of a business operator for a common obligation arising under a consumer contract on behalf of potential consumer claimants. If the action is confirmed, the quantum of damages will be determined based on individual claims filed by consumers having elected to opt in. However, the scope of claims under this Act is limited and only covers claims arising from consumer contracts and to certain categories of property damage: claims for performance based on contractual obligations; unjust enrichment; breach of contract; warranty against defects; and claims for damages arising out of unlawful acts. However, damage to property other than the subject matter

of the consumer contract, lost profits, personal injury, and pain and suffering are expressly excluded by the Act. There is also the so-called "appointed party" mechanism under Article 30 of the CCP, which allows certain plaintiffs (or defendants) appointed by other claimants (or defendants) to act on their behalf in pursuing (or defending) civil actions. Appointments can be made when there are enough claimants/defendants sharing a "common interest" (i.e., the main allegations or defences are common amongst them). The appointed party can pursue the case on behalf of the appointing parties and the result will be binding upon the appointing parties, including a settlement.

Interim relief

The following forms of interim relief are available under the Civil Provisional Remedies Law (Law No. 91 of 22 December 1989). Where a dispute involves a monetary claim, obligees/potential plaintiffs may apply for a provisional attachment order (*kari sashiosae*) to ensure that any future monetary judgment will be enforced under said Law (Article 20). The effect of the attachment is to freeze the obligor's/potential defendant's assets to keep the defendant from disposing of his movables (most often money in bank accounts) or immovables and secure the future collection of their claims. It does not entitle the obligee to convert the seized property into money and have his obligation satisfied therewith.

Where a dispute involves certain categories of non-monetary claims, potential plaintiffs may apply for a provisional disposition order (*kari shobun*) to preserve their rights with respect to the subject matter in dispute (Article 23). Unlike a provisional attachment, which only concerns monetary claims, provisional disposition may take different forms due to the variety of subject matters in dispute. Provisional orders establishing a provisional legal relationship between the parties (e.g., in a labour relationship between an employer and a dismissed employee, the employee would file a motion requesting the court to issue a provisional order confirming the employee's status as an employee pending a resolution of the dispute on the merits and receive salary without having to report to work) are available to avoid substantial detriment or imminent danger caused by disputed legal relationships. To be granted an order, the claimant must demonstrate: (i) its substantive right to be protected; and (ii) that the exercise of its rights will most likely be impossible or extremely difficult without such provisional attachment or disposition. For provisional dispositions establishing a provisional legal relationship between certain parties, the claimant must establish the *prima facie* existence of a legal relationship that the other party is disputing, and the need for interim relief to avoid substantial detriment or imminent danger to the claimant.

Enforcement of judgments

Domestic judgments

A local judgment may be enforced by submitting, to the execution court or to a bailiff, an original copy of the judgment and a certificate of enforceability issued by a court clerk of the judgment court (Articles 25 and 26 of the Civil Execution Law, Law No. 4 of 30 March 1979 (CEL)). The court or bailiff handles the enforcement of judgments. Enforcement differs for a monetary and a non-monetary judgment. Pursuant to Article 22 of the CEL, compulsory execution may be carried out based on (*inter alia*) the following "obligation-titles" (*saimu meigi*) (also covering foreign judgments discussed in the next paragraph): a final and binding judgment; a judgment with a declaration of provisional execution; an order of compensation of damages with a declaration of provisional execution; a demand for payment with a declaration of provisional execution; a notarial deed prepared by a

notary with regard to a claim for payment of a certain amount of money or any other fungible chattel or a certain amount of securities, which contains a statement to the effect that the obligor will accept compulsory execution; a judgment of a foreign court for which an execution judgment has become final and binding; or an arbitral award for which an execution order has become final and binding, etc.

