

# Rules of Evidence (Civil Proceedings): Overview (Japan)

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A Practice Note that provides an overview of the rules governing disclosure and the admissibility of evidence in civil proceedings in Japan.

This Practice Note examines the main rules under the Code of Civil Procedure (*Minjisoshohō*), including the absence of a formal discovery or disclosure procedure and the mechanisms available to petition a court for an order to produce documents. It addresses the burden and standard of proof, the consequences for failing to provide evidence, and the grounds for challenging the admissibility of evidence obtained by anti-social measures. This Practice Note also discusses witness and expert evidence, including the roles of both court-appointed and party-hired experts. A significant focus is on the complexities of gathering cross-border evidence, outlining procedures for obtaining evidence from abroad for use in Japanese courts and for obtaining evidence located in Japan to support foreign litigation, particularly as Japan is not a party to the Hague Evidence Convention.

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Evidence is fundamental to the outcome of any civil litigation case. Usually, the facts in issue in a case must be proved by evidence, and the court will decide the case on the evidence adduced by the parties.

One of the most challenging aspects for any cross-border practitioner is to adapt to the differences in the rules of evidence taking in various jurisdictions. These differences are evident in the manner in which evidence is produced, the issues surrounding relevance and admissibility, the probative value attached by the courts to the various types of evidence and the principles of burden and standard of proof across jurisdictions. Further, such disputes often give rise to situations where one of the parties to the litigation is required to produce evidence located in a jurisdiction foreign to the forum of proceedings. These are important legal issues that a practitioner should be aware of since they largely determine the way litigation is conducted in all the major civil law and common law systems around the world and ultimately influence its result.

This Note provides an overview of the rules of disclosure and evidence in civil proceedings in Japan. In particular, it looks at:

- The rules regarding the disclosure obligations of the parties.
- Admissibility of evidence.
- Witness evidence.
- Expert evidence and the role of experts (court hired independent experts and party hired experts) in civil proceedings.
- The rules regarding the burden of proof and standard of proof in civil proceedings.
- The rules regarding cross-examination.

- Issues that arise in gathering cross-border evidence, including:
  - the applicable international treaties, agreements, and regulations governing cross-border evidence;
  - how to obtain foreign evidence for use in Japanese civil proceedings; and
  - how to obtain evidence located in Japan for use in foreign civil proceedings.

#### Rules of Evidence and Evidence in Domestic Proceedings

Articles 179 to 242 in Chapter 4 of the Code of Civil Procedure (*Minjisoshohō*) govern the main rules of evidence in Japan including the detailed procedures for:

- Examination of witnesses.
- Examination of the parties.
- Examination of expert opinion.
- Examination of documentary evidence.
- Court's observation (judicial inspection).
- Preservation of evidence.

The burden of proof is subject to substantive laws. The general rule is that each party must prove the facts supporting their claims.

However, the burden of proof exceptionally may shift to the other party, taking into consideration fairness between the parties. Litigation counsel will assess the distribution of the burden of proof as the first step of the litigation strategy.

#### Obtaining Evidence

#### Disclosure or Discovery Obligations

The Code of Civil Procedure does not provide for discovery or disclosure procedures. The parties must submit to the court their evidence to support their own cases. However, in practice, each party will submit evidence to both the court and the other parties.

#### Role of the Courts in the Evidence-Taking Process

Generally, in civil procedure, the courts examine only the evidence that parties request the court to review (Article 180, Paragraph 1, Code of Civil Procedure). The civil court has the discretion to admit evidence and may exclude any evidence

it considers unnecessary (Article 181, Paragraph 1, Code of Civil Procedure). However, the court may examine evidence *ex officio* in some exceptional cases, such as to:

- Determine the existence of jurisdiction.
- Request the investigation of a third party to disclose certain information (*Chosa Shokutaku*).
- Request the expert opinion of a third party (expert) (*Kantei Shokutaku*).

### Other Mechanisms to Obtain Disclosure from an Adverse Party and Third Parties

Under the Code of Civil Procedure, courts may order the parties or any other third party to produce documents. A party that bears the burden of proof of specific facts that will be supported by documents in the possession and control of another party, or a third party, may petition for an order to produce, which must include:

- The titles of the document.
- The general content of the document.
- Details of the holder of the document.
- The facts to be proven by the document.
- The grounds for the obligation to produce the document.

(Articles 219 and 221, Paragraph 1, Code of Civil Procedure.)

