DISPUTE RESOLUTION IN JAPAN

Finding the courts, slowly

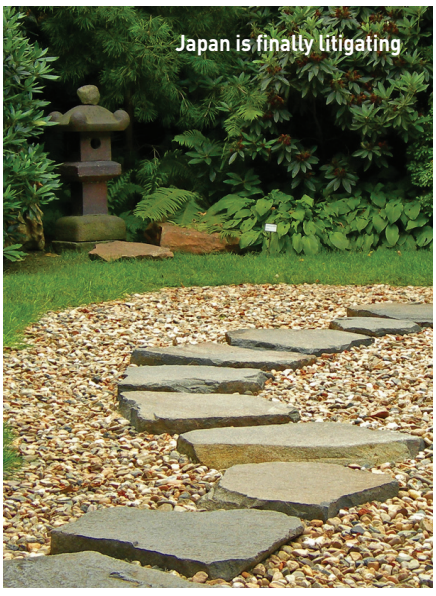
Japanese companies are finally discovering litigation and arbitration

In Japan, litigation and arbitration have historically been rare forms of dispute resolution. But several changes in the legal environment affecting both the courts and arbitration tribunals may lead to a rise in the number of cases brought in Japanese tribunals.

Civil litigation

According to statistics provided by Japan's Supreme Court, the number of civil cases in District Courts in 2007 (the most recent period for available data) was 203,806, only a slight increase from 182,804 in 2003. However, significant reforms to the Japanese court system, together with more aggressive regulatory enforcement actions, suggest a trend towards more civil litigation.

The courts have made efforts to speed up trials so parties that previously chose out-of-court settlements because the system was slow are now going to trial. In 2003, Japan's legislature enacted the Act on the Expediting of Trials, with an aim to conclude legal proceedings as soon as possible within 2 years.


Japan is finally litigating

These efforts have produced results: according to recent Supreme Court reports, the average length of civil cases ending in 2006 was 7.8 months, down 5.1 months from 12.9 months in 1990.

Reforms have also strengthened the courts' ability to handle cases requiring specialised knowledge, making it more likely parties will turn to Japanese courts to resolve such disputes. In 2005 the Intellectual Property High Court was established as a special branch of the Tokyo High Court. It handles appellate cases involving intellectual property matters, ensuring consistency of case law in this area and promising speedy decisions. Another example is the introduction of the Labor Dispute Determination Procedure in 2006, where a committee composed of one judge and two citizens with specialized knowledge on labor matters make prompt and flexible determinations to solve labour disputes.

Japanese regulators are also increasingly willing to take administrative actions against public companies that include steep fines - a step that is leading to more civil litigation. This trend is most remarkable in the area of securities and antitrust enforcement. In 2007, the Japanese Securities and Exchange Surveillance Commission recommended the Financial Services Agency (FSA) issue an order requiring companies involved in securities fraud to pay fines in 31 cases, more than double the 14 cases in which such fines were requested in 2006. Similarly, amendments to Japan's Anti-Monopoly Act in 2006 increased the scale of permitted fines. As a result, the total fines imposed for antitrust violations increased to ¥11.3 billion in 2007, up ¥2 billion from the previous year. Administrative actions such as these encourage shareholders to bring suit against companies. This is demonstrated by a case involving IHI Corporation, a large Japanese engineering company. Shareholders brought suit against IHI after the FSA imposed fines of approximately ¥1.6 billion, the largest ever for securities fraud, on the company for false statements in financial reports. More similar cases are expected.

Arbitration

Rates of international arbitration in Japan have historically been low because of what many considered to be an out-of-date and inadequate arbitration law and infrastructure. In 2003, Japan began to change this with the enactment of the first legislative reform of the Japanese arbitration system since 1890. The new law is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, and, together with the revised rules of the Japan Commercial Arbitration Association (JCAA), establishes a modern arbitration infrastructure in line with international standards.

So far, modernisation of the system has not resulted in an increase in the number of arbitrations conducted in Japan. According to statistics prepared by the Hong Kong International Arbitration Centre (HKIAC), the JCAA, Japan's leading arbitration center, conducted only 15 international arbitration cases in 2007, compared with 448 cases at the HKIAC. Reasons for the limited use of the new infrastructure include: (i) an insufficient number of arbitrators with specialised knowledge and ability to communicate in foreign languages; (ii) indifference to arbitration among Japanese corporations and lawyers; and (iii) legal uncertainty, for example with respect to the extent of court intervention, due to the scarcity of precedents.

But an increasing number of Japanese corporations are now aware of the advantages of arbitration, especially in the context of international business agreements. A survey by the JCAA in 2007 showed that 66% of international business agreements entered into by Japanese corporations now include arbitration clauses, 39% of which provide Japan as the location of arbitration. This may result in more arbitration cases and precedents, which should reduce the legal uncertainty of Japanese arbitration.

There will also be a growth in litigation and arbitration in Japan because the number of attorneys practicing in the country is increasing. Since Japan adopted a US-style law school system and reformed bar examinations in 2004, there has been a rapid increase in the number of attorneys licensed to practice in Japan. As of March 2008, there were 25,000 Japan licensed attorneys, up from 15,000 in 1995, and the goal is 50,000 by 2018. Additionally, relaxation of regulations governing the practice of law by foreign licensed attorneys in Japan has led to a dramatic three-fold increase in the number of such lawyers practicing in Japan.

Although foreign lawyers are not allowed to litigate in Japanese courts, they are allowed to advise on litigation matters involving the jurisdictions in which they are licensed, and this advice might include suggesting litigation in Japan. In addition, under the new arbitration law they are allowed to be appointed as arbitrators and represent clients in international arbitrations.

By H. Christopher Boehning, Daniel B. Thacker and Shuhei Uchida of Paul Weiss Rifkind Wharton & Garrison LLP