Compulsory execution may be commenced only when an authenticated copy or a transcript of an obligation-title, or a judicial decision that is to become an obligation-title when it becomes final and binding, has been served upon the obligor in advance or simultaneously. Means of compulsory execution of obligation-titles include the following:

- For the enforcement of a monetary claim, the CEL allows for compulsory execution, and the debtor's general properties (real properties, ships, movable properties, claims and other property rights) can be attached and sold in a public auction sale, and the sales proceeds are then used for the satisfaction of the monetary claim (Section 2 of Chapter 2 of the CEL).
- For the enforcement of an obligation to deliver real property, a request for the surrender or delivery of real estate property, etc. (i.e., real property in which a person resides) may be made under Articles 168 and 169 of the CEL and an indirect, compulsory execution method is also available under Articles 173 and 172 of the CEL.
- For the enforcement of an obligor's performance obligation, execution may be made by a third-party substitute (Article 414-2 of the CCP and Article 171 of the CEL) or through an indirect compulsory execution method under Article 172 of the CEL (monetary sanction: the execution court orders the obligor to pay the obligee a certain amount deemed reasonable to secure performance of the obligation by reference to the period of delay, or immediately if the obligor fails to perform the obligation within a reasonable period).
- For the enforcement of an obligor's obligation not to do something, a petition may be filed with the court to remove the results of the obligor's actions at the expense of the obligor or impose any other reasonable disposition for the future (Article 414-3 of the CCP and Article 171 of the CEL). In addition, indirect compulsion is available under Article 172 of the CEL. No direct enforcement by specific performance is allowed if the nature of the obligation does not permit enforcement (Article 414-1 of the CCP).

Foreign judgments

Japan is not party to any bilateral or multilateral treaty for the recognition and enforcement of foreign judgments. To enforce a foreign judgment, the party enforcing the judgment of the foreign court must obtain an execution judgment from a competent District Court in Japan declaring such enforcement (Article 24-4 of the CEL). The requirements for the recognition of a foreign judgment are set forth in Article 118 of the CCP. The petitioner must establish that the judgment is final. In addition, the judgment must satisfy the following requirements: (i) the jurisdiction of the foreign court that rendered the judgment is recognised in accordance with or under laws, regulations, conventions or treaties; (ii) the losing party has received proper service of summons or orders required to commence the proceedings (excluding service through notice by publication), or has appeared without being so served; (iii) the content of the judgment and the proceedings of the lawsuit are not contrary to public policy in Japan; and (iv) reciprocity exists (i.e., the courts of the relevant foreign country provide reciprocal recognition of Japanese judgments). If these requirements are satisfied, the foreign judgment will be effective and enforceable in Japan and the court issuing an execution judgment must not retry the whole case or review the case on its merits regardless of whether or not the foreign judicial decision was erroneous

(Article 24-2 of the CEL). With respect to (iii) above, a Supreme Court judgment of 1997 denied the enforceability of punitive damages in a judgment of a State court of California as a violation of Japan's public policy.

Cross-border litigation

Jurisdiction

The jurisdiction of the Japanese courts in cross-border disputes is governed by the CCP (Chapter 2, Section 1, Articles 3-2 *et seq*.), which lays down international jurisdiction rules applicable to litigation in the Japanese courts. Jurisdiction over a dispute primarily depends on the classification of the dispute, as per the examples below:

- Jurisdiction based on the defendant's domicile (Article 3-2 of the CCP): the defendant's domicile or residence in Japan; or the principal place of business or business office of the defendant's legal entity.
- Jurisdiction over an action involving a contractual obligation (Article 3-3): for an action based on a claim for performance of a contractual obligation; on a claim for damages due to non-performance of a contractual obligation; or on any other claim involving a contractual obligation, the place of performance of the obligation (Article 3-3(1) of the CCP).
- A tortious action: the place of the tortious act (Article 3-3(8) of the CCP). A tortious act is deemed to happen where the tortious act was committed (including the place where the product has been manufactured in product liability cases) or where the results have occurred (unless the occurrence in Japan of the results of a wrongful act committed abroad was unforeseeable).
- Jurisdiction over actions involving consumer contracts and labour relations:
    - Article 3-4(1): A consumer dispute commenced by a consumer whose domicile is located in Japan at the time the action is filed or at the time the consumer contract is concluded.
    - Article 3-4(2): An action involving a dispute over a civil matter that arises between an individual worker and that worker's employer with regard to the existence of a labour contract, or any other particulars of their labour relations, may be filed with the Japanese courts if the place where the labour is to be supplied is within Japan.
    - Article 3-5(3): An intellectual property (IP) dispute related to the registration of an IP right in Japan, or about the existence or validity of certain IP rights registered in Japan.
    - Agreement on Jurisdiction: Article 3-7(1): Parties' agreement to international jurisdiction.
    - Article 3-8: Jurisdiction by appearance.

