

Technology Disputes Digital Edition 2022



Japan

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PRELIMINARY CONSIDERATIONS

Common disputes and preliminary actions

- 1 | What are the most common issues that arise in connection to technology contracts? What actions should be considered when these issues arise? (For example, what steps should parties take to protect their rights while negotiating with the other side? Can they agree to suspend time running? How can they preserve any claims that may have arisen?)

There are two categories of typical disputes regarding technology contracts.

One is a type of dispute regarding system integration contracts (system development disputes). In a typical dispute, the user asserts that the integration of a system has not been completed, or that there are defects in a system that has already been integrated, and refuses to pay the related fees, or demands a refund of fees already paid. On the other hand, the vendor asserts that integrating the system has been completed and that the user is required to pay additional fees if it continues to insist on further improvements to the system, claiming that any such improvements are not covered by the original contract. In some cases, the vendor commences with further system integration work not covered by the contract and subsequently claims additional fees from the user.

The other type of dispute is related to intellectual property (IP disputes). If a licensee uses a system (software) outside the scope of the related license agreement, the licensor may seek injunctive relief or compensation for damages caused by the IP infringement. Third-party IP rights holders may also seek injunctive relief or compensation for damages caused by an IP infringement against the licensee of a system, in which case there is likely to be a dispute between the licensor and the licensee regarding indemnification of damages by the licensor.

Contract termination

- 2 | How can a contract be terminated in your jurisdiction? What considerations should be taken into account when deciding whether and how to terminate a technology contract?

Under the Civil Code, in the event that one party breaches a contract, the contract may be terminated by the other party if the breaching party fails to take corrective action, despite having been given a warning specifying an appropriate period for rectification, unless the breach of contract is attributable to the terminating party and is not immaterial. Advance warning of termination may be omitted if it is impossible for the other party to perform its obligations, or the other party clearly indicates its intent to avoid the performance of its obligation. In practice, instead of issuing a warning of termination and then subsequently issuing a formal notice of termination, a single notice stating an intention to

terminate the contract if corrective action is not taken within a certain number of days is typically employed.

It is possible for the parties to contractually agree on the causes of termination and the corresponding procedure.

In the case of a system integration contract, the user may terminate the contract at any time for any reason (even in the absence of a breach of contract by the vendor) by compensating the vendor for damages caused by such termination. If the user wishes to avoid having to pay compensation in such cases, it is, in practice, required to state the basis for its position in its notice of termination.

Without-prejudice communications

- 3 | Is it possible to have conversations aimed at settling a dispute which cannot subsequently be used as evidence in legal proceedings if the dispute is not resolved? If so, what formalities are required (if any)? If not, how should confidentiality be preserved through mutual agreement?

It is possible to have conversations aimed at settling a dispute that cannot subsequently be used as evidence in legal proceedings if the dispute is not resolved, and no specific formality is required for the same, provided there is a mutual agreement between the parties. Such an agreement is understood to be valid in civil litigation to the extent that it does not breach the principle of the free evaluation of evidence. Accordingly, any evidence submitted in breach of such a mutual agreement will not be adopted by a judge in civil litigation. However, the submission of an explanation of historical negotiations is not typically prohibited during the settlement procedure of such litigation, and this may affect the judge's plan and strategy for settlement may be impacted accordingly. In Japan, the same judge oversees both adjudication and settlement of cases, and if settlement is not reached, the judge will issue a judgment with the history of negotiations in mind.

Settlement formalities

- 4 | If a settlement is reached, what formalities are required in your jurisdiction for the settlement to be enforceable?

If a general settlement agreement is not performed voluntarily, a litigation filing or other legal procedure to obtain a formal court judgment or other decisive order will be necessary in order to formalise the obligation prior to making an application for enforcement to the court.

One option for formalising the obligation is to obtain a notarial deed containing approval of the execution of a monetary debt. If payment is not made voluntarily, such a deed itself may formalise the obligation under the title of such deed, and an application of enforcement can be made to the court immediately.

