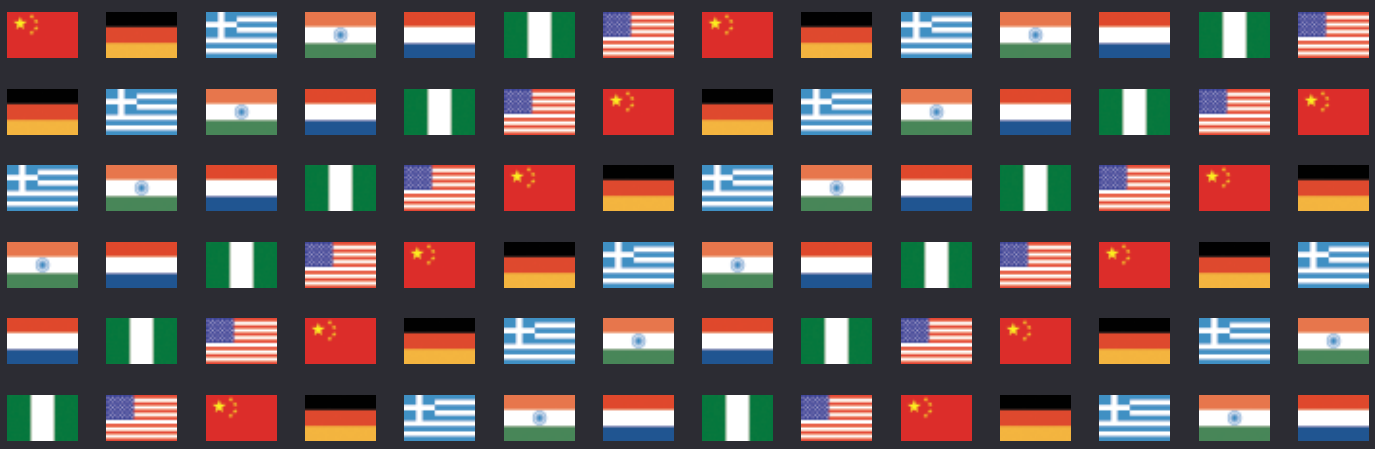
Securities Litigation 2021

Contributing editor
Jason M Halper



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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Securities Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor Jason M Halper of Cadwalader, Wickersham & Taft LLP, for their continued assistance with this volume.

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Getting The Deal Through

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Contents

Japan

Christopher Studebaker and Masaki Sekimoto

Tokyo International Law Office

GENERAL FRAMEWORK

General climate

1 Describe the nature and extent of securities litigation in your jurisdiction.

The Financial Instruments and Exchange Act (FIEA) establishes disclosure regulations to secure the accuracy of statements in disclosure documents and protect investors.

Under the FIEA, an issuer of securities shall be liable for damage suffered by investors who acquired, purchased or sold the securities if the disclosure documents (eg, securities registration statement, prospectus, annual securities reports and quarterly securities reports): (1) contain misstatements regarding material matters; (2) omit statements of material matters that should be stated; or (3) omit statements of material facts that must be stated to avoid causing misunderstanding. The FIEA also prohibits, inter alia, market manipulation and insider trading.

In typical securities litigation, investors bring FIEA claims for alleged material misstatements or omissions against the company (ie, the issuer) following a corrective disclosure that results in a share price drop. They also may bring FIEA claims against the issuer's directors, executive officers, sellers of the securities, auditors (ie, certified public accountant or auditing firm) that certified any financial statements or audits and underwriters for FIEA violations. Private securities litigation claims for insider trading and market manipulation are uncommon.

Investors may also assert claims for damages based on the Civil Code and the Companies Act. Such claims are less common, however, in part because of the difficulty in meeting the high burden of proof.

Courts and time frames

2 What experience do the courts in your jurisdiction have with securities litigation? Are there specialist courts for securities disputes? What is the typical time frame for securities litigation in your jurisdiction?

In Japan, there is no special court for securities litigation. There are no specific procedural features that are particular to securities litigation, and the proceedings are the same as those in general civil proceedings for damages.

