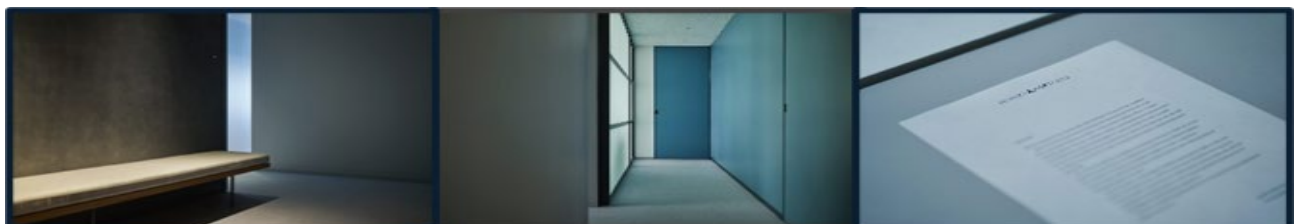


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Navigating Japanese Commercial Litigation: A Guide for Foreign Businesses

Contents:

1	Jurisdiction and Governing Law	2
2	Service of Process Considerations	3
3	Costs	3
4	Evidentiary Considerations.....	4
5	Damages and Provisional Remedies	5
6	Enforcement of Foreign Judgments and Arbitration Awards.....	6
7	Role of Judges as Case Managers and Mediators.....	6
8	Case Timelines in Complex Commercial Litigation	7



Navigating Japanese Commercial Litigation: A Guide for Foreign Businesses

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For foreign businesses, navigating Japan's legal system requires adapting to its distinct approach to commercial litigation. Rooted in the civil law tradition, Japan's system emphasizes judicial management and procedural efficiency, which often contrasts sharply with the adversarial nature of common law jurisdictions. Foreign companies must contend with unique jurisdictional rules, stringent evidentiary requirements, and procedural norms that reflect Japan's legal and cultural environment.

This article provides foreign businesses with practical guidance on key aspects of Japanese commercial litigation. It covers 8 foundational topics such as jurisdiction and governing law while addressing procedural considerations like service of process, litigation costs, and evidentiary limitations. The article also explores the enforcement of foreign judgments and arbitration awards, the judiciary's active role in case management and mediation, and typical timelines for resolving disputes.

1 Jurisdiction and Governing Law

1.1 Jurisdictional Considerations

Japanese courts take a broad approach to jurisdiction in cross-border disputes, guided by principles codified in the Code of Civil Procedure. The Code can be categorized into two sections with regards to jurisdiction – (i) whether Japanese courts have jurisdiction over a matter (Article 3-2 to 3-12 of the Code) and (ii) which Japanese court (e.g., Tokyo District Court) has jurisdiction (Article 4 to 22 of the Code). This article focuses on the former.

In a matter where defendant has a domicile or principal office in Japan, jurisdiction of a Japanese court typically would not be an issue. Also, forum selection clauses in contracts are generally upheld as long as they are reasonable and not contrary to public policy.

The issue can become complex, particularly when a plaintiff files a lawsuit before a Japanese court based on tortious act which took place outside of Japan or globally. Article 3-3(viii) of the Code establishes that a Japanese court has jurisdiction over a tort claim when tortious act was committed in Japan or when its consequences arise in Japan. Additionally, jurisdiction may be denied under “special circumstances” based on Article 3-9, which requires courts to assess factors such as the nature of the case, the burden imposed on the defendant in responding to the action, and the location of relevant evidence.

1.2 Governing Law Considerations

It may come as a surprise to some foreign businesses that a Japanese court can apply foreign law other than Japanese

law to resolve disputes. For example, it is possible for the Tokyo District Court to apply California law for a breach of contract claim or even a tort claim brought by a company based in California.

The Act on General Rules for Application of Laws governs the determination of applicable law in cross-border legal relationships. Parties have significant autonomy to select the governing law for their agreements, particularly in contracts. If no law is chosen, the applicable law is determined by identifying the jurisdiction most closely connected to the matter.

In tort cases, the default governing law is typically that of the country where the harm occurred. However, if the nature of the tort is more closely connected to another jurisdiction, the court may apply that jurisdiction's law.

2 Service of Process Considerations

Service of process in Japan is governed by the Code of Civil Procedure and must comply with both domestic and international requirements to ensure proper notice to defendants. For domestic cases, service is carried out through the court system, with documents delivered typically to the defendant's residence/office via mail.

In cross-border disputes where defendants have no residence or office in Japan, service of complaints and other court documents may require cooperation from foreign government institutions. The appropriate method of service depends on the country where the defendant resides or has an office.

For example, if a Japanese court were to serve a defendant in the U.S., the service can be processed under the Hague Service Convention or the Consular Convention between Japan and the U.S. Each method has its pros and cons. Service via the Consular Convention is generally faster (approximately 2-3 months compared to 4-5 months under the Hague Service Convention). However, a defendant can refuse service under the Consular Convention, whereas service under the Hague Service Convention is compulsory.

