



JAPAN

REMEDIES THAT CROSS BORDERS

Japan used to be a country that emphasized pre-dispute regulation, but in recent years it has begun to shift to a system of deregulation and free competition. Accordingly, the country is attempting to make changes to the way litigation operates and the number of lawsuits filed is on the rise. After the adoption of the Financial Instruments and Exchange Act (the “FIEA”) in 2004, securities litigation began to gain momentum among Japanese investors, but it wasn’t until the high profile accounting scandal at Olympus Corporation in 2011, when investors from around the globe began looking to Japan to pursue legal recourse. Numerous institutional investors filed suit in Japan against Olympus as a result of the accounting scandal and the action on behalf of one group of investors announced a settlement in 2014 for 11 billion yen (approximately \$92 million). Another action on behalf of another group of investors also recently settled (2016) for an undisclosed sum. As a result of the successful resolutions of the Olympus cases and two recent high-profile corporate scandals (accounting discrepancies announced at Toshiba in 2015 and emissions manipulations disclosed by Mitsubishi in 2016), Japan is once again in the spotlight for shareholder litigation.

THE LEGAL SYSTEM GENERALLY

Japan is a civil law country, but unlike many civil law countries which utilize the inquisitorial system, it operates in an adversarial manner. Judges are present

at all stages of a proceeding, including when the plaintiff appears in court to state the complaint and when the defendant responds. There are no jury trials in civil cases in Japan, and compared to other countries, overall rates of civil litigation are low because of a cultural aversion to litigation and a proclivity for resolving disputes through settlement. More than half of all cases filed are resolved through settlement proceedings and judges often use their authority to advise parties to settle.

Discovery

Japan does not have a system of pretrial discovery like in the U.S., however, there are means for collecting evidence that are designed to be used after a trial commences. Authority and control over collecting evidence is under the purview of a judge's responsibilities. Japanese attorneys do not have the power to compel production of documents or testimony of witnesses or parties and must rely on either voluntary cooperation or the intervention of the court. Although most evidence gathering is done after trial commences, there are some methods of procuring evidence informally through attorneys.

Costs of litigation and attorney fees

Japan is a loser pays system and the court fees and other litigation costs of the prevailing party are paid by the losing party. There is no cap on the amount of court fees that a losing party must pay but the judge is free to use discretion. The attorneys' fees are not considered costs, however, and each party is responsible for paying their own attorneys' fees. Japanese attorneys are prohibited from representing clients on a purely contingent fee basis and from advancing any court costs on a client's behalf, but third party funding of litigation costs and attorneys' fees is allowed.

Court costs and stamp duties are set by statute and depend upon the amount in controversy. In joint proceedings, the court costs and other costs and fees are generally shared among the group.

Overview of Japan's Securities Laws

Shareholders can typically bring actions in Japan for allegations of violations of the Financial Instruments & Exchange Act ("FIEA") and for violations of the Japanese Civil Code ("JCC"). The FIEA is particularly designed to cover accounting fraud cases, but also covers prospectus liability and other material misrepresentations, omissions, or false statements made by a company. Litigation under the FIEA allows investors to bring a claim in Japanese civil courts for damages that result from false material statements or material omissions made in quarterly or annual reports.

Unlike claims in the U.S. or many other countries, investors do not need to prove either scienter (that the company made deliberate misstatements or omissions) or reliance on the misstatements. That makes claims under the FIEA very attractive and strong. Article 21 of the FIEA provides that when an annual or quarterly report "contains any false statement on important matters or lacks a statement on important matters that should be stated or

on a material fact that is necessary for avoiding misunderstanding [the company] shall be held liable to compensate damage sustained by persons who have acquired the Securities issued by [the company] without knowing of the existence of the fake statement or lack of such statement." Essentially, under Art. 21, investors may successfully assert a claim by furnishing proof of (1) falsity, (2) materiality, and (3) loss causation.

The JCC provides for general tort liability. Article 709 is a general tort provision, stating that "[a] person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence." A plaintiff suing under Article 709 must demonstrate (a) the defendant's intentional or negligent wrongdoing (the "illegal act"), and (b) that the wrongdoing caused damage to the plaintiff ("loss causation"). The Japanese Supreme Court has held that investors who have incurred losses due to false statements or misrepresentations made by issuers may rely upon Article 709 to recover those losses.

COLLECTIVE SECURITIES LITIGATION IN JAPAN

Japan does not currently have a class action system, but it does have two procedural mechanisms that allow for group litigation: joinder and representative actions. Joinder and representative actions do not allow for actions of the magnitude of the typical U.S. class action, but they do allow for a wider array of group actions. Japan also allows for consumer group actions, but those actions may only be brought by qualified consumer groups and the actions may only seek injunctive relief.

Joinder of Claims

Joinder of claims proceedings are the predominant method used to bring multiparty actions in Japan. Joinder is a procedure that allows for the consolidation of claims between several parties into one single combined action. The Japanese Code of Civil Procedure provides that when the rights or liabilities for an action are common to more than one person or when actions are based on the same facts or laws, then the individuals may join together as co-litigants to either pursue or defend against a claim. Each party must give its authorization to be part of the proceeding. Typically, this type of group action only involves a small number of parties, but it is not unheard of to have several hundred people join together in an action. An action in joinder can

only be commenced when it can be demonstrated that each individual lawsuit is economically viable.

In joinder, a limited number of lawyers will typically act jointly for the parties. In practice, the co-litigants will form one group and hire common lawyer(s). Documents appointing a lawyer have to be executed by each party. Because the lawyers are representatives of all parties, each individual party is not required to appear in court. This multiparty action is maintained at the discretion of the court and the court can decide at any point to separate the claims if it decides that there are significant dissimilarities in the proceeding. Even if the court does not elect to separate the claims, there is no guarantee that the judgment will be the same for each party joined as a co-litigant. Even after joining in a multiparty claim, each party retains a right to settle their individual claim, withdraw, or appeal a judgment independently of the other co-litigants. Throughout the litigation procedure, each co-litigant's actions are seen as independent of and do not affect the other co-litigants.

Litigation costs per person decrease with joinder because the court fees are based the amount in controversy. As an example: an individual claimant with alleged damages of 1 million yen would pay court fees in the amount of 8,600 yen and the stamp duty of 6,000 yen. In comparison, if 100 people joined as co-litigants and each alleged 1 million yen in damages, for a total of 100,000,000 yen, the court fee would only be a total of 410,760 yen or 4,107.6 yen per person. Parties are able to share all other litigation-related costs including expert and witness fees, postage, and attorneys' fees.

Representative Actions

The Japanese Code of Civil Procedure provides that a number of individuals appoint one or more representatives to commence a proceeding on behalf of everyone. The group of people sharing the representative must share common interests. According to precedent, common interests include: 1) where the purposes, obligations, or liabilities of an action are common to more than one person; and 2) where the claim or defense is based on the same facts or laws. The representative party must be chosen from amongst the parties with a shared claim or defense. Once parties have chosen a representative, the parties will be withdrawn from the proceedings, but the judgment will still pertain to them. Representatives have to be explicitly authorized by each represented party. Parties do not, however, actually have to initiate an individual complaint in court. Identifying and acquiring authorizations from potential parties limits the number of parties that can participate. Once the representative has been selected, the representative has the right to select a lawyer.

A new party can join the representative action if he can demonstrate that he shares a common interest in the claim. There are no restrictions or limitations on a party's ability to either withdraw from the group action or change the representative.

A representative is free to withdraw from litigation or enter into a settlement agreement at their discretion. The decision or settlement agreement will, however, be shared by all represented parties.