After a claimant serves a petition (ie, complaint) and writ of summons on defendant, the defendant files an answer. The court of first instance (ie, district court) then holds several 'preparatory proceedings' (ie, hearings) to clarify issues and both parties submit briefs and supporting documentary evidence to the court. Court hearings occur every one or two months. Witnesses are generally examined after the parties have submitted documentary evidence and made oral arguments. Once all evidence has been examined, the court generally renders a judgment within two months. Civil legal proceedings in the court of first instance take less than 12 months (eight months on average) from filing of the petition to trial but complex cases could take longer. District court decisions are appealable to the High Court. The High Court generally renders a decision within six to 12 months but could take longer than a year in complex cases. High Court decisions are appealable to the Supreme Court if the issues concern constitutional violations, lower court procedural breaches and material matters concerning the construction of laws and regulations. The Supreme Court typically renders a decision within four to six months after brief submissions and oral argument.

Government regulation and enforcement

3 What is the relationship between private securities litigation and government regulation and enforcement in your jurisdiction?

The Financial Services Agency (FSA) and the Securities and Exchange Surveillance Commission (SESC), a committee established within the FSA, enforce the FIEA through investigations of market misconduct and inspections of disclosure requirements. The SESC is responsible for ensuring the fairness and transparency of the markets and for protecting investors. Its oversight function includes:

- conducting investigations of market misconduct including insider trading and market manipulation;
- conducting inspections of violations in disclosure requirements by listed companies;
- monitoring of violations of laws by financial instruments business operators (ie, remote offshore trade participants in Japanese exchange transaction) and unregistered business operators; and
- making recommendations of administrative actions or administrative monetary penalty payment orders or filing criminal charges in conjunction with the prosecutor's office. The SESC does not have power to directly prosecute and penalise companies and persons for FIEA violations.

Private securities litigation may be filed in the absence of, in tandem with, or after a SESC or other regulatory investigation. In general, however, private securities litigation arises when: (1) administrative monetary penalties are imposed on the issuer for material misstatements or omissions; and then (2) investors assert claims for damages against the issuer, the issuer's directors, executive officers, auditors or underwriters based on those findings. The administrative authorities' fact-finding or imposition of penalties are not legally binding on the court in private securities litigation but can serve as a persuasive authority.

CLAIMS AND DEFENCES

Available claims

4 | What types of securities claim are available to investors?

There are three types of claims available to investors in securities litigation: Civil Code claims; Financial Instruments and Exchange Act (FIEA) claims; and Companies Act claims.

For tort liability under the Civil Code, a plaintiff is required to prove:

- the wrongdoer's (eg, the issuer's) intent or negligence;
- causation between tortious conduct (ie, material misstatements or omissions) and the plaintiff's damage; and
- amount of damage.

The amount of damage is considered to be the difference between the purchase price and the sales price (or current value) of the security if the plaintiff establishes that it would not have purchased the security if the material misstatements or omissions in the public filings had been known. However, the plaintiff bears a high burden of proof as each element must be proven.

As a practical matter, given the difficulty in establishing liability under the Civil Code, investors usually bring FIEA claims. In particular, the FIEA eases a plaintiff's burden of proof in claims against issuers of primary and secondary offerings and in the secondary market. Reliance and scienter need not be proven, and damages are presumed. No such presumptions exist, however, for FIEA claims brought against the issuer's directors, executive officers, sellers of the securities, auditors or underwriters.

In addition, investors may assert a claim against the issuer's directors, executive officers or auditors based on the Companies Act. However, investors must meet a high evidentiary burden to establish liability under the Companies Act.

The court system is unified in that there are no different jurisdictions (ie, national versus prefecture or federal versus state).

Offerings versus secondary-market purchases

5 | How do claims (or defences to claims) arising out of securities offerings differ from those based on secondary-market purchases of securities?

The differences between the issuer's liabilities arising out of acquisition of securities in primary or secondary offerings and secondary-market purchases or sales of securities are as follows:

- the nature of liability (strict liability versus negligence);
- the amount of damage (statutory versus presumptive); and
- the statute of limitations period (three or seven years versus two or five years).

Public versus private securities

6 | Are there differences in the claims or defences available for publicly traded securities and for privately issued securities?