Even if one of the foregoing grounds is found, the court may dismiss the case if it finds that there exist special circumstances under which a trial and judicial decision by the courts of Japan would harm equity between the parties or impede the well-organised progress of court proceedings (Article 3-9).

Proceedings, etc.

Court proceedings are conducted in Japanese only. Interpretation or translation in Japanese is required for testimonies or submission of documents in a foreign language. Legal representation by an attorney is not required before all courts, especially the lower courts. In court proceedings, the basic rule is that only a *Bengoshi* (an attorney-at-law registered in Japan) may act as a procedural attorney. A *Gaikokuho Jimu Bengoshi* (a foreign attorney registered with the Ministry of Justice) is not able to act as a procedural attorney in a court

of law in Japan. With respect to the application of a foreign law in the Japanese courts where a foreign law was selected or determined to be the governing law, the foreign law is seen as the norm on which the judgment should be predicated. In principle, the duty of the court is to ascertain the law and its substance and in doing so, the court may make enquiries to the Supreme Court, the Ministry of Justice, universities, or the foreign country's embassy or consulate. An expert witness can be appointed by the court. The court may also ask the parties to assist and produce legal opinions from foreign lawyers or scholars (and in practice, the court very often ends up relying on the submissions of the parties).

Service of summons

Service to a Japanese party

Service of summons is important, especially if a foreign judgment needs to be enforced in Japan at a later stage. Under Article 118-2 of the CCP, the defeated defendant must have received proper service of summons or order necessary for the commencement of the lawsuit (or have appeared without service). It also provides that service by publication does not suffice. According to a Supreme Court judgment of 28 April 1998, service of summons or order does not need to be done in accordance with Japanese law, but it must notify the defendant of the commencement of the lawsuit and must not impair the defendant's defence rights. If there is any treaty on the service method to be used between Japan and the State where the judgment is entered, service must be made accordingly.

Japan is a signatory to both the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 (Service Convention) and the Hague Convention on Civil Procedure. The Service Convention provides for the channels of transmission to be used when a judicial or extrajudicial document is to be transmitted from one State party to the Convention to another State party, for service of the latter. The Service Convention deals primarily with the transmission of documents; it does not address or comprise substantive rules relating to the actual service of process. The Service Convention does not preclude a party from exercising its authority to serve directly by post unless the contracting State declares that it refuses such service. Although Japan has not made such a declaration, service directly made by post is considered not to meet the requirements of Article 118-2 of the CCP.

To meet the requirements of Article 118-2 of the CCP, the defendant must have had the opportunity to become aware of the occurrence of the lawsuit and defend themselves against this lawsuit. In this regard, in a case involving a Japanese national resident of Japan as defendant, the Tokyo High Court ruled in its judgment of 18 September 1997 that a Japanese translation must be included for the service of summons or order, regardless of the Japanese national's language skills. The document to be served under the Service Convention is first sent to the Ministry of Foreign Affairs, which reviews it to determine whether the document satisfies procedural requirements (for example, whether the request and the summary of the document are properly filled in and whether the complaint is translated). If the requirements are satisfied, the Ministry sends the document to the Supreme Court of Japan. Following its own review, the Supreme Court sends the document to the District Court having jurisdiction over the addressee of the document. The District Court then serves the document on the addressee by special mail service. Once this is done, the District Court issues a certificate of service, which is sent to the Ministry through the Supreme Court.

