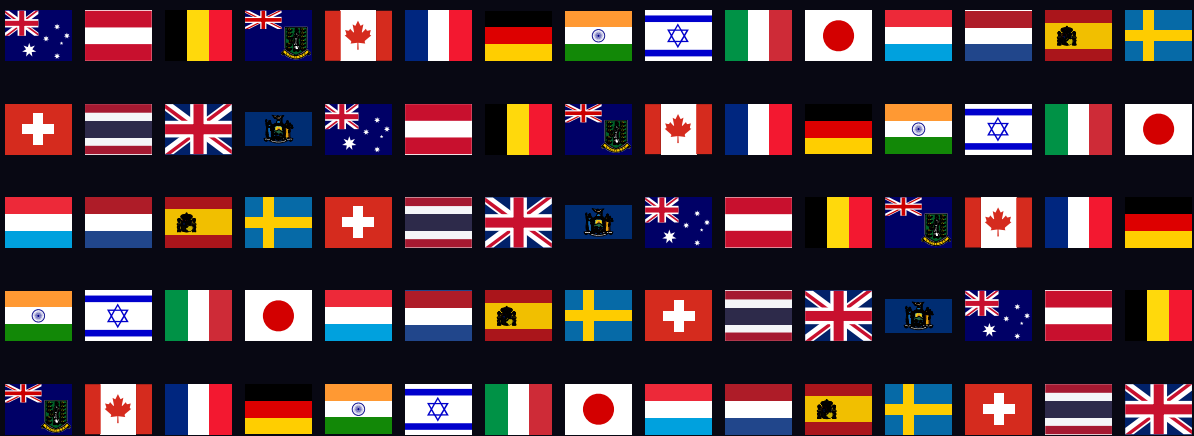


LITIGATION FUNDING

Japan



Litigation Funding

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Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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REGULATION

Overview

Is third-party litigation funding permitted? Is it commonly used?

All references to Japanese legislation and rules in this article are translations provided by the Japanese government (at http://www.japaneselawtranslation.go.jp/law/search_nm/?re=02) or the Japan Federation of Bar Associations (at https://www.nichibenren.or.jp/library/en/about/data/basic_rules.pdf).

The current situation in Japan

Although contingency fees are permitted and regularly used for litigation and other types of dispute resolution in Japan, the issue of whether third-party funding is permitted under Japanese law remains uncertain. While the common law doctrines of champerty and maintenance do not exist under Japanese law, no explicit law approves or prohibits third-party funding in Japan. It is not so common to use third-party funding in Japan, but there are cases where parties of litigation or arbitration are funded. No court decision dealing with this issue has been officially reported there.

Alongside the increased attention from Japanese companies towards international arbitration in recent years, the Japanese government has provided support for developing and promoting international arbitration in its own jurisdiction. For example, in parallel with conducting a discussion on the Reforms of Arbitration Act, the government supported the establishment of the first international arbitration facilities in Japan in 2018. The government task force's report specifically pointed out that:

"[the government] should consider how to utilise and regulate third-party funding in which third parties cover the costs of arbitration proceedings as a measure for responding to the demand for supporting the cost of arbitration in the private sector."

We anticipate developments in this area in the coming years. In this chapter, we will outline the set of provisions and restrictions commonly discussed regarding third-party funding under current Japanese law: the Attorneys Act, the Trust Act and the Basic Rules on the Duties of Practicing Attorneys. If some forms of third-party funding arrangements are understood as a form of loan, then financial regulations, including the Money Lending Business Act and the Interest Rate Restriction Act, may apply. In such cases, the arrangements can be subject to administrative or criminal sanction if they violate these regulations (eg, by exceeding the statutory limitation on interest rates). However, third-party funding is not likely to be considered a loan agreement, because the funded party is not required to repay the money to the funder irrespective of the outcome of litigation.

Article 73 of the Attorneys Act

Article 73 of the Attorneys Act provides that:

'No person shall engage in the business of obtaining the rights of others by assignment and enforcing such rights through lawsuits, mediation, conciliation or any other method.'

This provision specifically prohibits any person from taking over the rights of another person and enforcing those rights

through court proceedings or any other dispute-resolution mechanism. However, the provision is not intended for regulating third-party funding. To avoid the possibility of violating article 73 of the Attorneys Act, third-party funders and their users should not make any arrangements that include the assignment of claims.

Article 72 of the Attorneys Act

Article 72 of the Attorneys Act provides that:

'No person other than an attorney or a legal professional corporation may, for the purpose of earning compensation, engage in [legal] services such as provision of an expert opinion, representation, mediation, or settlement of [a] case for which an appeal is filed with [an] administrative authority, including a request for administrative review, objection, request for re-examination or other general legal cases, or may engage in mediation services related to these cases; provided, however, this does not apply if otherwise provided in this Act or other laws.'