Unlike public companies, private companies generally need not issue securities registration statements or disclose annual securities reports or quarterly securities reports under the FIEA. However, if there are material misstatements or omissions in the financial statements or annual business reports required under the Companies Act, the issuer's directors, executive officers or auditors may be liable under the Companies Act or under the Civil Code.

Primary elements of claim

7 | What are the elements of the main types of securities claim?

Claims against the issuer – primary and secondary offerings

Under the FIEA, when an investor asserts a claim against the issuer arising out of the acquisition of the securities in primary or secondary offerings, the investor must only establish the existence of the material misstatements or omissions in the securities registration statement and the investor's acquisition of the securities in primary or secondary offerings. The investor is not required to establish the amount of damage incurred or causation between the material misstatements or omissions and the damage. The amount of damage is statutory and the formula is set forth in the FIEA.

Claims against the issuer – secondary market

Under the FIEA, when an investor asserts a claim against the issuer arising out of secondary-market purchases or sales of the securities, the investor must only establish (1) the existence of the material misstatements or omissions in the disclosure documents and (2) the investor's purchase or sale of the securities on the secondary market. The investor is not required to establish (3) the amount of damage incurred or (4) causation between the material misstatements or omissions and the damage. The amount of damage is presumed under certain circumstances and the formula is set forth in the FIEA.

Claims against others

Under the FIEA, when an investor asserts a claim against the issuer's directors, executive officers, sellers of the securities, auditors or underwriters, the investor bears the burden of establishing items (1) through (4) as discussed above.

Primary defences

8 | What are the most commonly asserted defences? Which are typically successful?

For FIEA claims, the issuer, the issuer's directors, executive officers, sellers of the securities, auditors or underwriters will not be liable if the investor knew of the material misstatements or omissions when acquiring, purchasing or selling the securities. In that case, causation between the material misstatements or omissions and damage is lacking. However, a defendant bears the burden of proof (ie, the investor need not prove that it lacked awareness of the falsity).

In addition, the FIEA provides that if the issuer proves that all, or part, of the investor's loss was caused by reasons other than the material misstatements or omissions, the issuer is not liable for all or part of the investor's damage because causation is lacking. The issuer bears the burden of proof.

Further, as to the damage of investors who purchased the securities on the secondary market, the FIEA provides that if events other than the material misstatements or omissions caused the decline but the amount of decline attributable to those events is extremely difficult for the issuer to establish, the court has the discretion to reduce damages accordingly.

Materiality

9 | What is the standard for determining whether the misstated or omitted information is of sufficient importance to be actionable?

'Material' is considered to be matters or facts that give important influence on investors' decisions and price formation of the securities on the market. According to the case law, 'material' is not the specific or subjective importance to the investor who asserts a claim (ie, whether

the information was actually important for the particular investor is irrelevant), but rather the abstract and objective importance to investors in general and the market in particular.

As long as the information is 'material' for market price formation, an investor suffers harm even if the investor did not find specific or subjective importance to the information. This is similar to the 'fraud on the market' theory in the United States (ie, the market price of shares impounds all publicly available information, including material misrepresentations).

Scienter

10 What is the standard for determining whether a defendant has a culpable state of mind to support liability? What types of allegation or evidence are typically advanced to support or defeat state-of-mind requirements?

Claims against the issuer – primary and secondary offerings
Under the FIEA, the issuer will be strictly liable to investors who acquired the securities in primary or secondary offerings for the material misstatements or omissions in its securities registration statement.

Claims against the issuer – secondary market
Under the FIEA, if the issuer proves that it had no intent or negligence concerning the material misstatements or omissions in the disclosure documents, the issuer will not be liable to investors who purchased or sold the securities on the secondary market.

Claims against others
Under the FIEA, if the issuer's directors, executive officers, sellers of the securities, auditors or underwriters prove that they had no intent or negligence concerning the material misstatements or omissions in the disclosure documents, they will not be liable to investors who acquired the securities in primary or secondary offerings or purchased or sold the securities on the secondary market.

Reliance

11 Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

Under the FIEA, an investor who asserts a claim based on material misstatements or omissions is not required to prove that the investor relied on the disclosure documents when the investor acquired, purchased or sold the securities.