If the petition meets the requirements, the court may order the individual or entity that holds the documents to produce them to the court. The individual or the entity is not required to produce any documents that fall within the following exceptions:

- Documents that incriminate the holder and the holder's family.
- Documents that concern a secret in relation to a public officer's duties, which will likely harm the public interest or substantially hinder the performance of that individual's duties if revealed.
- Documents that are subject to professional confidentiality and containing information gained in connection with that individual's duties, for example, as a lawyer or doctor.
- Documents prepared exclusively for use by the holder.
- Documents concerning a suit pertaining to a criminal or juvenile record.

## Standard of Proof and Burden of Proof in Civil Proceedings

The burden of proof is a matter of substantive law. In civil proceedings, parties must prove the facts by a preponderance of evidence, rather than beyond reasonable doubt. The evidence must support the parties' legal arguments based on the applicable laws.

## Failure to Give Evidence at Trial: Consequences

If a party does not follow a document production order, loses the documents or does not make it available to the other party, the court may determine that the other party's allegations regarding the documents are true (Article 224, Paragraph 1 and 2, Code of Civil Procedure). Failure to produce a document makes it extremely difficult for the other party to make a specific allegation regarding the content of the document and prove the intended facts by using any other evidence, so the court may determine that the other party's allegations regarding the facts are true (Article 224, Paragraph 3, Code of Civil Procedure).

## Admissibility of Evidence

There is no specific statutory rule that allows challenges to the admissibility of evidence in courts. However, a party may make a challenge if the evidence was obtained by significantly anti-social measures such as secret recording or theft that infringed a party's privacy, right of self-determination, or communication with its attorney (see, *Tokyo High court on 15 July 1977, Case No. Showa 47 (Ne) 2220* and *Tokyo District Court, 29 May 1998, Case No. Heisei 9 (Wa) 20985*).

There is no statutory rule regulating the timing to challenge the admissibility of evidence.

## When to Apply

There is no statutory rule regulating the timing to challenge the admissibility of evidence.

## Exclusionary Rules of Evidence

There is no attorney-client privilege rule in Japan. However, legal professionals may refuse to testify on confidential information that they obtained in the course of their duties unless otherwise exempted from confidentiality as an exceptional case (Article 197, Paragraph 1, Item 2, Code of Civil Procedure). The Code of Civil Procedure does not provide for a party's right to refuse to provide statements on the grounds that the information was exchanged in confidential communications with a lawyer.

## Discretion of Court to Exclude Evidence

If a party intentionally or with gross negligence fails to produce the evidence and documents in a timely manner, and the courts finds it causes delay to the conclusion of the litigation, the court may exclude the document on a petition by the other party or *ex officio* (Article 157, Code of Civil Procedure). In addition, the court may exclude any evidence and documents produced by a party if the court deems the evidence unnecessary (Article 181, Code of Civil Procedure).

## Witness Evidence: Oral and Written

Under the Code of Civil Procedure, witnesses may submit a written statement and are not always required to give oral evidence. However, the courts may permit counsel to cross-examine and re-examine a witness if the courts consider it fair and necessary for both parties in the procedure. The same rules are also applicable to non-trial submissions, such as for applications or motions.

## Requirements for the Content of Written Evidence (Witness Statement or Affidavit)

There is no rule for the requirements on the contents of written statements except for the witness having to affix their signature and seal to show that the witness produced the written statement personally. The same is true to non-trial submissions, such as for applications or motions.

## Oral Evidence in Support of Written Evidence

The courts may request a witness to give oral evidence to allow counsel to cross-examine and re-examine if the courts consider it fair and necessary for both parties.

## Timing for Filing Written Witness Evidence

There is no specific timing for filing a written statement under the Code of Civil Procedure. However, the parties must produce evidence, including the written statements, in a timely manner to avoid the court excluding the evidence (see [Discretion of Court to Exclude Evidence](#)).

## Evidentiary Value of Witness Evidence

A written witness statement has the same evidentiary value as other documentary evidence if the witness statement was subject to cross-examination by the opposing party's lawyers. It is generally considered that written witness evidence without cross-examination has less probative value.

## Cross-Examination and Re-Examination

A party first examines its own witness before the witness is cross-examined by the other party (and may be subject to re-examination) unless the court changes the order of proceedings (Article 202, Paragraph 1 and 2, Code of Civil Procedure).

## Witness Unwilling or Unable to Provide Evidence or Attend Court

The court may impose court fees and an administrative fine not exceeding JPY100,000, a criminal fine not exceeding JPY100,000 or imprisonment if the witness refuses to testify and the court judges there is no legitimate reason to do so (Article 200, 192 and 193, Code of Civil Procedure).

