The Dispute Resolution Review

Seventh Edition

Editor
Jonathan Cotton

Law Business Research

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EDITOR'S PREFACE

The Dispute Resolution Review covers 48 countries and territories. Disputes have never respected national boundaries and the continued globalisation of business in the 21st century means that it is more important than ever before that clients and lawyers look beyond the horizon of their home jurisdiction.

The Dispute Resolution Review is an excellent resource, written by leading practitioners across the globe. It provides an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. It is written with both in-house and private legal practitioners in mind, as well as the large number of other professionals and businesspeople whose working lives bring them into contact with disputes in jurisdictions around the world.

This Review is testament to the fact that jurisdictions face common problems. Whether the issue is how to control the costs of litigation, which documents litigants are entitled to demand from their opponents, or whether a court should enforce a judgment from another jurisdiction, it is fascinating to see the different ways in which different jurisdictions have grappled with these issues and, in some cases, worked together to produce a harmonised solution to international challenges. We can all learn something from the approaches taken by the 48 jurisdictions set out in this book.

A feature of some of the prefaces to previous editions has been the impact that the turbulent economic times were having in the world of dispute resolution. Although at the time of writing the worst of the global recession that gripped many of the world's economies has largely passed, it is has left its mark. Old and new challenges and risks remain in many parts of the world such as renewed speculation on the future of the eurozone, the sanctions imposed on Russia, and falls in the price of oil. In some regions, the 'green shoots' of recovery have blossomed while in others they continue to need careful nurturing. Both situations bring their different challenges for those involved in disputes and, while the boom in insolvency-related disputes and frauds unearthed in the recession remain, the coming year could see an increase in investment and acquisitions with a subsequent focus on disputes concerning the contracts governing those investments.

I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at p. 739 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research, in particular Nick Barette, Eve Ryle-Hodges and Shani Bans, who have impressed once again in managing a project of this size and scope, and in adding a professional look and finish to the contributions.

Jonathan Cotton
Slaughter and May
London
February 2015

Chapter 27

JAPAN

Tatsuki Nakayama[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i Litigation

Japan is a unitary country with 47 prefectures and one judicial system. The three-tiered judicial system in Japan, based on civil law, is composed of five types of courts: the Supreme Court, eight high courts, 50 district courts, 50 family courts and 438 summary courts.

The Supreme Court is the highest court in Japan to review appeals from lower courts, but only on restricted grounds.[2] High courts have jurisdiction over appeals from district courts and family courts. The Intellectual Property High Court is a special branch of the Tokyo High Court that handles appeals regarding intellectual property.

The district court is generally the court of first instance, except for cases within the exclusive jurisdiction of other courts. It also functions as an appellate court for rulings from summary courts. In general, cases at district courts are tried by a single judge unless all three judges decide to hear the case as a panel.[3] The summary courts are courts of first instance for civil cases with claims of not more than ¥1.4 million.

Though the citizen judge system, or lay judge system, for bigger criminal cases started in 2009, there are no jury trials in civil cases. Unlike common law countries, most judges in Japan commence their careers after a traineeship following the passing of the Japanese National Bar Exam. Very few become judges after working as practising attorneys.

1 Tatsuki Nakayama is a partner at Miyake & Yamazaki.

2 Article 312 of the CCP.

3 Article 26 (2) of the Court Act (Act No. 59 of 1947).

ii Alternative dispute resolution (ADR)

Litigation is the most commonly used method of dispute resolution in Japan. The most common alternative dispute resolution system for civil matters is conciliation in the district and summary courts. Other extrajudicial methods for private ADR are still uncommon but are gradually being used more and more.

II THE YEAR IN REVIEW

Comprehensive amendments to the Commercial Arbitration Rules of the Japan Commercial Arbitration Association (JCAA) came into effect on 1 February 2014. The number of JCAA Rules increased from 72 to 85. These amendments are aimed at enhancing the availability of JCAA arbitration in line with recent trends in other international arbitration rules. The main amendments are as follows:

i Multiple claims, joinder and consolidation

Multiple claims can be heard in a single arbitration under broader and clearer conditions. If the parties agree in writing, all claims arise under the same arbitration agreement or all claims arise between the same parties and are mutually related to some extent, then the claimant can submit a single request for arbitration for multiple claims under Rule 15.1 of the amended JCAA Rules.