As long as the price is erroneously formed based on the material misstatements or omissions, there is causation between the material misstatements or omissions and damage even if the investor did not actually review the disclosure documents. This is similar to the 'fraud on the market theory' in the United States.

However, if the investor knew of the material misstatements or omissions, the issuer, the issuer's directors, executive officers, sellers of the securities, auditors or underwriters will not be liable for damages. In that case, causation between the material misstatements and the damage is lacking.

Causation

12 Is proof of causation required? How is causation established? How is causation rebutted?

Claims against the issuer – primary and secondary offerings
Under the FIEA, an investor is not required to establish that the actionable misconduct was the cause of economic losses to the investors.

Claims against the issuer – secondary market
Similarly, investors with claims against issuers in the secondary market need not establish loss causation.

Claims against others
Under the FIEA, when an investor asserts a claim against the issuer's directors, executive officers, sellers of the securities, auditors or underwriters, the investor bears the burden of establishing not only the existence of the material misstatements or omissions and the investor's acquisition, purchase or sale of the securities but also the amount of damage incurred and causation between the material misstatements or omissions and the damage. A defendant can rebut causation by showing that some or all of the price decline was not the result of any purported material misstatements or omissions, but some other market factor.

Other elements of claim

13 What elements or defences present special issues in the securities litigation context?

The FIEA provides the following special provisions in regard to the amount of damage.

Claims against the issuer – primary and secondary offerings
The amount of damage is statutory, and the formula is set forth in the FIEA. It is calculated as the amount paid by the investor minus

- the market price of the securities at the time of asserting a claim (or the estimated disposal price at the time of asserting a claim if no market price is available); or
- the disposal price, if the investor sold the securities before asserting a claim.

Claims against the issuer – secondary market
Under the FIEA, the amount of damage suffered by the investor who purchased the securities within one year before the disclosure date of the material misstatements or omissions and continues to hold the securities on the disclosure date is presumed to be:

- the average market price (or the estimated disposal price if no market price is available) of the securities over one month before the relevant disclosure date minus
- the average market price (or the estimated disposal price if no market price is available) of the securities over one month after the relevant disclosure date.

The investor is allowed to establish that the damages are beyond the presumed amount. However, such established damages must not exceed the amounts below (because, under the FIEA, the damages of investors who purchased the securities on the secondary market should not exceed the damages of investors who acquired the securities in primary or secondary offerings). Such damages are calculated as the amount paid by the investors minus

- the market price of the securities at the time of asserting a claim (or the estimated disposal price at the time of asserting a claim if no market price is available); or
- the disposal price, if the investor sold the securities before asserting a claim.

Claims against others
When an investor asserts a claim against the issuer's directors, executive officers, sellers of the securities, auditors or underwriters, the investor bears the burden of establishing the amount of damage.

Limitation period

14 What is the relevant period of limitation or repose? When does it begin to run? Can it be extended or shortened?

Claims against the issuer – primary and secondary offerings

Under the FIEA, the right to claim damages extinguishes if it is not exercised within three years of the time when the investor comes to know or should have been able to know the material misstatements or omissions if exercising reasonable care. Also, a claim extinguishes when it has not been exercised for seven years after the securities registration statement comes into effect.

Claims against the issuer – secondary market

Under the FIEA, a claim extinguishes if it is not exercised for two years from the time when the investor comes to know or should have been able to know the material misstatements or omissions if exercising reasonable care. Also, a claim extinguishes when it has not been exercised for five years after the disclosure documents are filed or submitted.

Claims against others

The FIEA provides no particular provisions regarding the statute of limitations for a claim against the issuer's directors, executive officers, sellers of the securities, auditors or underwriters based on the material misstatements or omissions. As such, the Civil Code, which provides the statute of limitations for torts, applies as the default rule. Namely, a tort claim extinguishes if it is not exercised within three years of the time when an investor who acquired, purchased or sold the securities learns of the damage, or due to a period of exclusion 20 years after the time of the material misstatements or omissions.

