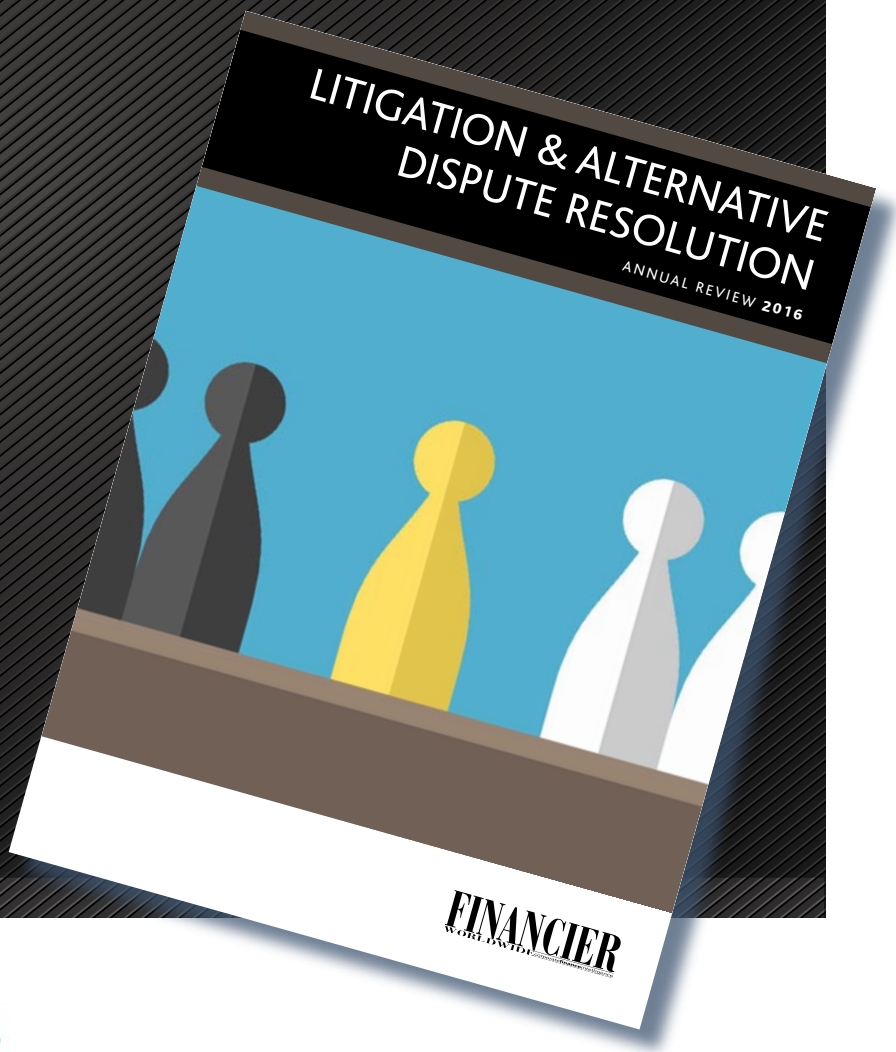
ANNUAL REVIEW

LITIGATION & ALTERNATIVE DISPUTE RESOLUTION



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JAPAN

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Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN JAPAN?

NOMIYA: After the financial crisis in 2008, many companies in Japan incurred huge losses in connection with their purchased currency swaps. This was due to the sharp appreciation of the yen and these losses were also linked to many claims for damages against financial institutions which sold the swaps on the grounds of violating the principles of suitability and accountability. We have also seen many lawsuits between system vendors and users in relation to disputes arising from system development agreements.

Q WHAT GENERAL ADVICE CAN YOU OFFER TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF MEDIATION, ARBITRATION, LITIGATION AND OTHER METHODS?

NOMIYA: We mainly consider the following three aspects when deciding the means for an effective dispute resolution: time frame, privacy and accessibility to evidence. Lawsuits in Japan are open to the public and are generally time consuming. In addition, unlike in common law countries, the discovery process has not been adopted in Japan and thus strategic consideration is required for gathering and selecting evidence. On the other hand, in litigation, one can expect a practically reasonable decision to be rendered by well-trained professional judges. Thus, if a dispute involves complex legal issues or fact findings, litigation is preferable. Arbitration is not open to the public and takes less time than lawsuits because decisions cannot be appealed. Accordingly, arbitration is useful in cases involving trade secrets or know-how and in situations where resolving a dispute is urgent. In addition, if a party does not have enough evidence to fully support its claim, arbitration may be an option because, unlike in litigation, extensive document production may be ordered by the arbitrators. Mediation may be an option in a case where the other party is reasonably expected to make a compromise. Moreover, because filing a mediation suspends the statute of limitation, an applicant may strategically use mediation proceedings to buy time to marshal evidence during mediation proceedings in preparation for filing a lawsuit.