A third party may join the arbitration as a claimant or as a respondent if all parties and the third party have so agreed in writing, or all claims are made under the same arbitration agreement, subject to the written consent of the third party when it is requested to join after the constitution of the tribunal (Rule 52). The previous Rules only allowed joinder if all parties and the third party had so agreed in writing.

Under Rule 53, the tribunal may consolidate another pending arbitration with the pending arbitration if these pending arbitrations meet the three requirements of Rule 15.1.

ii Appointment of arbitrators

If there should be three arbitrators and either party fails to appoint its arbitrator, considering the equality of the parties in the appointment of arbitrators, the JCAA shall appoint all three arbitrators, not only the arbitrator that was failed to be appointed, pursuant to Rule 29.7.

iii Mediation

Under the previous JCAA Rules, the tribunal could attempt to settle the dispute if the parties so agreed. However, this arrangement was different from the common law approach of having a mediator that is not also the arbitrator conduct the mediation so they are not prejudiced by the mediation proceedings.

In light of this concern, the 2014 amendment paved a clearer way for mediation. While arbitral proceedings may be referred to mediation at any time if so agreed in writing by the parties, in principal no arbitrator is to serve as a mediator under Rule 54.

On the other hand, the parties may not challenge the arbitrator on the grounds that such an arbitrator served as a mediator under the exception of Rule 55.1.

iv Interim measures and emergency arbitrators

Chapter V (Interim Measures by Arbitral Tribunal or by Emergency Arbitrator) provides nine Rules (Rules 66 to 74) with respect to interim measures, whilst the previous Rules had only one brief Rule in this regard.

The biggest change is that Rule 66.2 sets requirements for interim measures. The requesting party must satisfy the arbitral tribunal that the harm likely to be caused without interim measures 'substantially outweighs' the harm caused by the requested interim measures, and that there is a 'reasonable possibility' that the requesting party will succeed on the merits of the claim.

In line with recent international trends, the JCAA adopted new Rules 70 to 74 for emergency arbitration. For instance, the JCAA shall use reasonable endeavours to appoint an emergency arbitrator within two days after the application under Rule 71.4. Thereafter, under Rule 72.4, the emergency arbitrator must decide on emergency measures within two weeks of its appointment.

v Other improvements

There are other improvements aimed at expediting the arbitral procedures. They include the following:

Time limit

Rule 39 has a general requirement that the arbitral tribunal must make reasonable efforts to render an arbitral award within six months from the tribunal's constitution. Rule 40 further elaborates on the tribunal's efforts to identify the issues to be determined as early as practicable.

Expedited procedures

Rule 75.1 allows the parties to opt for expedited procedures when they so notify the JCAA in writing, in addition to in any case where the amount of the claim is not more than ¥20 million.

III COURT PROCEDURE

i Overview of court procedure[4]

Civil court procedure is governed by the Code of Civil Procedure (CCP) (Act No. 109 of 1996) and other applicable laws.[5] English translations of many Japanese laws can be found on the Japanese Law Translation[6] database run by the Ministry of Justice.

ii Procedures and time frames

Procedures

A civil action commences with the filing of a complaint. There is no electronic filing system, so physical filing of the complaint by post or in person is necessary.[7] Within 30 days of receiving the complaint, the presiding judge should designate the date of the first hearing. After the service of the complaint and the writ of summons issued by the competent court, the defendant should file a reply.

There are in general two types of procedure before the examination: formal hearings and informal preparatory proceedings. The formal hearing is the hearing for oral arguments. However, before the hearing the parties will be required to submit preparatory briefs[8] so hearings seldom require oral argument by the parties. Typically, in a hearing, attorneys will make only short comments on the documents that have already been produced. With the exception of petty monetary claims, after a few formal hearings, many cases undergo non-public preparatory proceedings held at a small chamber among the parties and the judge. At these informal proceedings, the parties will candidly discuss the legal and factual matters of the case in order to clarify the main issues efficiently.

As the case proceeds, the court will order hearings every one to two months. Before each hearing, the parties exchange written briefs until the major issues become clear. There are no time restrictions imposed on the exchange of briefs; it will continue as long as necessary at the discretion of the judge. Judges usually require the submission of these briefs seven days before the hearing. In bigger cases, this exchange of preparatory briefs can last for a couple of years or more. But statistics show that most cases will require four hearings on average.