REMEDIES, PLEADING AND EVIDENCE

Remedies

15 What remedies are available? Do any defences present special issues in the context of securities litigation? What is the measure of damages and how are damages proven?

The remedy available for claims under the Financial Instruments and Exchange Act (FIEA), the Civil Code and the Companies Act is monetary compensation. Punitive damages are not allowed under Japanese law.

In principle, the amount of damage is assessed by comparing the investor's hypothetical financial condition if there had been no material misstatements or omissions and the investor's actual financial condition. However, if factors other than the misstatements or omissions, in whole or in part, caused the price decline, then the portion attributable to those factors will be deducted from the damages.

Pleading requirements

16 What is required to plead the claim adequately and proceed past the initial pleading?

There are no pleading requirements and a motion to dismiss is not available in Japanese civil lawsuits. However, if the complaint fails to adequately and properly plead all required elements of the claim and the plaintiff fails to make appropriate corrections despite receiving a court order to do so within the time given to the plaintiff, the court must dismiss the complaint.

Procedural defence mechanisms

17 What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pretrial resolution?

There are no procedural mechanisms available to defendants to dismiss claims at an early stage of the proceedings. However, if a plaintiff asserts a claim that the court considers to be inadequately pled or without merit, the court may instruct the plaintiff to cure or dismiss the claim.

Evidence

18 How is evidence collected and submitted to the court to support securities claims and defences in your jurisdiction? What rules and common practices apply to the introduction of expert evidence and how receptive are courts to such evidence?

Japan does not have a system of broad and compulsory discovery procedures equivalent to those in other common law jurisdictions such as the United States. However, under the Civil Code of Procedure, courts have discretion to order: (1) production of documents *sua sponte* or upon a petition from a party; (2) examination of the parties' witnesses through written statements or orally before the court; and (3) discovery from third parties. If a party fails to comply with a court order, the court may deem the allegation pertaining to the related evidence as true. The court may also issue a civil fine against the non-complying party. The combination of court-controlled evidence production and numerous short hearings over extended periods serves as a substitute for US-style pretrial discovery. Because a plaintiff need not prove intent or negligence in FIEA claims against the issuer, the limitation on discovery is generally not considered a significant hurdle. In fact, it can result in lessening legal costs.

In principle, each side collects evidence to support its claims or defences for submission to the court. Nevertheless, if particular documents are necessary to the case for good reason and in the possession of the counterparty or third party, the party seeking discovery may petition the court to order the production of those documents.

Expert evidence is permitted. Experts may be appointed by the court or the parties. Expert witnesses and opinions are proffered in the same way as ordinary evidence. The court will decide whether to accept expert evidence considering the time and necessity to the case.

LIABILITY

Primary liability

19 Who may be primarily liable for securities law violations in your jurisdiction?

The issuer's directors, executive officers and 'equivalent persons' may be liable for the damage caused by the material misstatements or omissions. These persons are usually in a leading position regarding the material misstatements or omissions, and therefore are subject to the liability. According to the case law, 'equivalent persons' are those persons that are given a position and authority almost equivalent to that of a director who manages the issuer's business.

Secondary liability

20 | Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

The principles of secondary, vicarious or 'controlling person' liability are not recognised under the Financial Instruments and Exchange Act (FIEA) or the Companies Act. In the Civil Code, vicarious liability is recognised, and investors may pursue claims accordingly. Investors are required to prove:

- the wrongdoer's (employee's) intent or negligence;
- causation between the tortious conduct and damage;
- the amount of damage;
- employment relationship with the wrongdoer; and
- the tortious conduct was made in regard to the employer's business.

Claims against directors

21 | What are the special issues in your jurisdiction with respect to securities claims against directors?

Under the FIEA, if the disclosure documents contain material misstatements or omissions, the issuer's directors are liable for damage suffered by investors who acquired, purchased or sold the securities. However, the directors may be relieved from liability if they prove that they did not know and could not know that there were material misstatements or omissions even if exercising reasonable care. This is similar to the due diligence defence in the United States. Also, the issuer's directors may be relieved from liability if they prove that the investor knew of the material misstatements or omissions at the time of acquisition, purchase or sale of the securities.

The issuer's directors may be liable under the Companies Act and the Civil Code based on the material misstatements or omissions.