Service to a foreign party

Service outside Japan is performed by service as commissioned by the court to the competent government agency of the foreign country or to a Japanese ambassador or consul stationed in the relevant foreign country (Article 108 of the CCP). Even if the foreign country was

also a party to the Service Convention and central authority service was allowed, it normally takes between six months to more than a year to complete service. Service by a consul may normally be achieved within six months; however, if a person on whom documents are served refuses to accept them, service cannot be affected. If there is no diplomatic relationship between Japan and the foreign country and service under Article 108 of the CCP may not be performed, or if the competent authority of the foreign country fails to send a report of service for more than six months, documents may be served by publication (Article 110); although, in practice, this is seldom the case.

International arbitration

Arbitration is not a popular method of resolving domestic disputes between Japanese companies. The number of cases handled by the main institute, the Japan Commercial Arbitration Association (JCAA), is nominal compared with the number of litigations handled by domestic courts or the caseload of competing institutions in Singapore or Hong Kong. Japanese companies typically rely on Japanese courts for domestic matters and would only favour arbitration for their cross-border activity: in this context, they tend to select major, internationally recognised arbitration centres such as the International Chamber of Commerce (ICC) or the Singapore International Arbitration Centre (SIAC).

The Arbitration Law, Law No. 138 of 1 August 2003 (JAL), is applicable to arbitral proceedings whose place of arbitration is in Japan. The JAL is based on the UNCITRAL Model Law, although there are a limited number of deviations from the Model Law. In addition, the Supreme Court Rules on Procedures of Arbitration Related Cases (Supreme Court Rule No. 27 of 26 November 2003) prescribe procedural rules for court cases relating to arbitration. No distinction is drawn between domestic and international arbitration. The JAL sets out procedural rules, but should the parties specifically agree on other procedural rules (for example, JCAA's Commercial Arbitration Rules or the ICC Arbitration Rules), these rules will override the JAL, which will only fill the gaps. Revisions to bring the JAL in line with the latest Model Law are currently being discussed in the Legislative Council.

The arbitration agreement must be in writing (Article 13-2 of the JAL). Documents signed by all the parties or letters exchanged between the parties, including documents exchanged by fax or other communication devices, and other written instruments, are acceptable. The agreement is valid only when the subject matter relates to a civil dispute (excluding divorce, etc.) that can be resolved by settlement between the parties (Article 13-1). Arbitrability of a dispute is broadly construed in Japan to cover a variety of civil and commercial disputes. Certain matters are generally considered to be non-arbitrable, including: insolvency; antitrust matters; the validity of IP rights granted by the government; and shareholders' lawsuits against shareholders' general meeting resolutions. Japanese courts generally take a pro-arbitration approach towards the enforcement of agreements to arbitrate. Article 14-1 compels Japanese courts, upon a petition by the defendant, to dismiss a claim related to a civil dispute that is subject to an arbitration agreement (save in limited circumstances, including when the arbitration agreement is null and void, cancelled or invalidated for other reasons). A consumer may unilaterally terminate an arbitration agreement with a business operator to arbitrate disputes that may arise in the future, and an agreement with respect to labour disputes that may arise in the future between an individual employee and his employer is null and void (JAL Supplementary Provisions, Articles 3 and 4).

The tribunal itself may rule on its own jurisdiction (i.e., the authority to conduct arbitral proceedings and make an award). Article 23-1 of the JAL expressly provides the principle of competence-competence in the same manner as the Model Law. The tribunal may rule

on assertions made on the existence or validity of an arbitration agreement or its own jurisdiction. If such an objection is made, the tribunal shall issue a preliminary independent ruling or an arbitral award when it considers it has jurisdiction, and when it deems otherwise, shall issue a ruling to terminate the arbitral proceedings (Article 23-4).

Article 36 provides that unless the parties have agreed on the rules of law applicable to the substance of the matter, the arbitral tribunal will apply the substantive law of the State with which the dispute subject to the arbitral proceedings is most closely connected.

Unless otherwise agreed by the parties, the tribunal may order a party to take such interim protection measures as the tribunal deems fit with respect to the subject matter of the dispute and order a party to provide appropriate security in connection with such measure (Article 24). Because interim measures decided by arbitrators are not immediately enforceable, Article 15 provides that, notwithstanding the existence of an arbitration agreement, a party may request an interim protection measure from a court before or during arbitration proceedings, and that the court may grant such measure in respect of a dispute that is the subject of the arbitration agreement.