Examining the language of article 72, a third-party funder is prohibited from, among other things, engaging in legal services or mediation services (in relation to legal services) for compensation. For example, if a third-party funder gives a concrete opinion on a claim (eg, the probability of success in an arbitration case) in the funded party's interest instead of, or in addition to, conducting due diligence in its own interest, such arrangements might constitute legal services under article 72. 'Mediation services' in this article refers to activities wherein a person facilitates the establishment of representation or other relevant relationship between a party of legal proceedings and a person (eg, a lawyer) who provides expert opinions, represents a party in dispute or facilitates settlement. If, therefore, a third-party funder acts as an intermediary to facilitate representation of the funded party by a lawyer, the funder may face the risk of violating article 72. Under typical third-party funding arrangements, the roles of lawyers representing the parties and those of third-party funders are clearly separated. If the service provided by a third-party funding arrangement is limited to paying the legal costs associated with legal proceedings in exchange for receiving a fee from the proceeds of the outcome of the proceedings, it is unlikely that providing the service is against article 72 of the Attorneys Act.

Article 10 of the Trust Act

A similar restriction is found in the Trust Act. Article 10 states that:

'No Trust is allowed to be created for the primary purpose of having another person conduct any procedural act.'

In a case where a claim is transferred to a third-party funder, the transfer of the claim may arguably constitute a trust in which the primary purpose is to have the third-party funder conduct legal proceedings, and therefore such arrangements would be restricted by this provision. However, a typical third-party funding arrangement in which the third-party funder receives a contingency fee in exchange for providing the claimant with the funds to cover legal costs does not transfer the claim from the claimant to the funder. Therefore, such arrangements would not fall within the scope of this restriction.

The Basic Rules on the Duties of Practicing Attorneys

The Basic Rules on the Duties of Practicing Attorneys, established by the Japan Federation of Bar Associations, is a set

of ethical rules governing the Japanese legal profession. Its purpose is to regulate the conduct of attorneys, some of which may be relevant for certain forms of third-party funding. For example, article 12 prohibits those in the legal profession from dividing the fees for services with any person other than a lawyer or a legal professional corporation. In this regard, to avoid any unnecessary concern about the applicability of article 12, a third-party funder should receive its fees from the litigant, not through the legal counsel of the funded party.

As another example, the Basic Rules on the Duties of Practicing Attorneys prohibit members of the legal profession from taking cases referred from someone in a non-legal profession who illegally engages in legal services or falsely indicates that they are qualified to engage in legal services, thereby violating articles 72 to 74 of the Attorneys Act. The provision of article 11 of the Basic Rules on the Duties of Practicing Attorneys is as follows:

'An attorney shall not accept a referral of a client from a person who violates the provisions of Articles 72 to 74 of the Attorney Act (Act No. 205 of 1949) or a person who [is reasonably] suspected [of violating] these provisions, [shall not] use [the services of] such [a] person or [shall not] allow such [a] person to use [the attorney's] name.'

As long as a third-party funder does not engage in activities that go against the Attorneys Act, a lawyer who receives a referral from the third-party funder is not likely to be in violation of article 11 of the Basic Rules on the Duties of Practicing Attorneys.

Law stated - 28 September 2022

Restrictions on funding fees

Are there limits on the fees and interest funders can charge?

There are no specific regulations limiting the fees and interest that funders can charge. If fees and interest are found to be excessively high, the arrangements may be invalid because such arrangements are considered to be against public policy, pursuant to article 90 of the Civil Code. Article 90 of the Civil Code states:

'A juridical act that is against public policy is void.'

If some forms of third-party funding arrangements are understood as a form of loan, financial regulations including the Money Lending Business Act and the Interest Rate Restriction Act may apply. In such cases, the fees and interest shall not exceed the statutory limits on interest rates mandated by the Money Lending Business Act and the Interest Rate Restriction Act. For example, the maximum interest rate permitted by the Interest Rate Restriction Act is between 15 and 20 per cent per year, depending on the amount of the principal.

Law stated - 28 September 2022

Specific rules for litigation funding

Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

There are no specific legislative or regulatory provisions drafted for the purpose of regulating third-party funding in Japan. If some forms of third-party funding arrangements are understood as a form of loan, financial regulations

including the Money Lending Business Act and the Interest Rate Restriction Act may apply.