At any time the judge can encourage the parties to settle.[9] The judge will often act as the mediator. In Japan, some argue that the judges with the highest settlement rates,

4 The Supreme Court and the Japan Federation of Bar Associations (JFBA) furnish brief English guides on the judicial system in Japan on their websites (www.courts.go.jp/english/judicial_sys/index.html and www.nichibenren.or.jp/en/about/judicial_system/judicial_system.html).

5 The Civil Proceedings Regulations (Rules of Supreme Court No. 5 of 1996) and the Court Act, etc.

6 www.japaneselawtranslation.go.jp.

7 With the exception of some very important or specifically defined documents, some can be filed by facsimile under the Civil Proceedings Regulations.

8 Articles 139 and 161 of the CCP.

9 Article 89 of the CCP.

thus showing the greatest efficiency in resolving disputes, are promoted more quickly than others. Thirty-two per cent of district court cases were settled in 2011.

In Japan there is no American-style extensive discovery procedure, nor is there any separation between the pleadings and discovery stage. The parties can at any time produce the evidence they think is relevant to the merits of the case. Evidence can be produced at the initial stage together with a complaint or at the last minute, even after the completion of the witness examination. However, evidence produced in an untimely fashion can be denied.[10]

Once the key issues are clear, the case proceeds to the examination stage. In Japan, the examination stage of the case is relatively short compared to common law countries. A witness will normally take no more than two hours on the stand, including cross-examination, and only a few witnesses are questioned.[11] Therefore, the whole examination of witnesses and parties is often completed in only half a day.

After the examination stage, the judge may require the parties to submit final statements, to attend subsequent hearings for settlement, or to close the hearings immediately in preparation for considering the judgment. The judgment is rendered one to two months after the closing of hearings.

Time frame

The average time for completion of all cases in district courts was 6.8 months in 2010. In 2011, 81 per cent of all cases in district courts were completed within one year and 96 per cent within two years.[12] However, it should be noted that more than half the cases at district courts are petty monetary claims for the recovery of interest that is overpaid pursuant to the Interest Rate Restriction Act (Act No. 100 of 1954). These petty claims normally finish faster, within just a few months. If we exclude these petty claims, the average time for completion is 8.3 months in 2010.

As would be expected, more complicated cases take longer to resolve. In 2010, the average time for completion of labour cases was 11.8 months, intellectual property cases 14.8 months, construction-related cases 17.5 months and medical malpractice cases 24.9 months. The newly introduced Labour Dispute Adjudication System settles individual labour disputes faster. The average time for completion of disputes under this system was 71.6 days in 2010.[13]

Under the Consumer Contract Act, qualified consumer organisations, certified by the Prime Minister, may demand an injunction to prevent business operators' unreasonable conduct. There is currently no provision in this Act that allows the organisations to demand damages.

10 Article 157 of the CCP.

11 The average number of witnesses and parties examined at the first instance is only 0.3 (if petty monetary claims for the recovery of overpaid interest, common in Japan, are excluded, the average number goes up to 0.5) in 2010.

12 Judicial Statistics, Supreme Court.

13 Report on Inspection regarding Acceleration of Judicial Process, Supreme Court, 8 July 2011.

iii Interim measures

Under the Civil Provisional Remedies Act, there are two types of interim measures: provisional seizure and provisional disposition. Provisional seizures are used to preserve the debtor's property to secure the monetary claims of creditors. On the other hand, provisional dispositions are used to preserve the disputed subject to secure non-monetary claims or to determine provisional legal status between the parties. The rulings on such provisional measures are rendered quickly: 70 per cent of the interim procedures were finished within one month in 2011.

iv Class actions

There is no provision in the CCP for class action suits. Instead, if a group wants to be a party to litigation, they must appoint among them one or more persons who stand as plaintiffs or defendants on their behalf.[14]

Under the Consumer Contract Act,[15] qualified consumer organisations, certified by the Prime Minister, may demand an injunction to prevent business operators' unreasonable misconduct. There is currently no provision in this Act that allows the organisations to demand damages. However, the Special Civil Litigation Procedure for the Collective Recovery of Consumers' Monetary Damages Act (Act No. 96 of 2013) was newly promulgated in December 2013 and will take effect three years after its promulgation. This new Act paves the way for consumers to collect damages.

v Representation in proceedings

Natural persons and legal entities may represent themselves in all levels of courts. In addition, associations and foundations without a legal status can be a party to the litigation under their own name so long as they have a representative or an administrator.[16]