Pursuant to Article 39, the award must be in writing, dated and signed by the arbitrators and should, unless agreed otherwise by the parties, state the reasons for the award. If the arbitral tribunal is a panel, it is sufficient for the award to be signed by a majority of arbitrators. Copies of the award must be served on the parties. The grounds for the setting aside of an award by the court under Article 44-1 are substantially similar to those entrenched in the Model Law. Article 45 provides that an arbitral award (irrespective of whether or not the place of arbitration is in Japan) shall have the same effect as a final and conclusive judgment.

Japan is a party to the New York Convention and the Washington Convention. The JAL also adopts the provisions of the Model Law on the recognition and enforcement of foreign awards. For the enforcement of an arbitral award made in a foreign country, the applicant needs to file a petition with the court to get an enforcement order, together with a certified copy of the award and a translation into Japanese (Article 46 of the JAL).

The costs of arbitration are apportioned between the parties in accordance with the parties' agreement (Article 49-1). If there is no agreement (or applicable rules such as JCAA's Commercial Arbitration Rules), each party bears the costs it has disbursed with respect to the proceedings (Article 49-2). The JAL does not provide that the losing party should systematically bear the costs.

Mediation and ADR

There is no obligation to pursue alternatives to litigation (except for court-annexed mediation, which is mandatory at first instance for family disputes and certain rent disputes but is rarely used for large commercial disputes). Japanese people and corporates typically prefer the amicable settlement of disputes through negotiation over court litigation. Even then, a negotiated settlement (*wakai*) can be made at any time before or during the court proceedings.

ADR is available on a voluntary basis in the form of civil mediation under the Law Concerning the Promotion of the Use of Alternative Dispute Resolution Procedures (Law No. 151 of 1 December 2004 (ADR Law)). The ADR Law has introduced an accreditation system for private dispute resolution services, but this is not mandatory. If the parties can reach an agreement, this agreement is put on record by the court and becomes enforceable in the same manner as a final judgment. Civil mediation procedures are simple and cost effective (costs are fixed) and proceedings are confidential. The relative success of mediation

is due to the increasing costs and sophistication of modern litigation and the recognition that existing commercial relationships had better be preserved insofar as possible.

Civil litigants can also agree to refer their dispute to civil conciliation (*chotei*) under the Civil Conciliation Law (Law No. 222 of 9 June 1951 (CCL)). Conciliation under the CCL is conducted by a conciliation committee composed of one judge and two or more civil conciliation commissioners appointed from amongst knowledgeable and experienced citizens. The committee assists the parties in finding an amicable settlement and usually submits a settlement plan to the parties. If the parties can reach an agreement, this agreement is put on record by the court and has the same effect as a court judgment and can be enforced accordingly. If the parties are unable to reach an agreement, the plaintiff must file a suit before the ordinary courts to pursue their claims.

Arbitration (*chusai*) is the most frequently used ADR mechanism to resolve large commercial disputes. The main thrust behind the new JAL based on the UNCITRAL Model Law discussed above was to encourage the use of arbitration. Although commercial arbitration has not been used very actively as a means of resolving domestic disputes in Japan, it has gradually become an important option, especially in an international context.

The major ADR institutions in Japan include, with respect to arbitration, JCAA, the Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange, the Japan Sports Arbitration Agency (JSAA) for sports-related disputes, and the Japan Intellectual Property Arbitration Center (JIPAC) for IP-related disputes. For mediation, institutions include the courts, the Financial Instruments Mediation Assistance Center (FINMAC), and the Japan Bankers' Association. A number of domestic construction disputes are also resolved through the Med-Arb process before the Construction Dispute Review Boards established pursuant to the Construction Business Act. A number of industry-associated (product-specific) trade associations have established permanent dispute resolution organisations in the wake of the enactment of the Product Liability Law (Law No. 85 of 1 July 1994): the Federation of Pharmaceutical Manufacturers Associations of Japan; the Japan Chemical Industry Association; the Association for Electric Home Appliances; the Japan Automobile Manufacturers Association, Inc.; the Center for Housing Renovation and Dispute Settlement Support; the Consumer Product Safety Association; the Japan General Merchandise Promotion Center; the Japan Cosmetic Industry Association; the Fire Equipment and Safety Center of Japan; the Japan Toy Association; and the Japan Construction Material & Housing Equipment Industries Federation, etc.