While service under the Hague Service Convention is the standard approach for serving defendants in signatory countries, practical challenges should be considered. One key issue is that documents often need to be translated into the language of the receiving country, which can add time and cost to the process. This translation requirement applies not only to the complaint but also to its exhibits. To mitigate translation expenses, plaintiffs may consider simplifying their complaint and minimizing supporting documents.

3 Costs

Understanding the cost structure of Japanese litigation is essential for effective case management. Key considerations include filing fees, court costs, attorney fees, translation expenses, and security requirements for foreign plaintiffs.

3.1 Filing Fees

In principle, plaintiffs need to specify the amount of damages sought in their complaint and pay a filing fee based on

the claim amount. For high-value cases, fees can be significant: a JPY 1 billion claim requires JPY 3,020,000, while a JPY 10 billion claim costs JPY 16,020,000.

Although plaintiffs can increase the claim amount during litigation, recovery of the additional amount may be capped by the statute of limitations. For example, if a JPY 100 million claim is raised to JPY 200 million after one year and the statute of limitations has expired during the one-year period, recovery is limited to JPY 100 million. While there are measures under Japanese law which could prevent such expiration, plaintiffs should carefully consider various factors when setting a claim amount.

3.2 Court Costs and Attorney Fees

In Japan, the losing party generally bears court costs, but attorney fees are excluded. However, in exceptional cases, particularly tort claims, attorney fees are recoverable as part of damages, typically capped at 10% of the awarded amount. If a plaintiff partially succeeds, the court may apportion costs among the parties based on the outcome.

All court proceedings are conducted in Japanese. Foreign entities need to translate court submissions, including evidence, contracts, and witness statements, into Japanese. Accuracy in translation is crucial, as errors can affect the interpretation of evidence. Non-Japanese-speaking witnesses often require court interpreters, and the quality of interpretation can significantly influence testimony.

3.3 Security for Foreign Plaintiffs

Foreign plaintiffs face additional requirements. Plaintiffs who are not domiciled in Japan and do not maintain a business office within Japan may be ordered to provide security for litigation costs (Article 75 of the Code of Civil Procedure).

The amount of security can be significant, particularly in high-value cases. For instance, a JPY 1 billion claim may result in a court order to post security exceeding JPY 10,000,000. This amount generally covers filing fees for district court proceedings and potential appeals to higher courts, where fees are greater. While courts may not always require the full amount requested by the defendant, security can sometimes reach tens of millions of yen.

4 Evidentiary Considerations

4.1 Restrictions on Evidence Disclosure

Evidence disclosure in Japanese litigation is highly restrictive compared to common law systems. Article 221(1) of the Code of Civil Procedure imposes strict requirements on document requests, requiring the requesting party to specify: (i) the document's identification, (ii) its purpose, (iii) the possessor, (iv) the facts to be proven, and (v) the legal basis for the obligation to produce the document. Broad or speculative requests are not permitted, and documents created for internal use or protected by trade secrets or confidentiality agreements may be exempt from disclosure.

Unlike U.S.-style discovery, Japan does not allow for wide-ranging document production or depositions. Witness

examinations occur only at the court's discretion, and the requesting party must demonstrate the relevance of the evidence to key factual disputes. These limitations streamline proceedings but create challenges for foreign parties accustomed to more comprehensive evidence-gathering systems, particularly in complex commercial disputes.

4.2 Using 28 U.S.C. § 1782 for Cross-Border Evidence Collection

Foreign litigants involved in Japanese proceedings can leverage 28 U.S.C. § 1782 to obtain evidence from entities or individuals within U.S. jurisdiction. This statute empowers U.S. district courts to compel the production of documents or testimony for use in foreign legal proceedings. To qualify, the request must show that the evidence is relevant and that the target resides or conducts business in the district. Multinational corporations or U.S.-based parties often fall within the scope of this statute.

One of the key advantages of § 1782 is its broad scope compared to Japan's restrictive evidence disclosure rules. It enables access to critical evidence that may not otherwise be obtainable under Japanese procedures. However, litigants must carefully demonstrate the relevance and necessity of the request, as U.S. courts retain discretion in granting these applications. Also, a U.S. court will assess whether the requested discovery is "obtainable" in Japan. If the evidence could have been secured through Japanese legal procedures, the court may be reluctant to grant the request. Therefore, to mitigate this, the requesting party should be prepared to demonstrate that it attempted but was unable to obtain the evidence through Japanese proceedings.

5 Damages and Provisional Remedies

5.1 Damages in Japan

Japanese law focuses on compensatory damages aimed at restoring the injured party to the position they would have been in had the breach or harm not occurred. This basically includes direct financial losses and lost profits, provided the latter can be substantiated with evidence. Courts typically require clear documentation or expert testimony to quantify losses and lost profits, making detailed preparation critical for plaintiffs.

Punitive damages are not recognized, as they are viewed as contrary to Japan's public policy. This contrasts sharply with common law jurisdictions where punitive damages often serve as a deterrent. Non-economic damages, such as compensation for emotional distress, are available but limited to specific cases, such as defamation, personal injury, or similar tort claims.