Law stated - 28 September 2022

Legal advice

Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

Yes. The Attorneys Act and the Basic Rules on the Duties of Practicing Attorneys are the principal rules that govern the activities of the legal profession in Japan. If lawyers advise their clients in relation to third-party funding, they are required to comply with these rules. The relevant rules, among others, are articles 72 to 74 of the Attorneys Act and articles 11 and 12 of the Basic Rules on the Duties of Practicing Attorneys.

Law stated - 28 September 2022

Regulators

Do any public bodies have any particular interest in or oversight over third-party litigation funding?

Yes. The Ministry of Justice has the power to regulate matters regarding the Attorneys Act, which is currently the most relevant legislation regarding third-party funding. It is still unclear if future legislation will categorise third-party funders as a type of financial institution. If it becomes the case, the Financial Services Agency would acquire the power to regulate third-party funders.

Law stated - 28 September 2022

FUNDERS' RIGHTS

Choice of counsel

May third-party funders insist on their choice of counsel?

There is an argument that such an arrangement might be found to violate the Attorneys Act or the Basic Rules on the Duties of Practicing Attorneys. With the lack of specific legislation on third-party funding in Japan, it is uncertain if the relevant authority (eg, the Ministry of Justice or Japan Federation of Bar Associations) would find that by insisting on a certain counsel for the specific funded case, a third-party funder indirectly provides legal services, which is not allowed.

Law stated - 28 September 2022

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

In general, the courts have the authority to allow a third party to attend hearings and settlement proceedings. For example, article 169.2 of the Code of Civil Procedure provides that:

'The court may permit the attendance of a person it considers appropriate; provided, however, that the court shall permit the attendance of any person a party requests, unless that person's attendance would be detrimental to the conduct of the proceedings.'

Since the current Code of Civil Procedure does not recognise third-party funding, it is still unclear how the court would deal with this issue.

Law stated - 28 September 2022

Veto of settlements

Do funders have veto rights in respect of settlements?

Funders who want to have veto rights in respect of settlements should be aware of the risk that such arrangements may be found to violate the Attorneys Act or the Basic Rules on the Duties of Practicing Attorneys. If funders have such rights in a specific claim, the relevant authority may find that the funders having control over the claim implies that the funders are providing legal services to the litigant, or the funders have received the assignment of the claim.

Law stated - 28 September 2022

Termination of funding

In what circumstances may a funder terminate funding?

In principle, parties to the funding agreement can agree on the conditions of termination. Until new legislation clarifies the standards or regulations on third-party funding, the conditions remain unclear.

Law stated - 28 September 2022

Other permitted activities

In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Until new legislation clarifies the standards or regulations on third-party funding, the role of funders remains unclear.

Law stated - 28 September 2022

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

May litigation lawyers enter into conditional or contingency fee agreements?

Yes. Contingency fee arrangements are permitted in Japan and are commonly used for contentious matters. As the standard fee arrangement for lawyers, the standard fee table of the Japan Federation of Bar Associations adopted a combination of the up-front fee and contingency fee arrangements. The standard fee table was abolished in 2004 to increase the competition among lawyers, but some litigation lawyers in Japan have continued using the fee table after 2004 voluntarily.

Law stated - 28 September 2022

Other funding options

What other funding options are available to litigants?

One option available is the Japan Legal Support Center, which provides legal aid to individuals who are not able to afford legal services or the costs of initiating litigation. The Japan Legal Support Center is a government-funded entity that makes necessary payments on behalf of a user in need, if the user meets certain criteria. The user is required to repay the costs unless the Center waives the obligations based on the financial requirements. Companies are not eligible to use the services.

Law stated - 28 September 2022

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

How long does a commercial claim usually take to reach a decision at first instance?

According to the Annual Report of Judicial Statistics Overview, 2021 edition, volume 1 (Civil Cases) published by the Supreme Court of Japan, a commercial claim usually takes about 10 months to reach a decision at the court of first instance. In 2020, almost all civil proceedings were suspended because of the effects of the covid-19 pandemic. Court proceedings returned to the normal schedule in 2021.

The aforementioned statistics include cases determined via default judgment or settlement. At the court of first instance, approximately 20 per cent of claims are decided via default judgment. Further, approximately 40 per cent of claims are settled in the process of litigation. It would therefore take longer than 10 months if the case is going to receive final judgment. In our experience, a large and complex case usually takes from 18 to 24 months to reach final judgment at the court of first instance.

Law stated - 28 September 2022

Time frame for appeals

What proportion of first-instance judgments are appealed? How long do appeals usually take?

According to the Annual Report of Judicial Statistics Overview, 2021 edition, volume 1 (Civil Cases) published by the Supreme Court of Japan, approximately 20 per cent of first-instance judgments are appealed. It takes between six months to 12 months in most cases for proceedings at the appellate courts to reach a decision.

