KOJIMA LAW OFFICES

Labor and Employment Practice Group Vol. 2 November 2013

Labor & Employment Law Newsletter

Resolving Labor Disputes in Japan

Overview

Given the complexity of labor law in Japan, it is important for foreign companies to understand the three basic mechanisms available to resolve labor disputes between an employee and an employer: standard court litigation, the court-run labor tribunal, and alternative dispute resolution ("ADR"). Among these, the labor tribunal has received the bulk of attention in recent years and has become an increasingly popular choice.

Table 1

	Standard Court Litigation	Labor Tribunal	ADR
Resolution body	• District Court • Summary Court *	• District Court	• Labor Relations Commissions • Regional Employment Bureaus, etc.
Average duration	13 months **	2.5 months	1 month
Number of new cases	3,170 (2011) *** 3,385 (2012) ***	3,586 (2011) 3,719 (2012)	6,510 (2011) *** 6,074 (2012) ***
Advantages over litigation		• Greater flexibility in resolving disputes • Lower cost • Shorter duration • Confidential proceedings	• A wide range of settlement options can be achieved through negotiations • Lower cost • Shorter duration • Confidential proceedings • Participation is entirely voluntary and either party may withdraw at any time

Source: May 31, 2013 press release from the Ministry of Health, Labour and Welfare

* Summary Courts have jurisdiction over claims totaling up to 1.4 million Japanese yen.

** Data for trial courts.

*** This figure represents cases handled by Regional Employment Bureaus only.

Together, labor tribunals, traditional litigation, i.e., standard court litigation, and ADR sponsored by administrative agencies represent the primary ways to resolve labor disputes in Japan and each is discussed separately below.

Labor Tribunal (*rodo-shimpan*)

Since its establishment in 2006, the labor tribunal has handled an ever-increasing number of cases, more than quadrupling from only 877 in 2006 to 3,719 in 2012. As the table above illustrates, labor tribunal cases now outnumber standard court cases. The labor tribunal has become a popular choice due to the perception that it offers a fast and economical way to resolve labor disputes (see Flowchart 1 below for an overview of the basic stages of the labor tribunal system).

Labor tribunals achieve this efficiency by limiting proceedings to only three hearings (additional hearings are possible only under special circumstances). Because of the limited number of hearings, it takes an average of about two-and-a-half months for a labor tribunal to issue a ruling in simple cases involving disputes over issues such as wages or retirement allowance. District courts have jurisdiction over labor tribunals.

A labor tribunal consists of a judge and two labor tribunal commissioners. The commissioners are selected from among citizens with special knowledge and experience dealing with labor disputes. In practice, one of the two commissioners is typically labor friendly (think labor union president) while the other is on the management side (e.g., human

Autumn leaves in Kyoto

Contents

Message from the Labor and Employment Practice Group

Kojima Law Offices have provided legal services in the area of labor and employment law since its founding in 1984. Our Labor and Employment Practice Group represents clients in labor disputes and assists them in structuring and implementing HR policies. We work with both foreign headquarters and local management to timely and appropriately resolve employment issues that overseas companies face operating in Japan. As part of our continuing effort to reach out and share our expertise with others, the Labor and Employment Practice Group publishes this newsletter to provide a better understanding of this complex area of law, thereby enabling the reader to make more appropriate employment and labor decisions. We hope you find the newsletter both interesting and informative and welcome any feedback you wish to share with us.

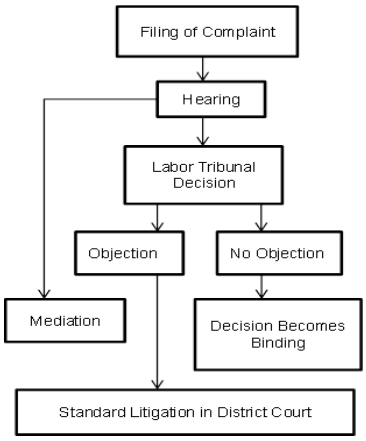
Labor and Employment Practice Group
Kojima Law Offices

URL: http://www.kojimalaw.jp/en/index.html

Contact: (E-mail) webmaster@kojimalaw.jp
(Tel) 81-3-3222-1401

resource managers). Prior to issuing a ruling, the labor tribunal usually attempts to mediate the dispute over the course of the three-hearing proceedings. If mediation is unsuccessful, the tribunal will generally issue a decision rather than hold additional hearings. Once issued, the decision becomes binding only if neither party objects within two weeks of receipt of the decision. Once the decision is final, it has the same binding effect as a court order (i.e., the prevailing party can compel the other party to comply with the decision). Unlike standard court litigation, labor tribunals are free to fashion decisions tailored to a given dispute. For instance, an employee who has been terminated may ask the labor tribunal to reinstate him to his former position, yet the tribunal may instead simply order the employer to pay the employee a certain amount of monetary compensation.