5.2 Provisional Remedies and Interim Measures

Provisional remedies are available in Japanese litigation to protect a party's interests before a final judgment, with preliminary injunctions being one of the most effective tools for plaintiffs. These injunctions are intended to prevent irreparable harm by maintaining the status quo until the dispute is resolved. To obtain such relief, the applicant must demonstrate that it is "necessary in order to avoid any substantial loss or imminent danger that would occur" (Article 23(2) of the Civil Provisional Remedies Act).

Given the significant impact on the respondent, the Act generally requires that a court may not issue an injunction without holding oral arguments or a hearing, allowing the respondent an opportunity to be heard. Additionally, courts typically require the applicant to provide a security deposit, ensuring that the respondent is compensated if the injunction is later determined to have been unjustified.

Provisional attachment is another effective tool available to plaintiffs in Japanese litigation. This remedy prevents the dissipation of assets during litigation, ensuring that a future monetary judgment can be enforced. A provisional attachment order can, for example, freeze a defendant's bank accounts or other assets to prevent them from being transferred or concealed before the case is resolved. To obtain a provisional attachment, the applicant must specify the monetary claim and demonstrate that "it is likely that a compulsory execution regarding a claim for payment of money will not be possible, or it is likely that significant difficulties will arise in implementing compulsory execution" (Article 20(1) of the Civil Provisional Remedies Act). Judges have broad discretion in granting these orders and determining the amount of the security deposit required from the applicant.

6 Enforcement of Foreign Judgments and Arbitration Awards

Foreign judgments and arbitration awards can be enforced in Japan under specific legal frameworks. For foreign court judgments, Article 118 of the Code of Civil Procedure requires four conditions: (1) the jurisdiction of the foreign court is recognized pursuant to laws and regulations, conventions, or treaties; (2) the defeated defendant has been served (excluding service by publication or any other service similar thereto) with the requisite summons or order for the commencement of litigation, or has appeared without being so served; (3) the content of the judgment and the litigation proceedings are not contrary to public policy in Japan; and (4) a guarantee of reciprocity is in place. If these conditions are not satisfied, a foreign judgment cannot be enforced in Japan.

Arbitration awards are enforceable under Japan's Arbitration Act, which aligns with the New York Convention. Awards are recognized if they meet certain requirements, including a valid arbitration agreement and no conflict with Japanese public policy. Applications for enforcement are reviewed by Japanese courts, and once approved, the award is treated as equivalent to a domestic judgment.

During the recognition process, Japanese courts will examine public policy violations, particularly in cases involving punitive damages, which are generally considered incompatible with Japanese legal principles. To ensure successful enforcement, foreign entities must align claims with Japan's legal framework and seek expert advice to navigate procedural complexities effectively.

7 Role of Judges as Case Managers and Mediators

In Japanese civil litigation, judges take an active role in managing cases, distinguishing the system from the adversarial approach in common law countries. Rather than acting as neutral referees, Japanese judges guide the proceedings by overseeing evidence collection, identifying key issues early, and streamlining the process to ensure efficiency. This hands-on approach reflects the civil law tradition's emphasis on judicial management.

A unique feature of the Japanese system is the judge's dual role as mediator and adjudicator. Judges frequently facilitate settlement discussions, analyzing the strengths and weaknesses of each party's case and proposing potential resolutions. These discussions, often conducted privately, encourage candid dialogue and allow for tailored solutions. Judicial mediation is particularly effective in disputes where preserving business or interpersonal relationships is critical, offering a less adversarial alternative to trial. While some criticism exists, such as concerns about perceived pressure to settle due to the judge's authority, judicial mediation remains a key aspect of Japan's legal system, promoting practical and amicable dispute resolution.

8 Case Timelines in Complex Commercial Litigation

The timeline for resolving complex commercial disputes in Japan depends on the case's complexity and the court level. District court proceedings for commercial disputes typically take 12 to 24 months.

If the district court judgment is appealed, the case moves to one of Japan's high courts or, for certain intellectual property cases, the Intellectual Property High Court in Tokyo. Appeals in Japan are treated as continuations of the initial case, allowing the high court to review both factual findings and legal arguments. Consequently, appellate proceedings often involve a full reconsideration of both facts and law, which can significantly alter the case's outcome. This stage generally takes 6 to 12 months, depending on the case's complexity, additional evidence, and expert or witness examinations.

Appeals from the High Courts are directed to the Supreme Court, but review is not automatic. The Supreme Court hears only cases that present significant legal or constitutional issues, focusing solely on legal questions. Given its discretionary jurisdiction, the Supreme Court accepts only a small percentage of appeals, making it rare for a case to be reviewed.

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Isshiki & Partners is a Tokyo-based law firm specializing in cross-border matters. Our attorneys, many of whom previously practiced at leading global law firms, excel at representing international clients in a broad array of litigation, intellectual property and corporate matters. We work closely with our affiliate, Isshiki Patent & Trademark Firm, to provide comprehensive IP services, handling every phase of intellectual property matters from initial filings to Supreme Court appeals.



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