In addition, a record of settlement made prior to the filing of an action in summary court can also formalise an obligation under the title of such action.

CLAIMS

Causes of action

- 5 | What causes of action commonly arise in connection to a contract for hardware or software design, implementation and licensing? What elements must be established to succeed in these claims? (Can any non-contractual claims be brought, such as liability for pre-contractual statements?)

System development disputes

A user may seek compensation for damages against the vendor. In such a case, the existence of a breach of contract, reasons attributable to the vendor, the amount of damages claimed, and a causal relationship between breach and damages must be established.

The vendor may seek the payment of fees against the user. In such a case, the contents of the agreement between the parties and the performance of the contractual obligations must be established. If the vendor voluntarily provided services outside the scope of the contract, this fact, and the amount of the relevant fees, must also be established.

Intellectual property disputes

On the assumption that the licensor holds the intellectual property (IP) rights, including patent rights and copyrights, in the system (software), whether a claim is merely a violation of the licence agreement or constitutes an IP infringement may depend on the nature of the conditions claimed to be breached.

At a minimum, if a licence agreement is terminated due to breach, the claim is deemed to be for IP infringement and the licensor may seek injunctive relief and compensation for damages. In such a case, the IP infringement must be established and, for compensation for damages, damages and a causal relationship between the IP infringement and the damages claimed, or the basic facts to support the application of a contractual provision for the presumption of damages under applicable IP law, must be established. Negligence is presumed for patent infringement but not for copyright infringement.

If there is a dispute between the licensee and a third-party IP holder, the licensee may seek indemnification from the licensor, if the licensor has warranted that the use of the relevant system (software) does not infringe the IP rights of third parties. In such a case, the breach of such a warranty, damages (including incurred fees) and a causal relationship between breach and damages must be established.

Statutory claims

- 6 | Has your jurisdiction enacted any legislation providing additional protection for business purchasers of hardware, software or associated licences? (For example, are any rights, duties or other terms implied by statute, including a duty of good faith?) What practicalities should be considered when bringing statutory claims?

There is no special legislation providing additional protection for business purchasers of hardware, software or associated licences, and such matters are treated under the general rules of the Civil Code. The Civil Code has provisions regarding the general rights and obligations of each party under specific types of contracts.

Contracts for system integration will be categorised either as a contract for work or a quasi-mandate contract. Under a contract for work, the vendor has an obligation to complete system integration. Under a quasi-mandate contract, the vendor has a mandatory duty of care under the Civil Code.

The Civil Code stipulates the requirements applicable to sales of hardware.

There are no provisions specifically targeted to license agreements for systems (software) under the Civil Code, and only general rules are provided. Accordingly, each party needs to ensure that there is mutual agreement on the details of the conditions of the licence. In the case of IP infringement, injunctive relief and compensation for damages are remedies available to IP holders under applicable IP laws.

Defences

- 7 | What defences are available against the most common claims raised in technology disputes? What elements must be established for these defences to succeed?

System development disputes

The vendor may raise defences of comparative negligence, profit-loss set-off, and contractual limits on the amount of damages in order to rebut a user's cause of action for compensation for damages.

The defence of comparative negligence is used to reduce the amount of damages to be compensated, on the basis that the breach of contract is partially attributable to the user.

Profit-loss set-off is used to reduce the amount of damages to be compensated by setting off earned profits (including saving costs) against the amount of damages claimed as a result of the breach of contract.

Contractual limits on damages to be compensated is common in practice, particularly in system integration contracts, and it is common for parties to agree that an amount equivalent to the contractually determined fees shall be the limit on the amount of damages, unless such damages are caused intentionally or by gross negligence.

A user may raise defences to termination of a contract for breach of contract and assert a set-off of the user's claim for damages to rebut a vendor's cause of action seeking the payment of fees. Recently, in disputes related to system integration, the vendor's obligation with respect to project management and the user's obligation of cooperation have been disputed issues.

Intellectual property disputes

A defendant can raise the invalidity of IP rights as a defence. It is also possible to file a claim for the invalidation of a trial or of opposition to the Japan Patent Office with regards to any IP registered at the Japan Patent Office, including patents.