Non-lawyers such as licensed judicial scriveners[17] may represent clients at the summary courts with the court's permission.[18] In 2011, in only 30 per cent of district court cases (if smaller monetary claims for the recovery of overpaid interest are excluded, 40 per cent) and 2.3 per cent of summary court cases were both parties represented by lawyers.[19]

vi Service out of the jurisdiction

Service of process in foreign jurisdictions is conducted through the competent government agency by letters rogatory or through the Japanese consulate of that jurisdiction.[20] Direct

14 Article 30 of the CCP.

15 Article 12 of the Consumer Contract Act (Act No. 61 of 2000).

16 Article 29 of the CCP.

17 The official national association of judicial scriveners call themselves 'Shiho-Shoshi lawyers' on their website: www.shiho-shoshi.or.jp/english/.

18 Article 54 of the CCP.

19 Judicial Statistics, Supreme Court.

20 Article 107 of the CCP.

service by post to foreign recipients is not allowed. The 1965 Hague Service Convention, the 1954 Hague Civil Procedure Convention, bilateral conventions[21] and reciprocal judicial aid arrangements set out these processes. Service through foreign agencies or Japanese consulates can take several months or more. Service to foreign jurisdictions without diplomatic relations with Japan, such as Taiwan and North Korea, is by law through publication, but in practice the Japanese court clerk also notifies the party by post.[22]

Pursuant to Article 184 of the CCP, if a party needs to examine a witness or other evidence in a foreign jurisdiction, he or she must coordinate with the governing agency of that jurisdiction or the Japanese consulate.

vii Enforcement of foreign judgments

A final and binding judgment rendered by a foreign court shall be effective in Japan when it meets all the following requirements:[23]

a Jurisdiction of the foreign court is recognised under laws, regulations, conventions or treaties. The recognition of jurisdiction of a foreign court has long been determined by the 'rule of reason', or principles of justice, found in case law, considering the circumstances of each case; no clear criteria were provided.[24] However, after the promulgation of the amended CCP in April 2012, the updated Article 3-2 to 3-12 of the CCP will govern the determination of international jurisdiction. If jurisdiction in Japan is not found through Article 3-2 to 3-12 of the CCP, then a foreign court's jurisdiction will be recognised in turn.

b The losing party must receive notice through a method other than service by publication, or any other service similar thereto, of a summons or order necessary for the commencement of the suit. If a party appears without receiving such service, they will be deemed to have waived any challenge to the adequacy of service.

c The content of the judgment and the court proceedings are not contrary to public policy in Japan. In this regard, punitive damages under the civil code of California were held contrary to public policy in Japan.[25]

d A mutual guarantee exists that the foreign jurisdiction will enforce the judgments and rulings of Japanese courts. The following jurisdictions have been held to have such a mutual guarantee: many states in the United States, the United Kingdom, Germany, Singapore, Korea, Zurich, Queensland (Australia) and Hong Kong. On the other hand, China, Russia, Thailand, Indonesia and other developing jurisdictions are believed to have no mutual guarantee with Japan.

21 The 1964 Japan-US Consular Convention and the 1965 Japan-UK Consular Convention.

22 Article 110 of the CCP and Article 46(2) of the Civil Proceedings Regulations.

23 Article 118 of the CCP.

24 Supreme Court judgment, 28 April 1998.

25 Supreme Court judgment, 11 July 1997.

Aside from foreign insolvency proceedings, there is no specific procedure in Japan for screening the above requirements. The party seeking enforcement of a foreign judgment must file an action for execution of judgment pursuant to Article 24 of the Civil Execution Act (Act No. 4 of 1979). For foreign insolvency proceedings, the foreign trustees, etc., must file a petition to a court in Japan for recognition of the foreign insolvency proceedings.[26]

viii Assistance to foreign courts

Service to individuals and entities in Japan by foreign jurisdictions[27] can be made via (1) the Ministry of Foreign Affairs of Japan under the 1965 Hague Service Convention, the 1954 Hague Civil Procedure Convention or reciprocal judicial aid arrangements, or (2) the Japanese consulates of the countries that are parties to the above Conventions or bilateral treaties.[28]

In either case, personal delivery is not allowed in Japan. However, it is controversial whether direct service by post to Japanese recipients from jurisdictions that are parties to a competent convention is legal.