Q TO WHAT EXTENT ARE COMPANIES IN JAPAN LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION?

NOMIYA: Japanese courts have divisions that specialise in commercial litigation or litigation relating to intellectual property and are fully capable of handling complex commercial disputes. Japanese judges, however, do not have any specialised knowledge of complex financial instruments such as derivatives. For this reason, since the financial ADR system was adopted in 2010, there has been a growing number of companies in Japan that have opted to avail themselves of the 'financial ADR' proceedings. Financial ADR resolves disputes through mediators who have specific knowledge and expertise in finance-related matters and are capable of settling disputes in a prompt and cost effective manner. In recent years, maritime disputes and construction disputes have becomes areas which have gained in popularity for the same reasons.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN JAPAN? ARE LOCAL COURTS SUPPORTIVE OF THE PROCESS?

NOMIYA: The leading institution for international commercial arbitration in Japan is the Japan Commercial Arbitration Association (JCAA). It handles approximately 10 to 20 international arbitration cases per year in Japan. Japan has a relatively modern arbitration law which is largely based on the UNCITRAL Model Law on International Commercial Arbitration. Notably, the JCAA made significant changes to its rules in December 2015, by introducing new provisions regarding emergency arbitrators, joinder of third parties, among others. Both the law and the JCAA rules are in line with the global standard. Local courts in Japan are known to be arbitration friendly because the arbitration law narrowly limits the grounds for vacating arbitral awards. There are only two cases that set aside an award in the past 10 years. One is a court decision in 2011, which set aside an award on the grounds that the award treated a disputed fact to be "undisputed" between the parties, which potentially affected the tribunal's decision. The other is a High Court decision in 2016 that is still pending in the Supreme Court, which set aside an award

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on the grounds that the presiding arbitrator violated the duty to disclose the conflict with one of the parties.

Q WHAT KINDS OF SITUATIONS OR CIRCUMSTANCES MIGHT LEAD COMPANIES TO PURSUE LITIGATION INSTEAD OF ARBITRATION?

NOMIYA: In most situations, litigation remains the common choice for companies in Japan. Japan has a reputably stable, mature and impartial judiciary and, therefore, companies in Japan generally trust the courts. Unlike some countries that employ a jury system in civil cases, the fact finding and decisions in court are made by well-trained professional judges. Arbitration, on the other hand, is a relatively risky choice in that some arbitrators may be less experienced in solid fact finding or making determinations on complex legal issues. Particularly, when the case at hand raises complex legal issues, arbitration is not a desirable choice because the parties are not allowed to make an appeal. Therefore, in such a case, lawyers usually recommend their clients pursue litigation instead of arbitration to leave room to appeal to a higher court.

Q WHAT PRACTICAL CHALLENGES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTIJURISDICTIONAL DISPUTES IN JAPAN?

NOMIYA: In international, multijurisdictional disputes, we always pay attention to the possibility of multiple lawsuits in different jurisdictions as it will be costly and burdensome to the parties. In addition, if the parties fail to agree to the governing law, the issue of the governing law depends on the country in which the lawsuit is filed. We always consider these issues when deciding the country or jurisdiction to file a lawsuit. In Japanese courts, all documents including evidence must be translated into Japanese. Because the judicial system in Japan does not adopt a certified translator system, the accuracy of the translation is often disputed. Further, if the defendant does not have an office in Japan, the service of complaint is made through diplomatic channels which can take between three and six months. These are practical challenges which must also be dealt with.

Q WHAT CONSIDERATIONS SHOULD COMPANIES MAKE WHEN DRAFTING A DISPUTE RESOLUTION CLAUSE IN THEIR COMMERCIAL CONTRACTS TO ADDRESS THE POSSIBILITY OF FUTURE DISPUTES?

NOMIYA: First of all, parties should check whether a court judgment or an arbitration award is enforceable in the country where the counterparty's assets are located. For instance, enforcement of a Japanese judgment is likely to be rejected in China. In drafting an arbitration clause, you should avoid causing any dispute regarding the validity of the arbitration clause which is both costly and time-consuming. From this perspective, it is safe to adopt a recommended form of arbitration clause provided by arbitration organisations. As long as the validity of the arbitration clause is so secured, it is also advisable to further include the qualifications of arbitrators with regard to technology or industry, as well as their legal background or native language. The number of arbitrators may also be important when it comes to drafting an arbitration clause. If the value of the deal is relatively small, the parties should explicitly agree to have just one arbitrator to avoid the possibility of three arbitrators being chosen, which would cause the parties to hesitate to refer a dispute to arbitration given the potential burden of arbitrators' fees.

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