If the licensee seeks indemnification from the licensor for a breach of a warranty of non-infringement of IP rights, the licensee may raise the defence of lack of required procedures stipulated under the license agreement (eg, notification requirements and the bestowing of discretion on the licensor with regards to the handling of disputes with third-party IP holders).

Limitation period

- 8 | What limitation periods apply for bringing claims in your jurisdiction? (Please indicate whether different periods apply for different types of claim.)

System development disputes

The statute of limitations applicable to claims applies from the earlier of:

- five years from the time of the establishment of knowledge that it is possible to bring such claims; and
- 10 years from the time at which it becomes possible to bring such claims.

The duration of the statute of limitations may be increased by six months without the need for recourse to court proceedings by bringing a claim.

An agreement between the parties to negotiate is a permitted reason for the suspension of the statute of limitations; provided that the

agreement must cover a period of one year or less. The agreement may be renewed for up to five years in total.

Intellectual property disputes

There is no period of statute of limitation for injunctive relief, as long as an IP infringement continues. With respect to compensation for damages, the statute of limitations applicable to claims applies from the earlier of:

- three years from the time of the establishment of knowledge of the incurrance of damages and the infringement; and
- 20 years from the occurrence of the infringement.

LITIGATION PROCEEDINGS

Pre-action steps

- 9 | What pre-action steps are required or advised before bringing legal action? (For example, is pre-action mediation mandatory in your jurisdiction?)

There are no mandatory pre-action steps, including for mediation. However, in system development disputes, at some time after the lawsuit is filed, the court often recommends that parties refer the case to mediation. In practice, it is very common for the parties to agree to conduct the mediation according to the court's recommendation.

On the other hand, mediation is not a common alternative dispute resolution method for intellectual property (IP) disputes.

Competent courts

- 10 | Does your jurisdiction have a specialist court or other arrangements to hear technology disputes? Are there specialist judges for technology cases?

System development disputes

There are no specialist courts or arrangements for such disputes. The Code of Civil Procedure allows parties to agree to the court of jurisdiction in the first instance in advance. For example, it is legally effective to stipulate in a contract that the Tokyo District Court shall have exclusive jurisdiction as the court of first instance.

Intellectual property disputes

Under the Code of Civil Procedure, the Tokyo District Court and Osaka District Court have exclusive jurisdiction over actions involving patent rights, as well as copyrights in a work of computer programming. Certain civil divisions of each court are specialised in IP disputes (the IP Divisions).

Procedural rules

- 11 | What procedural rules tend to apply to technology disputes?

Both the Tokyo District Court and Osaka District Court have special rules for the progress of IP disputes. In particular, for patent infringement disputes, both courts use the 'Model of Well-Organised Proceedings' in order to expedite the court proceedings.

For example, the Model of the Tokyo District Court IP Division is as follows:

- 1 First date for oral arguments – defendant submits a summary of the assertions.
- 2 First date for preparatory proceedings – defendant submits:
 - an argument for the identification of the asserted product or method and the range of its technical scope; and
 - a defence of invalidity.

- Second date for preparatory proceedings – the plaintiff argues against steps (2.1) and (2.2).
- Third date for preparatory proceedings – defendant counter-argues to the plaintiff's argument in step (3);
- Fourth date for preparatory proceedings – plaintiff supplements its counterargument to the invalidity defence (step 2). Both parties give a presentation explaining the technologies (a technical briefing).
- Fifth date for preparatory proceedings – the court informally discloses its provisional determination of whether the asserted product or method infringes or not. If the determination is non-infringement, the court will close the hearing and recommend that the parties settle the case. If infringement is found, the court will move to hear the argument for damages.

Evidence

- 12 | What rules and standard practices govern the collection and submission of evidence in your jurisdiction (eg, discovery/disclosure obligations or obligations to preserve relevant documents)?

There is no mandatory collection and submission of evidence, such as discovery, in the Japanese court system.