The examination of evidence for foreign jurisdictions is also governed by (1) and (2) above. The examination of evidence for foreign jurisdictions, even where it contravenes any laws of the jurisdiction, is effective if it does not contravene the CCP.[29]

ix Access to court files

Any person can make a request to a court clerk for the inspection of a case record, whether the case is pending or not, unless:[30]

a the oral hearing was closed to the public;

b a material secret regarding the private life of a party is stated or recorded and the inspection of such information would cause substantial detriment to their social life; or

c a trade secret (as defined in Article 2(6) of the Unfair Competition Prevention Act) is contained within the record.

x Litigation funding

A party to the litigation who lacks the financial resources to pay the expenses necessary for preparing for and conducting a suit (i.e., the stamp fee on the complaint) or a person

26 Articles 17 and 21 of the Act on Recognition of and Assistance for Foreign Insolvency Proceedings (Act No. 129 of 2000).

27 The Act on Special Provisions concerning Civil Procedures Incidental to Enforcement of the Convention on Civil Procedure and other Convention (Act No. 115 of 1970) and the Law relating to the Reciprocal Judicial Aid to be given at the Request of Foreign Courts (Act No. 63 of 1905) are the main laws.

28 The 1964 Japan-US Consular Convention and the 1965 Japan-UK Consular Convention.

29 Article 184(2) of the CCP.

30 Articles 91 and 92 of the CCP.

who will suffer substantial detriment to his or her standard of living by paying such expenses, may ask the court for judicial aid.[31]

On the other hand, those who cannot afford lawyer fees may turn to the Japan Legal Support Centre for financial support.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Conflicts of interest[32]

A lawyer is prohibited from undertaking:

a cases in which he or she provided support to the other party after consultations, accepted the other party as his or her client, or was in a relationship of mutual trust with and was consulted by the other party; or

b cases that he or she handled as a public officer, an arbitrator or a mediator.

Also, without consent from the client, a lawyer is prohibited from undertaking:

a other cases requested by the other party to the client; or

b cases in which the interest of the client contradicts that of other clients or the lawyer.

Chinese walls

A lawyer is not allowed to provide legal services for a matter on which other lawyers of the same law firm are prohibited from providing legal service. However, this restriction does not apply if there is a reason for maintaining the fairness of their legal service.[33] There are no specific provisions that define 'reason for maintaining fairness' or Chinese walls. Chinese walls are considered to be a factor in favour of maintaining such fairness, but each case should be determined on its own facts and circumstances.[34]

ii Money laundering, proceeds of crime and funds related to terrorism

Money laundering is prohibited by several laws.[35] Effective from 1 April 2013, an amendment to the Act for the Prevention of Transfer of Criminal Proceeds will be

31 However, this aid applies only where it cannot be said that the applicant is unlikely to win the case pursuant to Article 82 of the CCP.

32 Article 25 of the Attorney Act (Act No. 205 of 1949) and Article 27 of the Basic Rules on the Duties of Practising Attorneys established by the JFBA in April 2005.

33 Article 57 of the Basic Rules on the Duties of Practising Attorneys.

34 The Ethics Committee of the JFBA, 'Commentary on Basic Rules on the Duties of Practising Attorneys' (2nd Edition) (2012).

35 The Act concerning Special Provisions for Narcotics and the Psychotropic Control, etc., and other Matters for the Prevention of Activities Encouraging Illicit Conduct and other Activities involving Controlled Substances through International Cooperation (Act No. 94 of 1991), Act on Punishment of Organised Crimes and Control of Crime Proceeds (Act No. 136 of 1999), Act on Punishment of the Financing of Criminal Activities for the Purpose of

enforced. This will require specified business operators, except for lawyers, to confirm more details about their clients in certain types of transactions.[36]

To prevent possible money laundering, lawyers, including registered foreign lawyers, are required to verify the identity of clients when they engage in the following transactions:

a administration of a client's account in a financial institution, taking custody of or administration of assets over ¥1 million; or

b preparation for, or execution of:
- sales or purchase of real estate;
- making capital contributions to establish or manage a company;
- establishment of a legal entity;
- a trust agreement; or
- sales or acquisition of a company.