The court may also subpoena a witness who does not appear before it without justifiable reason (Article 194 Paragraph 1, Code of Civil Procedure). Failure to appear without any justifiable reason may be punishable by court fees and an administrative fine not exceeding JPY100,000, a criminal fine not exceeding JPY100,000 or imprisonment (Articles 192 and 193, Code of Civil Procedure).

## Witness Immunity

Witnesses, witnesses of fact or expert witnesses, are not immune from being sued regarding anything they submit as part of their testimony. False testimony given by a witness may be punishable as perjury under Article 169 of the Penal Code.

## Expenses

A witness may be reimbursed for travel and accommodation expenses and may also be given a daily allowance (Article 18, Paragraph 1, Act on Costs of Civil Procedure).

## Expert Witnesses

### Court-Appointed Experts

Courts may appoint an expert witness at a party's request to provide testimony and evidence regarding certain facts (Article 180, Paragraph 1 and Article 213, Code of Civil Procedure).

### Party-Hired Experts

The parties are also allowed to appoint expert witnesses to present evidence in support of their case. For court proceedings in highly specialised areas, such as medical science or real estate, parties usually obtain their own written expert opinions. These private expert opinions are not subject to the same rules as court appointed experts and are treated as general documentary evidence.

### Fees of Expert Witnesses

In general, the losing party must pay the court-appointed expert fees (Article 61, Code of Civil Procedure). However, in case of partial defeat, the courts may allocate the fees to the party who partially lost the case (Article 64, Code of Civil Procedure).

### Role of Party-Appointed and Court-Appointed Experts

The party-appointed expert will be expected to support the allegations or case claimed by the appointing party while court-appointed experts must state their opinion in a neutral and fair position.

### Presentation of Expert Evidence

At its discretion, the court may request court-appointed experts to submit their evidence orally or as a written statement (Article 215, Paragraph 1, Code of Civil Procedure). Parties may examine a court-appointed expert who gives oral evidence, but only if necessary, to clarify the experts' opinions and confirm the grounds for the experts' opinions (Article 132-4, Code of Civil Procedure).

### Documentary Evidence: Certification of Documents

There is no authentication process for documentary evidence before it is admitted to the court. However, if the other party disputes the document's authenticity, the onus is on the party that produced the document to prove its authenticity.

There are some special presumption rules to facilitate proving the authenticity of documentary evidence. A document found to be created by public officials based on its form and substance, is presumed to be an authentic public document, that is a public document created at the official's will.

A private document with the signature or seal of the author or a representative is presumed to be an authentic private document, that is a private document created at the author's will. If the seal impression is found to be made by a seal in possession of the author, the seal impression is presumed to be made at the author's own will. The document is, therefore, presumed to be created at the author's will and authentic. The other party must prove otherwise against the presumption that the seal impression

is made at the author's will or the presumption of authenticity of documentary evidence (Article 228, paragraphs 2 and 4, Code of Civil Procedure).

#### Legal Framework Governing Cross-Border Evidence

Japan is not a party to the Taking of Evidence Regulation and the Hague Evidence Convention.

Japan is not a party to any other international instruments or treaties on evidence.

#### Obtaining Evidence from Another Jurisdiction

### General Requirements

A party may only obtain witness or documentary evidence abroad through the examination of evidence by the commissioned competent authority in the foreign country or the commissioned Japanese ambassador or consul located in the foreign country (Article 184, Paragraph 1, Code of Civil Procedure).

In Japan, foreign evidence may be produced through the following:

- Commission to the Japanese consul located in the foreign country.
- Commission to the foreign authority through the appointed government in the foreign country.
- Commission to the foreign ministry through the Japanese ambassador in the foreign country.
- Commission to the competent court in the foreign country.

The commission to the Japanese consul located in the foreign country will be available if the Japanese consul is permitted to examine evidence under a treaty or individual agreement between Japan and the foreign country, or if the foreign country is the party to Convention of 1 March 1954 on Civil Procedure (Convention on Civil Procedure) and does not reject this examination.

The commission or request to the foreign authority through the appointed government in the foreign country will be available if the foreign country is party to the Convention of Civil Procedure and the country has not declared that it wishes to be commissioned through the diplomatic route.

The commission or request to the foreign ministry through the Japanese ambassador in the foreign country will be available if the foreign country is party to the Convention of Civil Procedure and it declares that it wishes to be commissioned through the diplomatic route.

The commission to the competent court in the foreign country will be available if it is allowed by treaty or individual agreement between Japan and the foreign country.