Claims against underwriters

22 | What are the special issues in your jurisdiction with respect to securities claims against underwriters?

Under the FIEA, if a securities registration statement contains material misstatements or omissions, underwriters are liable for damage suffered by investors who acquired the securities in the primary or secondary offering. However, underwriters may be relieved from the liability if they prove that:

- where the financial accounting section of the securities registration statement contains material misstatements or omissions, they did not know such material misstatements or omissions; or
- where sections other than the financial accounting section of the securities registration statement contains material misstatements or omissions, they did not know such material misstatements or omissions even if exercising reasonable care.

This is similar to the due diligence defence in the United States. Also, the underwriters may be relieved from the liability if they prove that the investor knew of the material misstatements or omissions at the time of acquisition of the securities.

Under the current Japanese practice, issuers virtually cannot access the capital markets without services providers such as underwriters or auditors. Such professionals are expected to act as gatekeepers when issuers enter the capital market. By imposing the potential for civil liability on them, the issuer's disclosures in theory will be scrutinised more carefully.

Claims against auditors

23 | What are the special issues in your jurisdiction with respect to securities claims against auditors?

Under the FIEA, if financial statements (including balance sheet, profit and loss statements and other documents concerning statements on finance and accounting) pertaining to the disclosure documents contain the misstatements or omissions and the auditor has certified that there are no misstatements or omissions therein, the auditor is liable for the misstatements or omissions.

However, the auditor may be relieved from liability if it proves that it did not provide such incorrect certification intentionally or negligently, or the investor knew of the misstatements or omissions.

COLLECTIVE PROCEEDINGS

Availability

24 | In what circumstances does your jurisdiction allow collective proceedings?

There is no class action system in Japan such as in the United States.

Plaintiffs in securities litigation have brought claims as a group in the form of representative actions or through joinder of claims under the Code of Civil Procedure. These procedures permit consolidation of separate lawsuits and collective adjudication of claims where the obligations or liabilities are common to the investors and are based on the same facts or law.

In 2013, the Act on Special Provisions of Civil Procedure for Collective Recovery of Consumers' Property Damage (ASPCP), which provides a two-tier, opt-in procedure for group litigation for matters involving consumer contracts, was enacted. However, the ASPCP does not apply to Financial Instruments and Exchange Act claims.

Under the ASPCP, only Specified Qualified Consumer Organizations (SQCO), which are certified by the Prime Minister of Japan, may bring consumer collective actions. During the first stage (ie, common obligation confirmation proceedings), the SQCO files a lawsuit requesting for confirmation of common obligations, which are obligations of the defendant (ie, business operator) to compensate consumers based on factual and legal issues common to a group of consumers. In other words, consumers themselves cannot bring collective actions under the ASPCP. If the court confirms the common obligations, then consumers can opt in to the proceeding (ie, claim determination proceedings) by delegating the SQCO to file claims for damages with the court.

Claims subject to common obligation confirmation proceedings are limited to the following monetary claims in relation to a consumer contract for property damage suffered by a considerable number of consumers: (1) claims for performance of contractual obligation; (2) claims for unjust enrichment; (3) claims for non-performance of a contractual obligation; and (4) claims based on tort under the Civil Code.

Reliance, causation and damages

25 | Can reliance, causation and damages be determined on a class-wide basis, or must they be assessed individually?

Under the ASPCP, each consumer's amount of damage must be assessed individually.

Court involvement and procedure

26 What is the involvement of the court in collective proceedings and what procedures must be followed to achieve collective treatment of claims? What is the procedure for settling collective proceedings and what is the extent of the court's involvement in settlement?

There is no class action system in Japan such as in the United States.

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Claims subject to common obligation confirmation proceedings are limited to the following monetary claims in relation to a consumer contract for property damage suffered by a considerable number of consumers: (1) claims for performance of contractual obligation; (2) claims for unjust enrichment; (3) claims for non-performance of a contractual obligation; and (4) claims based on tort under the Civil Code.

Opt-in/opt-out

27 In collective proceedings, are claims opt-in or opt-out?

The ASPCP adopts 'opt-in' collective proceedings. For consumers to be compensated, each consumer must file its claim with the SQCO in the second stage of the proceeding.