Lawyers should also preserve clients' identification and documents describing the summary of transactions for five years after the completion of transactions. Further, lawyers are required to confirm whether the client's request involves a transfer of criminal proceeds. If they recognise the involvement, lawyers are prohibited from participating in the request.[37]

Lawyers' fees

There is no rule requiring the defeated party to pay the prevailing party's lawyers' fees. However, in tort cases, a defeated party may be held responsible for extra damages (amounting to around 10 per cent of the damages) as lawyers' fees, if so claimed by the other party. Further, a defeated party must bear the court's fees under Article 61 of the CCP.

iii Data protection

In December 2012, the JFBA established a new rule for the administration of clients' personally identifiable data.[38] Under this Rule, when lawyers are engaged in the following services, they must confirm their clients' identification by requesting official identification data as follows:

a driver's licence;

b administration of financial accounts;

Intimidation of the General Public and of Governments (Act No. 67 of 2002) and Act for Prevention of Transfer of Criminal Proceeds (Act No. 22 of 2007).

36 The Japan Financial Intelligence Centre under the National Police Agency provides English information concerning restrictions against money laundering: www.npa.go.jp/sosikihanzai/jafic/en/maneron_e/manetop_e.htm.

37 Article 8 of the Act for Prevention of Transfer of Criminal Proceeds and Articles 2 to 4 of the JFBA Rules regarding the Verification of Clients' Identity and Record-keeping.

38 Rule for Confirmation and Record of Clients' Identification Data (JFBA Rule No. 95 of 2012).

c maintenance or administration of assets amounting to not less than ¥2 million; and

d preparation or implementation of significant transactions, including the following:
- sale of real estates;
- incorporation or change in the organisation of a company; or
- appointment of a company representative.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

In Japan, lawyers benefit from attorney–client privilege. Lawyers have a confidentiality duty under the Penal Code and the Attorneys Act.[39] Hence lawyers, including registered foreign lawyers, may refuse to testify or turn over documents that may reveal confidential information obtained in the course of representing a client.[40] In-house lawyers will also be protected under this privilege so long as they acted primarily as a lawyer in the company they work for.

However, a client may not exercise any attorney–client privilege or work product protection. In February 2012, the JFBA proposed to amend the CCP to provide the client with the explicit right of refusal to testify on privileged matters or to produce privileged documents.

ii Production of documents

A party to litigation or a third party holding relevant evidence must, subject to the court's order, submit the evidence designated by the other party in accordance with Article 220 of the CCP. However, the holder of the evidence may refuse to produce it if:

a the holder or the spouse or the relative of the holder is likely to be prosecuted or convicted due to the disclosure;

b the confidentiality of a public officer, doctor, lawyer (including registered foreign lawyer) or other professionals could be compromised;

c technical or professional secrets could be revealed;

d the document is for the exclusive use of the holder; or

e the document relates to a criminal or a juvenile case.

If a party does not comply with an order to submit evidence, the court may admit the requesting party's allegations in lieu of the non-disclosed evidence. If a third party does not obey the disclosure order, it may be fined.[41]

39 Articles 197 and 220 (4) of the CCP.

40 Articles 197 and 220 (4) of the CCP.

41 Articles 224 and 225 of the CCP.

It is debated whether or not a court order to produce documents under the CCP can be made to a party in a foreign jurisdiction. In theory a party can request the court to commission the document holder (via foreign government agencies or the Japanese consulate under Article 184 of the CCP) to send the document under Article 223 of the CCP. However, this process is not in common use.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

ADR in Japan is divided into two categories: judicial ADR in which the court is involved, and non-judicial ADR in which the administrative institution or the private sector, instead of the court, handles disputes. Conciliation[42] is the most common. However, litigation is still used more often than conciliation. In both summary and district courts, the number of petitions for conciliation in 2011 is only about one-tenth of that for litigation: 74,891 for conciliation and 749,006 for litigation.[43]

ii Arbitration

Arbitration remains uncommon in Japan. To encourage more arbitration, the Arbitration Act was enacted in line with the 1985 UNCITRAL Model Law (the Model Law). This Act applies to both domestic and international arbitration. Registered foreign lawyers and non-registered foreign lawyers practising in a foreign state may represent their client in international arbitration in Japan.[44]

Japan is a signatory to the New York Convention and it does not limit the acceptance of the Convention to 'commercial' arbitration.[45] Setting aside and refusal to recognise or enforce awards are limited to the restricted situations outlined in the Model Law. If a party with a valid arbitration agreement files suit in a Japanese court, the court must decline to hear the case if so requested by the defendant.[46]

Regardless of the above pro-arbitration attitude and the strenuous efforts to promote arbitration, it has yet to be commonly used in Japan. According to JCAA, the major arbitration institute in Japan, there were only 19 petitions in the 2012 fiscal year.