#### Form or Application Along with the Documents

The requirements to the form or application to obtain evidence located overseas are:

- Identification of the witness or documentary evidence to be examined.
- List of the individual and specific items to be examined.
- Copy of the complaint, written reply or any other document describing the summary of the case, if it is considered necessary to provide the case summary to the consul, the appointed government and authority, the foreign ministry, or the competent court.
- A translation of the complaint, written reply, and the list of the items to be examined, if the witness to be examined does not understand the Japanese language. This translation is arranged by the applying party who will bear that cost. While a translation of the application form for commission to the consul is not required, it is needed for the commission to the other parties.

## Notice Requirements

The commissioned Japanese consul, the commissioned competent court in the foreign country, the commissioned foreign authority through the appointed government or the commissioned foreign ministry through the Japanese ambassador must notify the parties of the date, time, and location of the examination if the parties request to do so.

## Grounds

An application to obtain evidence abroad can be made for commission to the Japanese consul located in the foreign country under Article 15 of the Convention on Civil Procedure, as well as any treaty or individual agreement between Japan and the foreign country.

Article 8 of the Convention of Civil Procedure provides the grounds for an application to be made for commission to the foreign authority through the appointed government in the foreign country. An application made for commission to the foreign ministry through the Japanese ambassador in the foreign country and commission to the competent court in the foreign country is governed by Article 9, Paragraph 3 of the Convention on Civil Procedure.

An application can only be made for commission to the foreign authority through the appointed government in the foreign country, commission to the foreign ministry through the Japanese ambassador in the foreign country and commission to the competent court in the foreign country through a treaty or individual agreement between Japan and the foreign country.

## Costs and Expenses

The applying party must pay in advance the cost and expense for the examination and the certificate of the translation, if necessary, to the Japanese court in charge of arranging the commissions.

## Application and Procedure Irrespective of the Applicable International Instruments (If Any)

Commission is made to the Japanese consul located in the foreign country and commission to the competent court in the foreign country where the commission of examination is allowed by the treaty or individual agreement between Japan and the foreign country, irrespective of whether the Convention on Civil Procedure applies.



## Admissibility of Overseas Evidence

There is no additional requirement for admissibility of overseas evidence. The examination conducted abroad will be deemed effective if it meets the requirements under Japanese law, even if it is in breach of the foreign law (Article 184, Paragraph 2, Code of Civil Procedure).

## Willing Witness (Unable to Travel)

If a witness is willing to give evidence in support of legal proceedings in Japan but is unable to attend in person, the party may only obtain the witness evidence using the relevant type of the permitted commission of examination of evidence (see [Grounds](#)).

## Video-Link, Teleconference, or Depositions

Although Article 204 of the Code of Civil Procedure allows a witness to give evidence by video-link if it meets specific requirements, this provision is interpreted to apply only to the collection of the evidence within Japan and excludes overseas evidence from the scope of its application.

## Obtaining Evidence in Support of Foreign Litigation

## National Rules

Acts on Special Rules on Civil Procedure for Implementation of Convention on Civil Procedure (Acts on Special Rules) were enacted for commission to the Japanese court through the Ministry of Foreign Affairs in Japan while Acts on Mutual Legal Assistance based on Commission from Foreign Court (Acts on Mutual Legal Assistance) were enacted for commission to the competent Japanese court.

## Direct Application

There are no other national laws or procedures that are available directly to obtain evidence from a witness in Japan.

## Procedure to Enforce Request for Witness Evidence

Commission to the Japanese court through the Ministry of Foreign Affairs and commission to the competent Japanese court can enforce a request for witness evidence in support of foreign litigation. If the requesting foreign court requests the notification of the date and place of the requested examination, the requested Japanese court will notify the foreign court, but will not serve the summons for this examination to the parties. The examination procedure may be attended only by the parties to the case as well as their representative lawyers qualified to practice in Japan, rather than those of any other jurisdiction.

The examination procedure is conducted in accordance with the Japanese procedural rules in principle. However, if the request by the foreign court specifies any other method of examination and that method is not against the Japanese local legal order, the court may follow the alternative procedure. After the examination, the examination records in Japanese will be sent to the requested foreign court.

## Grounds

The legal grounds for the Japanese court's legal support to commission to the Japanese court through the Ministry of Foreign Affairs or commission to the competent Japanese court are set out in the Act on Assistance Based on Commission by Foreign Courts.

### Time Frame

There is no time frame to execute the request for evidence and no statistics exist on it. However, from the authors' practical experience, it could take several months to execute a request for evidence.

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