Flowchart 1



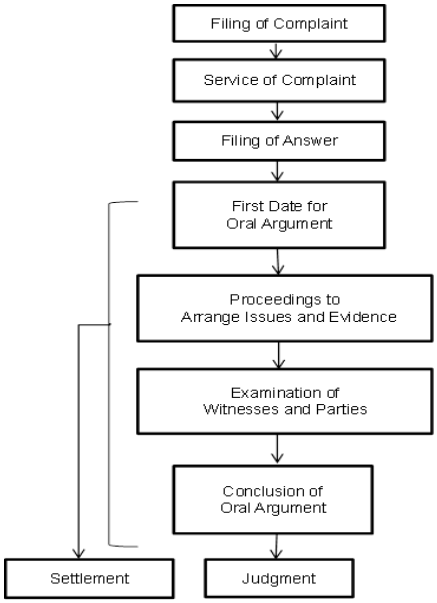
According to a 2011 Central Labor Relations Commission report, about 80% of labor tribunal cases are resolved through mediation or the issuance of a final decision. In the remaining cases, the petitioner either withdraws from the proceedings entirely, or objects to an unfavorable decision. When a party objects, the labor tribunal decision is invalidated and the dispute is automatically transferred to the district court and starts anew as a standard litigation case. A party looking for finality, therefore, should carefully consider whether going the labor tribunal route is really the best choice rather than opting for standard court litigation from the start. Although a party's labor tribunal petition may serve as a complaint in the district court, other items such as documentary evidence and briefs are treated differently and therefore need to be refiled. In this way, the parties will need to replicate at the district court level at least some of the work they performed in the labor tribunal proceedings.

Lastly, just because labor tribunal proceedings are quick does not mean that preparing for them is simple or easy. Generally, the respondent has only about 30 days to prepare for the first hearing after being served with the complaint. The first hearing is important because the tribunal, after narrowing down the issues and reviewing the evidence, typically has a good sense of how it will rule after the first hearing. Therefore, it is crucial to present the strongest possible case at the first hearing. Due to the short turnaround time, it is best to consult with local counsel immediately after receiving a labor tribunal complaint.

Standard Court Litigation

Unlike some European countries that have separate labor courts, in Japan ordinary civil courts handle labor disputes (see Flowchart 2 below for an overview of the basic stages of trial under the Japanese court system). The Tokyo and Osaka District Courts have divisions that specialize in labor disputes due to the large number of labor cases brought in those courts.

Flowchart 2



Filing an Answer

After being served with the complaint, the defendant needs to respond by filing an answer with the court (the court typically requires the answer to be filed within a month or so after service of the complaint).

Proceedings to Arrange Issues and Evidence

Proceedings to arrange issues and evidence require both parties to present their arguments and documentary evidence in detail. It generally takes a considerable amount of time to complete this stage of the proceedings in large part because each party needs to come up with appropriate counter-arguments to each and every claim from the opposing side. Accordingly, traditional litigation is usually far more time consuming than labor tribunals or ADR. Courts often attempt to settle cases after this step is complete, or after the witnesses finish testifying.

On average, it takes about 13 months to complete a labor-

related trial in district court compared to just one month for ADR, and two-and-a-half months for labor tribunal cases. However, there are ways to work within the confines of the court system to speed up the proceedings. For example, if the amount in controversy is less than 600,000 JPY, a small claims action (*shogaku-sosho*) is available. This small claims procedure consists of only one court hearing and is therefore relatively efficient and quick. Summary Courts have jurisdiction over small claims actions.

In certain cases, an employee may seek a preliminary injunction (*kari-shobun*) to, in essence, maintain the status quo until the court issues a final ruling in the case. Preliminary injunctions are often used to prohibit an employer from changing an employee's employment status or to require an employer to continue paying an employee's salary.

The losing party at trial may appeal to a higher court. An appeal must be in writing and filed with the district court within two weeks from the date the judgment is served.

ADR

Along with labor tribunals, employees often choose ADR to resolve labor disputes. Typical examples of ADR in the labor context include conciliation (*assen*) conducted by the Dispute Reconciliation Commissions, mediation (*chotei*) or arbitration (*chusai*) conducted by Labor Relations Commissions. Because a petitioner is not required to pay a filing fee to submit a petition for ADR managed by these agencies, ADR is often a popular choice among employees without substantial financial resources.

The benefits of ADR include a prompt resolution of disputes and closed, confidential proceedings. As with all forms of ADR, participation is completely voluntary. A respondent is free to withdraw from ADR proceedings at any time and can even refuse to appear at all without suffering any negative impact on his chances at trial or before a labor tribunal.

Although Japanese translation is indispensable when foreign documents are submitted to court or to ADR panels presided over by administrative agencies such as Regional Employment Commissions and Labor Relations Commissions, other ADR providers may forgo Japanese translations entirely. In the latter case, therefore, a party may be able to avoid expensive and time-consuming translation work if that party manages to convince the panel that translations are not needed in a given case. However, a decision that translations are unnecessary is in no way guaranteed and is solely within the discretion of each resolution body.