42 To avoid doubt, the term 'conciliation' corresponds to *chotei* in Japanese while 'mediation' is *assen* in Japanese. Compared to conciliation, in mediation a neutral third party tends not to intervene in the dispute and gives more party autonomy for an amicable settlement.

43 Judicial Statistics, Supreme Court.

44 Articles 5-3 and 58-2 of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986).

45 Japan applies the New York Convention on condition that the arbitral award is rendered in another contracting state of this Convention.

46 Article 14 of the Arbitration Act. However, unlike Article 8 of the Model Law, the court in Japan does not refer the parties to arbitration.

iii Mediation

Mediation is the least commonly used dispute resolution method in Japan. It is handled by municipal bodies or the private sector. Collective labour disputes,[47] construction-related disputes and consumer affairs are the most common cases settled through mediation.

To facilitate quicker settlement of claims resulting from the situation at the Fukushima Daiichi Power Plant after the Great East Japan Earthquake on 11 March 2011, the Dispute Settlement Centre for Nuclear Damage Compensation was established on 1 September 2011. Many lawyers are serving as mediators at this Centre. As of 31 December 2013, the Centre had received 9,154 applications for mediation, out of which 6,529 applications have been resolved. However, the Centre still has a large number of pending cases, so it wants to simplify and expedite the mediation procedures.

iv Other forms of alternative dispute resolution

Judicial ADR

Conciliation[48]

The goal of conciliation, governed by the Civil Conciliation Act,[49] is to settle disputes through amicable discussion and mutual agreement by the parties. Conciliation for civil matters can be conducted at the district and family court, while family conciliation is held at the family court. The process of conciliation is presided over by a conciliation committee, typically composed of a judge and two civil commissioners. Unlike litigation, there is no ruling or decision that binds the rights and duties of the parties.

Labour dispute adjudication system

To encourage earlier settlement for lengthy labour disputes, the labour dispute adjudication system started in April 2006. In this system, a tribunal composed of a judge and two part-time experts on labour relations is required to complete the trial within three hearings.[50] Disputes that cannot be resolved through this system are referred to the district courts for litigation. In the six years since its promulgation, this system has been used more commonly for labour cases than district courts. In 2011 there were 3,586 complaints filed in this new system and only 3,065 labour complaints in the district courts.

Non-judicial ADR

To promote ADR, the Act on the Promotion of the Use of ADR was enacted. Under this Act, private ADR institutions that satisfy certain conditions can obtain certification from the Ministry of Justice to conduct ADR. As of 1 January 2015, 131 certified ADR institutions are in operation.

47 Article 10 of the Labour Relations Adjustment Act (Act No. 25 of 1976).

48 The Japan Federation of Conciliation Associations provides a brief English guide of the conciliation system in Japan on its website, www.choutei.jp/english/index.html.

49 Act No. 222 of 1951.

50 Article 15 of the Labour Dispute Adjudication Act (Act No. 45 of 2004).

Applying to be a certified ADR institution can have a special effect on the nullification or interruption of extinctive prescription.[51] If a party that applied for certified dispute resolution fails to resolve their case and brings a suit within one month from the date of being notified of the termination of such resolution procedure, extinctive prescription is nullified as if the suit had been brought on the date on which the ADR application was made through the certified dispute resolution procedure.

The Financial ADR System,[52] which started in October 2010, is becoming more and more popular to address disputes between financial institutions and customers concerning financial commodities or services. It received 1,021 applications for ADR in the fiscal year 2013.

VII OUTLOOK AND CONCLUSIONS

An interesting case in terms of overlapping international jurisdiction is pending in the Tokyo District Court. Nippon Steel Corp (currently Nippon Steel & Sumitomo Metal Corp) filed a lawsuit in Tokyo against its South Korean rival, Posco, for ¥98.6 billion in compensation for damages alleging trade-secret theft. Posco reportedly filed a suit in Korea alleging that the Japanese pending litigation commenced by Nippon Steel is void. Which court will have jurisdiction is one of the issues in both cases. However, given the Tokyo District Court is currently litigating the merits of the case, the Japanese court is likely to have jurisdiction.

51 See Article 147 of the Civil Code. In Article 153 a demand has a similar effect as filing an application to certified ADR institutions.

52 Act for Amendment of the part of Financial Instruments and Exchange Act (Act No. 58 of 2009).

Appendix 1

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