However, the court may, at its own discretion or on the motion of a party, preserve related documents including, but not limited to, copying documents and taking photos (the 'preservation of evidence' procedure). In addition, the court may, upon a party's petition, order anyone to submit a document that relates to the facts to be proven (an 'order to submit documents'). Under the Code of Civil Procedure, the person in possession of the document may decline to submit a document that is prepared exclusively for the use of the person in possession or involves a technical or professional secret; however, in a patent lawsuit, a party cannot decline unless the person has a 'legitimate reason' for refusing to submit them.

Furthermore, in a patent lawsuit, the amendment of the Patent Act in 2019 created a new system called the 'inspection certificate' under which, if a third party is suspected of infringing on another party's patent right, neutral technological experts conduct on-site inspections of plants and other sites of the suspected infringing third party, implement research necessary for proving the infringement, and file a report on the results of the research with the court.

Privilege

- 13 | What evidence is protected by privilege in your jurisdiction? Do any special issues surrounding privilege arise in relation to technology disputes?

Attorney-client privilege and similar protections are not available in Japan. With respect to the order to submit documents, it is unclear whether a piece of attorney-client communication falls under 'a document prepared exclusively for the use of the person in possession', which is exempted from the order.

However, since there is no discovery procedure in Japan, nor is attorney-client communication subject to mandatory disclosure, the necessity of a separate attorney-client privilege for the protection of client confidentiality is relatively low, and thus, in general, the lack of the privilege is not a material detriment.

Protection of confidential information

14 | How else can confidential information be protected during litigation in your jurisdiction?

If the submitted allegations or evidence contain trade secrets, a litigant may file a motion to restrict access to the case record to prevent third parties from viewing it.

In addition, in a patent lawsuit, the court may, on the motion of a party, order confidentiality against a party or its agent with respect to trade secrets that have been or will be filed (a 'confidentiality protective order'). Moreover, with respect to the obligation of document submission, an in-camera procedure applies, whereby only the court inspects the motioned documents to ascertain the existence of a 'legitimate reason' under the Patent Act.

Expert witnesses

15 | Can expert witnesses be used in your jurisdiction? If so, how are they appointed and what is their role in the proceedings?

Under the Code of Civil Procedure, it is permissible to examine experts as witnesses on technical matters as well as on factual matters. The necessity of witnesses is determined by the court, which appoints them pursuant to the court's discretion. In practice, each party applies to examine the witnesses.

Under the Code of Civil Procedure, the court may also, if it finds it to be necessary for clarifying a matter related to the litigation or create a framework for smooth progress in the litigation proceedings, hear the opinions of the parties and have a 'technical adviser' involved in the proceedings. In practice, it is common for the court to appoint an adviser upon the petition of a party. Technical advisers are not witnesses, and their statements do not constitute evidence.

Time frame

16 | What is the typical time frame for litigation proceedings involving technology disputes?

System development disputes

The average duration of litigation in Japan has been gradually decreasing, to around 10 months. However, system development disputes often involve an extremely wide range of allegations and take an enormous amount of time to sort out, with many cases taking three to five years to complete.

Intellectual property disputes

Statistical data specifically for IP disputes is published by the court. The average duration of litigation has been gradually decreasing, to around one year. For patent lawsuits, the court established the Model of Well-Organised Proceedings for the purpose of expediting court proceedings, but such suits tend to be longer because technical matters are involved.

LITIGATION FUNDING AND COSTS

Litigation funding options

17 | How can litigation be funded in your jurisdiction? Can third parties fund litigation? Can lawyers enter into 'no win, no fee' or other forms of conditional fee arrangement?

Third-party funding is not prohibited. Nor are there any restrictions on the structure of attorney's fees, and thus no-win, no-fee options are available.

As a legal form, trusts constituted by rights for the purpose of conducting litigation are prohibited under the Trust Act.

Costs and insurance

18 | Can the losing party be required to pay the successful party's costs in the litigation? If so, is insurance available to cover a party's legal costs?