Regulator and third-party involvement

28 What role do regulators, professional bodies and other third parties play in collective proceedings?

The Prime Minister of Japan certifies entities to become SQCOs, which may bring consumer collective actions under the ASPCP.

FUNDING AND COSTS

Claim funding

29 What options are available for plaintiffs to obtain funding for their claims? What are the pros and cons of each option, including any ethical issues relating to litigation funding?

Contingency fee arrangements are permitted in Japan. Separately, although civil legal aid provides support (such as advance payment of attorneys' fees) for indigent parties, civil legal aid is different from litigation funding (third-party funding). There are no general rules aimed at addressing third-party funding. In other words, no law directly prohibits third-party funding, but no law explicitly permits it. Nor has the issue been addressed by the courts.

Costs

30 Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

There are no special rules regarding liability for costs in securities litigation. In general, the losing party bears litigation costs including fees paid for the revenue stamp, which is affixed to a complaint or other petition, court filing fees, postage for sending documents and daily allowance for witnesses. On the other hand, each party generally bears its own attorneys' fees.

Under the Code of Civil Procedure, the court must, upon the petition by a defendant, order the plaintiff to provide security for the litigation costs if the plaintiff lacks a residence or business office in Japan.

Privilege

31 What types of legal privilege exist between litigation funders and litigants?

There are no general rules aimed at addressing litigation funding including whether legal privilege exists between the funder and litigants. In principle, Japanese law provides no protection for attorney-client communications. However, the Attorney Act provides that a lawyer or a former lawyer shall have the right and the obligation to maintain the confidentiality of any facts, which they may have learned during the course of performing their duties. Moreover, the code of ethics or the Penal Code provides that if a lawyer discloses client information to others or violates the lawyer's confidentiality obligation, the lawyer could be disciplined by the bar association or subject to criminal liability.

INVESTMENT FUNDS AND STRUCTURED FINANCE

Interests in investment funds

32 Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

Various types of investment vehicles such as investment trusts and private equity funds are used in Japan. Real estate investment trusts and infrastructure funds are listed and traded on the stock exchange market.

An investor may assert a claim for damages against such entities as the settlor companies and trustee companies of investment trusts, the fund managers, the managing partners of partnerships under the Civil Code or investment business limited partnerships and the business operators of anonymous partnership for breach of fiduciary duties.

Structured finance vehicles

33 Are there special issues in your country in the structured finance context?

Various types of structured finance such as asset-backed securitisations are used in Japan. Asset-backed securitisations may take place through such entities as a specific purpose company, a limited liability company, a specific purpose trust or anonymous partnership. Types of receivables that are commonly securitised in practice include receivables on loans secured by residential mortgages, credit card receivables, lease receivables, auto-loan receivables and account receivables, which include promissory notes. Real estate is another type of asset commonly securitised in Japan. Asset-backed securities are typically traded on the private market.

An investor may assert a claim against such entities as the directors of special purpose companies, the managing members of limited liability companies, the trustee companies of trusts and the business operators of anonymous partnership for breach of fiduciary duties.

CROSS-BORDER ISSUES

Foreign claimants and securities

34 What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

Under the Code of Civil Procedure, the Japanese courts have jurisdiction over an action that is brought against a corporation whose principal office or business office is located in Japan; and a person domiciled in Japan.

Accordingly, any claimant, regardless of such claimant's domicile, may commence securities litigation in a Japanese court so long as the principal office or business office of the issuer is located in Japan or the issuer's directors and others are domiciled in Japan.

Foreign defendants and issuers

35 What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

Under the Code of Civil Procedure, the Japanese courts have jurisdiction over an action that is brought against a corporation whose principal office or business office is located in Japan; and a person domiciled in Japan.

Accordingly, any claimant, regardless of such claimant's domicile, may commence securities litigation in a Japanese court so long as the principal office or business office of the issuer is located in Japan or the issuer's directors and others are domiciled in Japan.