In 2017, the Japanese government announced its intention to establish a new, dedicated dispute resolution centre to bring various dispute resolution bodies, such as JCAA, under the same umbrella in a more internationally focused environment, and to raise the profile of international arbitration in Japan at a time when there is a noticeable uptick in the number of disputes involving Japanese companies. As a result, the first Japan International Dispute Resolution Center (JIDRC) was established in early 2018 in Osaka, followed by a second JIDRC facility established in Tokyo (JIDRC-Tokyo) in March 2020. The JIDRC facilities provide a venue for parties to hold hearings on cross-border disputes under procedural and substantive rules of their choosing. The JIDRC facilities can be used for institutional or *ad hoc* arbitrations and other ADR procedures. On 4 June 2019, SIAC entered into a memorandum of understanding (MOU) with the Japan Association of Arbitrators (JAA) and JIDRC to promote international arbitration as a preferred method of dispute resolution for resolving international disputes. Under the MOU, SIAC will work with the JAA and JIDRC to jointly promote international arbitration through conferences, seminars, workshops and training programmes on international arbitration in Japan and Singapore.

In addition, Doshisha University and the JAA opened an international mediation centre in Kyoto in November 2018, in collaboration with the Singapore International Mediation Centre (SIMC). The new mediation centre (the Japan International Mediation Center in Kyoto, or JIMC-Kyoto) is headquartered at Doshisha University. It relies on a system similar to the Arb-Med-Arb, which is in place between SIAC and the SIMC in Singapore and gives parties the opportunity to resolve disputes referred to arbitration through mediation first. In September 2020, JIMC-Kyoto and the SIMC launched joint mediation protocol, which provides cross-border businesses with an expedited online mediation amid the COVID-19 pandemic.

In May 2020, the Foreign Lawyers Act was amended to promote international arbitration in Japan. In order to boost international arbitration, the amendments aim to expand the scope of services that can be rendered by Registered Foreign Lawyers involved in arbitration proceedings.

Regulatory investigations

There are a variety of regulatory investigations that cannot be summarised here (and as many watchdogs). However, the main Japanese regulatory authorities are as follows:

- The Public Prosecutor's Office, which investigates and prosecutes criminal matters in general (assisted by the police).
- The Ministry of Justice, which has supervisory responsibility for matters regulated by the Companies Act (Law No. 86 of 26 July 2005), the Commercial Code and the CCP.
- The Ministry of Economy, Trade and Industry (METI) for various economic violations including under the Unfair Competition Prevention Law (Law No. 47 of 19 May 1993).
- The Ministry of Finance (MOF), which is in charge of matters regulated by the Foreign Exchange and Foreign Trade Law.
- The Ministry of Health, Labour and Welfare, in relation to regulatory matters concerning pharmaceuticals and medical devices.
- The Financial Services Agency (FSA) and the Securities and Exchange Surveillance Commission (SESC), which deal with violations of the Financial Instruments and Exchange Law (Law No. 25 of 13 April 1948).
- The JFTC, for antitrust violations including unfair practices and cartels under the Law on the Prohibition of Private Monopolization and Maintenance of Fair Trade (Law No. 54 of 14 April 1947), and violations of the Law against Delays in Payment of Subcontract Proceeds, Etc. to Subcontractors.
- The Japan Financial Intelligence Center (JAFIC) within the National Police Agency, which deals with money laundering investigations and terrorism.
- The Personal Information Protection Commission for the supervision and handling of data protection issues under the Protection of Personal Information Law (Law No. 57 of 30 May 2003).

The relevant authorities can use various investigation methods, including voluntary and compulsory information requests. They can also apply to a court for a search warrant in serious cases. Where an investigative authority concludes that a crime has been committed, it can refer the matter to the police and/or the public prosecutor.

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