Under the Code of Civil Procedure, the losing party is required to bear the costs of the litigation. However, costs for this purpose constitute the fees and other expenses paid by the prevailing party to the court and do not include the attorney's fees of the prevailing party, and thus the amount is usually moderate. As such, there is no available insurance specifically covering the cost of litigation.

In a suit for damages including a patent and copyright infringement lawsuit, attorney's fees may be awarded as a component of damages. However, the actual attorney's fees incurred by the prevailing party are not admissible, and, in practice, the amount of 10 per cent of the damages directly caused by the infringement is added by way of damages equivalent to attorney's fees.

REMEDIES AND ENFORCEMENT

Interim remedies

19 | What interim remedies are available and commonly sought in technology disputes in your jurisdiction?

Under the Civil Provisional Remedies Act, the plaintiff can file provisional remedy proceedings separate from the litigation proceedings. The provisional remedy proceeding is handled by a different judge from that in charge of the litigation proceedings. In technology disputes, the plaintiff may request the following orders, depending on its claim.

Order for provisional seizure

A plaintiff claiming the payment of money may request an order for provisional seizure. The court issues the order if it concludes that the plaintiff has established prima facie evidence of its right and that preservation of that right is necessary (eg, the defendant is about to dispose of its assets). This order prohibits the defendant from disposing of any of the assets specified by the plaintiff.

Order for preliminary injunction (order of preliminary disposition that determines a provisional status)

A plaintiff claiming injunctive relief may request an order for a preliminary injunction. The court issues the order if it concludes that the plaintiff has established prima facie evidence of its right and that preservation of that right is necessary (eg, the plaintiff would suffer significant damage due to the commencement or continuation of infringement by the defendant). This order prohibits the defendant from taking any of the acts of infringement specified by the plaintiff. In general, the plaintiff is required to prove the above requirements to a high standard because the plaintiff is able to obtain a result in effect similar to a final judgment.

Interim judgments

During litigation proceedings, the court may, at its sole discretion, issue an interim judgment before issuing a final judgment. The purpose of an interim judgment is to focus on certain issues in the subsequent proceedings by first resolving preliminary issues. However, in practice, interim judgments is rare.

Substantive remedies

20 | What substantive remedies are available and commonly sought in technology disputes in your jurisdiction? How are damages usually calculated?

The court issues a final judgment in favour of the plaintiff if it finds that the plaintiff has successfully proven its claim. The judgment orders the defendant to pay money or injunctive relief (prohibiting it from taking any acts of infringement), as requested by the plaintiff.

The court awards damages to the extent that the plaintiff has successfully established that they were or have been caused by the defendant's breach of a contractual duty or by tort. Punitive damages or statutory damages are not awarded.

IP disputes

A plaintiff claiming damages caused by patent or copyright infringement may use the following rules for estimating damages. This is the special rule for an IP holder to easily demonstrate the amount of damages:

- When the defendant sells any infringing products, the amount calculated by multiplying the number of infringing products that the defendant transferred by the amount of profit per unit from the products that the plaintiff would have sold if there had been no infringement shall be presumed to be the amount of damages incurred by the plaintiff, subject to a limit being such amount as is proportionate to the plaintiff's ability to work.
- If there are circumstances that would make it impossible for the plaintiff to sell the number of the products equivalent to the number that the defendant actually transferred, a corresponding amount shall be deducted from the above calculation.
- When the defendant benefits from an infringement, the amount of profit gained by the defendant is presumed to be the amount of damages that the plaintiff has incurred.
- The amount equivalent to the licensing fees that should have been paid to the plaintiff is presumed to be the amount of damages that the plaintiff has incurred.

Limitation of liability

21 | How can liability be limited in your jurisdiction?

There is no statutory limitation of liability, except for under the statute of limitations.

Liquidated damages

22 | Are liquidated damages permitted? If so, what rules and restrictions apply?

The contracting parties may agree in advance the amount of liability for damages, or for an exemption or limitation of liability for damages in the event of a breach of duty.