Law stated - 28 September 2022

Enforcement

What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

According to the Annual Report of Judicial Statistics Overview, 2021 edition, volume 1 (Civil Cases) published by the Supreme Court of Japan, the courts enforced approximately 74,000 judgments in 2021. The report does not include the statistics on the portion of judgments that required contentious enforcement proceedings.

As long as the judgment creditor can identify the assets of the judgment debtor, the enforcement process in Japan

does not take long. The enforcement process usually ends in a few months and may take up to six months. The reform of the Civil Execution Act came into force in 2020. The reform implemented a more serious penalty for non-compliance by the judgment debtor in the Property Disclosure Procedure. The judgment creditor may apply for the Property Disclosure Procedure in the court, where the judgment debtor is obliged to disclose its assets at the hearing pursuant to the Civil Execution Act. Before the reform, the sanction for non-compliance with the process was an administrative fine. Under the new law, non-compliance would lead to a criminal charge of imprisonment for up to six months or a fine of up to 500,000 yen. The number of applications increased sevenfold from 2019 to 2021. About 500 applications were made in 2019, and over 8,000 applications were made in 2020.

Law stated - 28 September 2022

COLLECTIVE ACTIONS

Funding of collective actions

Are class actions or group actions permitted? May they be funded by third parties?

New legislation that came into force in 2016 allows a registered consumer protection organisation to claim damages from business providers in a form of class action. The Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers provides the basis for initiating the proceedings. Due to the stringent criteria for making the claims, there are only 19 cases initiated based on the Act as of June 2022, according to a registered consumer protection organisation. The Act was reformed to improve the mechanism in 2022.

There are no specific rules prohibiting or approving use of third-party funding for these class actions.

Law stated - 28 September 2022

COSTS AND INSURANCE

Award of costs

May the courts order the unsuccessful party to pay the costs of the successful party in litigation?
May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Articles 61, 64 and 68 of the Code of Civil Procedure provide that the courts may order the unsuccessful party to pay the costs of the court proceedings. The Code distinguishes the costs to be paid to the courts (eg, the filing fees) and the costs associated with each party's activities (eg, the fees of legal counsel). The courts have the power to order the unsuccessful party to pay the first set of costs, but do not have the power to order the unsuccessful party to pay the latter.

The courts do not have power to order the unsuccessful party to pay the costs associated with the successful party's legal costs (eg, the attorney's fees, and transportation costs) pursuant to these articles of the Code of Civil Procedure. In practice, in tort cases, the court tends to award the successful party the legal costs as part of the damages. In other types of claims (eg, contract claims), this does not apply.

If the courts find that some portion of the litigation funding costs is to be considered as the costs to be paid to the courts, the courts may order the unsuccessful party to pay that portion of the litigation funding costs of the successful party. As there is no reported case in Japan on this issue yet, it is unclear how the courts will decide.

Law stated - 28 September 2022

Liability for costs

Can a third-party litigation funder be held liable for adverse costs?

This issue is still unclear because the Code of Civil Procedure does not yet recognise third-party funding. Under the current Code of Civil Procedure, it is unlikely that the court will directly order a third-party funder to bear adverse costs. The Code of Civil Procedure provides that the courts may order the unsuccessful party, not a third party, to pay the costs of the court proceedings.

Law stated - 28 September 2022

Security for costs

May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

The courts may order a plaintiff, but not a third party, to provide security for costs under certain circumstances stipulated in the Code of Civil Procedure. Article 75.1 of the Code of Civil Procedure provides that:

'[i]f a plaintiff is not domiciled in Japan or does not have a business office or other office in Japan, at the petition of the defendant, the court shall issue a ruling ordering the plaintiff to provide security for court costs.'

In such a case, the amount of security will be calculated based on the total amount of court costs that the defendant would need to pay for all instances. The plaintiff shall deposit the security based on the court order at a depository or deposit office or by another method provided by the court rules unless the parties agree otherwise pursuant to article 76 of the Code of Civil Procedure.

Law stated - 28 September 2022

If a claim is funded by a third party, does this influence the court's decision on security for costs?

Since a funded party is not required to disclose the fact that they received funding, the court might not notice that the party has been funded by a third party.

Law stated - 28 September 2022

Insurance

Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

The Insurance Act does not recognise after-the-event insurance. Article 2.1 of the Insurance Act provides the definition of insurance. It states:

'insurance policy: a contract, whether it is called as an insurance contract or mutual aid contract or by any other name, under which one of the parties promises to provide property . . . on the condition of the occurrence of a

certain event, and the other party promises to pay insurance premiums . . . according to the likelihood of such event occurring.'