Multiple cross-border claims

36 How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

There are no different jurisdictions (ie, national versus prefecture or federal versus state) or systems similar to multidistrict litigation within Japan. Multiple filings of securities claims arising from the same material misstatements or omissions can be filed with different district courts and each case will be handled separately in general.

Enforcement of foreign judgments

37 What are the requirements in your jurisdiction to enforce foreign court judgments relating to securities transactions?

The Code of Civil Procedure and Civil Execution Act set forth the requirements and procedures for recognising and enforcing a foreign-court judgment. Japan is not a party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments such as the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

Under the Code of Civil Procedure, the requirements for recognising a foreign judgment are: (1) the jurisdiction of a foreign court is recognised pursuant to laws and regulations, conventions or treaties; (2) the losing party has been served (excluding service by publication or any other similar service) with the requisite summons or order for the commencement of litigation, or has appeared without being so served; (3) the content of the judgment and the litigation proceedings are not contrary to the public policy in Japan; and (4) there exists reciprocity between Japan and the foreign country rendering the judgment treats Japanese judgments similarly.

The foreign judgment also must be final and binding (ie, judgment cannot be appealed based on existing procedures in the foreign country of judgment).

A court will determine whether these requirements are satisfied in an action for 'execution judgment' under the Civil Execution Act. If an execution judgment is obtained, the underlying foreign judgment will be enforceable in Japan.

There are no special rules for the recognition and enforcement of a foreign judgment relating to securities transactions.

ALTERNATIVE DISPUTE RESOLUTION

Options, advantages and disadvantages

38 What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

Disputes arising from the material misstatements or omissions may be resolved through a civil conciliation procedure (similar to mediation in the United States) and arbitration. However, arbitration is usually not an option to resolve disputes relating to a securities claim under the Financial Instruments and Exchange Act or a tort claim under the Civil Code. This is because an arbitration agreement would not exist between the plaintiff (investors) and defendants (issuer, issuer's directors, executive officers, sellers of the securities, auditors or underwriters).

UPDATE AND TRENDS

Key developments of the past year

39 What are the most significant recent legal developments in securities litigation in your jurisdiction? What are the current issues of note and trends relating to securities litigation in your jurisdiction? What issues do you foresee arising in the next few years?

On 22 December 2020, in a case of first impression, the Supreme Court held that an IPO's lead underwriter was liable for damages arising from material misstatements in the financial accounting section of a securities registration statement. The Supreme Court's decision clarifies that an underwriter may be obligated to investigate and confirm the accuracy of financials (ie, financial accounting section of a securities registration statement), even if certified by an auditor, and will likely have a significant impact on the securities practice as it expands underwriter liability in public offerings.

FOI Corporation (the company), a semiconductor production equipment maker, filed a securities registration statement and delivered a prospectus with material misstatements. The misstatements were not uncovered during the certified public accountant's audit, the underwriter's due diligence or the stock exchange's examination. Roughly six months after the IPO, the window-dressing accounting was revealed. Shortly thereafter, the company commenced bankruptcy proceedings and then delisted. Shareholders brought a lawsuit for damages under the Financial Instruments and Exchange Act (FIEA), the Companies Act and the Civil Code against, among others, the company's directors, the auditor, underwriters and the stock exchange.

The district court held that the lead underwriter was liable for the material misstatements under the FIEA. On appeal, the High Court ruled that the lead underwriter was not liable, despite the fact that the lead underwriter received two anonymous whistleblower tips about the material misstatements during the underwriting examination.

Investors appealed to the Supreme Court. In overturning the High Court, the Supreme Court held that:

- an underwriter has a duty to investigate and confirm the accuracy of a securities registration statement's financial accounting section even if an auditor audited that section, where the underwriter receives information that casts significant doubt on the basic reliability of the audit; and
- as a result, the defendant-lead underwriter was not relieved from liability under the FIEA because the lead underwriter did not conduct a good enough investigation or seek confirmation as to the accuracy of the financial accounting, and thus failed to prove that it was unaware the financial accounting section contained material misstatements.

Coronavirus

40 What emergency legislation, relief programmes and other initiatives specific to your practice area has your jurisdiction 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?

In Japan, there is no specific emergency legislation, relief programmes or other initiatives to address the pandemic in relation to securities litigation.

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