However, Japanese court precedents have interpreted such immunity clauses as not applying in cases where the duty is breached intentionally or by gross negligence. In addition, an immunity clause that exempts or reduces liability for damages in the event of a breach of duty is subject to the anti-competition law. Specifically, if one party abuses its superior bargaining position and forces the other party to agree to an immunity clause that is considered unfair in light of normal business practice, this may constitute a violation of the anti-competition law as an abuse of a superior bargaining position and be subject to a cease and desist order or a payment order for a surcharge by the Japan Fair Trade Commission (JFTC).

Enforcement

23 | What means of enforcement are available and commonly used by successful litigants in technology disputes in your jurisdiction?

Under the Civil Execution Act, the plaintiff can file civil enforcement proceedings if the defendant does not pay money when due or cease acts of infringement in accordance with the judgment. In technology disputes, the plaintiff may request the following types of execution depending on its claim.

Compulsory execution for a payment claim

The plaintiff may sell the defendant's assets (eg, real estate) in an auction operated by the court and receive the proceeds from the purchaser, or collect on behalf of the defendant a claim held by the defendant (eg, bank deposits) and receive payment with respect to such claim from the debtor.

Indirect compulsory execution

The court may order the defendant to pay the plaintiff a certain amount of money determined by the court if he or she does not cease the infringement. This is the mechanism commonly used to stop infringement through monetary pressure.

ALTERNATIVE DISPUTE RESOLUTION

Available ADR mechanisms

24 | What alternative dispute resolution (ADR) mechanisms are available and typically used for technology disputes in your jurisdiction? (Do they have statutory support?)

In technology disputes, arbitration (run by administrative or civil organisations) and mediation (run by courts or the aforementioned organisations) are available.

System development disputes

Mediation through the court is relatively common. In the mediation procedure, the mediation committee (usually consisting of a judge, an expert with expertise in system development, and a private practice lawyer) hear the case and present a settlement plan to the parties. Even if a plaintiff files litigation proceedings, the court usually transfers the case to mediation proceedings; however, a different judge from that in charge of the litigation will constitute the mediation committee. If the parties do not accept the settlement plan suggested by the committee, the case will be returned to the litigation proceedings.

Intellectual property disputes

A foreign company may use an arbitration procedure run by the International Arbitration Center In Tokyo (IACT), where English may be chosen as the arbitration language.

Recognition and enforcement

25 | What rules and practices govern the recognition and enforcement of foreign arbitral awards in your jurisdiction?

Japan is a signatory state to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Therefore, a foreign arbitral award from another signatory state can be enforced in Japan.

UPDATE AND TRENDS

Recent developments and trends

- 26 | What have been the most notable recent developments and trends affecting the conduct and resolution of technology disputes in your jurisdiction (including any recent or pending case law and legislative changes)?

System development disputes

Recent court cases have ruled that a vendor bears the obligation of project management – the obligation to manage the progress of the system development project and to properly address project impediments – as well as the obligations specified in the contract. This obligation arises on the basis that there is a significant difference in the knowledge and experience of system development between vendors and users. The user can claim damages or terminate the contract for the vendor's breach of project management obligations.

Coronavirus

- 27 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There is no emergency legislation and there are no relief programmes nor initiatives specific to technology disputes. Japanese courts were temporarily shut down due to the coronavirus in 2020, but as of 5 July 2021, they are operating normally.

System development disputes

Even in the event of a delay in the performance of a system development obligation or another breach of duty, the vendor may claim immunity on the ground that the breach of duty was caused by force majeure. It is relatively easy to claim exemption of liability if the contract specifies exemption of liability in the case of an infectious disease outbreak (force majeure exemption). In addition, even if the contract does not explicitly include such a provision, it may be argued that the vendor is not liable for damages because, under the Civil Code, the vendor is only liable for damages if the breach of duty is based on a cause attributable to the vendor. It is stipulated in the Civil Code that force majeure can never be the defence for a delay in the performance of a monetary claim, and the user has to make payment as long as the vendor performs its obligation under a contract.

LAW STATED DATE

Correct on

- 28 | Give the date on which the information above is accurate.

27 July 2021

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