It is considered that after-the-event insurance does not fall within this definition of insurance under Japanese law. In 2019, a business entity began providing the service of bearing legal costs in a form similar to after-the-event insurance, but this form of business is not considered an insurance service under Japanese law.

Insurance for attorneys' fees is available in Japan. Some insurance policies, such as automobile insurance, can include coverage of attorneys' fees.

Another type of insurance covering legal costs is Legal Expense Insurance. The German Rechtsschutzversicherung is the model for this type of insurance. This insurance has been available in Japan since 2000. The insurance policy covers the legal costs if the insured event occurs.

In both types of insurance, the main users are individuals.

Law stated - 28 September 2022

DISCLOSURE AND PRIVILEGE

Disclosure of funding

Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

No. There are no specific requirements to disclose a litigation funding agreement to the opposing party or to the court in Japan. The opponent of the funded party may make a request to the court for a document production order against the funded party to submit the funding agreement in a litigation pursuant to article 220 of the Code of Civil Procedure. The court has the power to order the disclosure of documents if the request meets certain requirements pursuant to articles 181 and 220 of the Code. It is unlikely that the court would order the funded party to disclose the funding agreement, because the court would not find that the funding agreement is 'necessary evidence' to examine the underlying dispute. In this regard, article 181.1 of the Code provides that:

'The court is not required to examine evidence offered by a party that the court considers to be unnecessary.'

Law stated - 28 September 2022

Privileged communications

Are communications between litigants or their lawyers and funders protected by privilege?

No. In Japan, the legal concept of attorney-client privilege is not recognised in civil proceedings.

However, as lawyers have a confidentiality obligation to their clients pursuant to article 23 of the Attorneys Act, the communication between the client and the lawyer would be protected by the confidentiality obligation. On the other hand, communication between the funders and the lawyers of the funded party is not directly protected by the confidentiality obligation under article 23 of the Attorneys Act.

Law stated - 28 September 2022

DISPUTES AND OTHER ISSUES

Disputes with funders

Have there been any reported disputes between litigants and their funders?

No. There have been no reported disputes between litigants and their funders. It remains rare for litigants to use any kind of litigation funding for domestic disputes.

Law stated - 28 September 2022

Other issues

Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

In 2019, a business entity in the private sector began providing funds for litigants in a form similar to after-the-event insurance. The uncertainty surrounding the legality of third-party funding will remain until either new legislation acknowledges that such services are permitted, or any court decision endorses that current Japanese law does not prohibit third-party funding. Until then, a potential third-party funder that wishes to provide its services in Japan may want to make a request to the relevant regulatory body (eg, the Ministry of Justice) to clear its concerns pursuant to article 7 of the Act on Strengthening Industrial Competitiveness. This process is called the 'request for the clearance of a Gray-zone'. Article 7.1 of the Act provides:

'[a] person that intends to start new business activities may ask for confirmation from the competent minister regarding the interpretation of provisions of Acts and orders based on Acts . . . that provide for regulations on the new business activities and business activities related thereto and the applicability of those provisions to the new business activities and related business activities.'

Law stated - 28 September 2022

UPDATE AND TRENDS

Current developments

Are there any other current developments or emerging trends that should be noted?

While the uncertainty surrounding the legality of third-party funding still exists in Japan, this funding option has been receiving increasing attention, especially among large companies that are potential users of third-party funding. Since 2017, the Japanese government has implemented its initiative to elevate the status of Japan as a forum for settling international commercial disputes. As part of this initiative, the government has finally begun a discussion on how to tackle the issue of third-party funding. In 2022, the Code of Civil Procedure was reformed to implement e-litigation. The reform will come into force in several phases by 2025, but the reform does not include provisions for third-party funding. As recent legislation in Singapore and Hong Kong ended the uncertainty on this issue, a legislative response in Japan also is awaited.

Law stated - 28 September 2022

Jurisdictions

	Australia	Piper Alderman
	Austria	Nivalion AG
	Belgium	Nivalion AG
	British Virgin Islands	Martin Kenney & Co
	Canada	Omni Bridgeway
	France	Nivalion AG
	Germany	Omni Bridgeway
	India	Khaitan & Co
	Israel	Woodsford
	Italy	Fideal S.R.L
	Japan	Miura & Partners
	Luxembourg	Nivalion AG
	Netherlands	De Brauw Blackstone Westbroek
	Spain	PLA Litigation Funding
	Sweden	Nivalion AG
	Switzerland	Nivalion AG
	Thailand	Rajah & Tann Asia
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