International Jurisdiction and Governing Law in Labor Disputes

Jurisdiction and governing law may seem like dry, academic subjects that belong in a law school classroom or a legal brief. However, these two issues can have a tremendous impact on how labor disputes are handled and resolved. Using the following hypothetical labor case, this article explores some of the significant jurisdictional and governing law issues that may typically arise in international labor disputes.

U.S.-based APEX Corporation entered into an employment agreement (the "Agreement") with Emiko, a Japanese citizen residing in Japan. Under the Agreement, California courts have exclusive jurisdiction over any dispute involving APEX and Emiko, and the Agreement is governed by the laws of California. Emiko worked at APEX's Tokyo branch under the terms of the Agreement, but was abruptly terminated without cause as APEX was allowed to do under the Agreement. California law permits this dismissal, but Japanese law does not. Emiko has sued APEX in the Tokyo District Court seeking damages under Japanese law. Can APEX get the case dismissed on the grounds that: (1) California courts have exclusive jurisdiction over the case; and (2) the Agreement is governed by California law?

International Jurisdiction

The amended Code of Civil Procedure (the "Amended Code") came into force on April 1, 2012. One of the significant changes to the Amended Code was the addition of provisions covering international jurisdiction. Prior to the amendment, Japanese courts decided whether they could take jurisdiction in international cases based on criteria gleaned from case law, in particular two leading Japanese Supreme Court cases decided in 1981 and 1997 respectively.

With employees generally having less bargaining power than employers, the Amended Code aims to even the playing field by making it easier for employees to bring suit in Japan. Under the Amended Code, even if an employee has agreed to submit to the exclusive jurisdiction of a court outside of Japan, that employee may nevertheless sue in Japanese court if: (1) the employee provided the

employer with labor services in Japan; and (2) the case involves a dispute between an individual employee and an employer, such as a dispute over retirement allowance, the validity of a dismissal, or failure to pay overtime (this provision of the Amended Code does not apply to a dispute between an employer and a labor union). In the APEX example above, therefore, Emiko would be able to bring suit against APEX in Japanese court because Emiko performed her services in Japan.

The new jurisdictional provisions of the Amended Code that make it easier for an employee to sue in Japanese court apply only to agreements made on April 1, 2012 or later. Earlier agreements rely on the previous Code of Civil Procedure, which, as mentioned above, failed to address issues of international jurisdiction. As a result, the court determines jurisdictional issues for earlier agreements based on case law (specifically, a 1975 Supreme Court case). While the Amended Code does not enforce an exclusive jurisdiction clause in labor disputes, the 1975 Supreme Court case held that such a jurisdiction clause is valid unless it is especially unreasonable and violates Japanese public policy. Where, for example, applying an exclusive jurisdiction clause would unduly favor an employer, or where an employer pressured an employee to consent to an exclusive jurisdiction clause without sufficient explanation, a Japanese court may invalidate the clause as a violation of Japanese public policy.

Would the result be different if APEX and Emiko had instead entered into an arbitration agreement? The answer is not clear. The Japanese Arbitration Act provides that an arbitration agreement does not apply to an individual labor-related dispute. However, the Tokyo District Court ruled in 2011 that the Arbitration Act does not apply to an arbitration agreement specifying that arbitration be held in Georgia under U.S. arbitration rules because the Arbitration Act applies only to arbitration agreements that provide for arbitrations in Japan. Because there are no appellate decisions regarding the applicability of the Arbitration Act to arbitration clauses specifying that the arbitration be held outside of Japan, it remains unclear at this point how this issue will be decided in Japan. In our example, therefore, it is uncertain whether a Japanese court could take jurisdiction in Emiko's case against APEX if the parties had entered into an arbitration agreement governed by California law that provides for arbitration in the U.S.

Governing Law

The Act on General Rules for Application of Laws (the "General Act") sets forth the governing law applicable to certain international cases. Assuming for the sake of discussion that the employment agreement between APEX and Emiko did not specify a governing law, the law of the place most closely connected to the labor contract would apply. The General Act provides that the country in which an employee renders his/her services is presumed to have the closest connection to the relevant employment agreement. In the APEX-Emiko case, therefore, Japanese law would apply if the parties not had selected a governing law.

In our example, APEX and Emiko agreed that California law would govern the Agreement. However, the General Act provides special rules for labor contracts. Specifically, a labor contract will be subject to mandatory provisions of the law of the place that is most closely connected to the contract if the employee demonstrates to the employer an intention to have the agreement governed by such mandatory provisions (provisions concerning such things as dismissal, working hours, overtime and annual paid leave are considered "mandatory" under Japanese law). Therefore, if Emiko notified APEX that the legality of her dismissal should be adjudicated under Japanese law, Japanese law would be the governing law in this case, even though the Agreement specified California law.

Labor and Employment Practice Group

Partner
Hiromasa Ogawa

Counsel
Izumi Okada Hitomi Sakai

Associates
Darcy H. Kishida * Hirokazu Amemiya
Norio Mitsuuchi Minoru Saito
Tatsuro Terada Seizaburo Taira
Ayako Shinmura

* Mr. Kishida is licensed to practice law in Hawaii, New York and Washington, D.C. and provided editorial assistance for this newsletter.