

Q&A **Litigation**

Rude Awakening: 'Invasive' US Legal System Shocks Japanese GCs, Execs—Who Law Firms Increasingly Court

In Japan, litigation is rare and less confrontational. The adversarial posture and invasiveness of U.S. litigation is often disorienting.

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The American and Japanese flags fly side by side in Yokosuka, Japan. Credit: Bill Chizek/Adobe Stock

For Japanese companies facing suits over their U.S. business operations, interacting with the American legal system can be a shock.

As more U.S. law firms gain a foothold in Japan, Law.com spoke to three lawyers who represent East Asian clients in U.S. litigation.

Here's what attorneys Michael Zogby of Barnes & Thornburg in Morristown, New Jersey; Koichiro Sato of Masuda Funai in Torrance, California; and solo practitioner York Faulkner, in Nashville,

Tennessee have learned about how their East Asian clients perceive the American legal system.

What do Japanese corporate clients find most surprising about being involved in U.S. litigation?

Zogby: The scope and costs of discovery.

Japanese clients expect an order from a court requiring collections or a production. What they encounter are far-reaching requests from an adverse party that could be staggering in scope and timing.

Rule 26(b) treats access to relevant information as a proportionality factor, so data held in Japan can be swept into U.S. proceedings. Depositions of Japanese witnesses must comply with the Hague Convention on the Taking of Evidence Abroad, adding complexity and cost that U.S. and Japanese counsel may not anticipate.

The rules are only part of the shock.

In Japan, litigation is rare and less confrontational.

The adversarial posture and invasiveness of U.S. litigation is often disorienting, and the tension with Japanese privacy and cyber protections, including the Act on the Protection of Personal Information, or APPI, remains one of the most challenging aspects.

Faulkner: The procedural complexities that appear to have little to do with the case merits.

There are jurisdiction and venue disputes over which court should hear the case. Motions practice about whether the complaint was adequately pleaded. Seemingly endless wrangling over the scope of discovery under a relevancy rule untethered to the targeted evidence's admissibility at trial. Disputes over whether an expert is qualified to offer an opinion at all rather than whether the offered opinion has any merit.

A Japanese client can struggle with the idea that it might spend over a year, and a great deal of money, before the disputed technology is given any real judicial consideration.

Japanese clients can appreciate that these procedural mechanisms exist for a reason, but are consistently surprised by the proportion of the case they consume.

Sato: The cost and the extent.

When you explain U.S. discovery to a Japanese client for the first time, what part gets the strongest reaction?

Zogby: The litigation hold and the cost of discovery.



Michael Zogby of Barnes & Thornburg. Courtesy photo

Preservation obligations, custodian identification, and the duty to preserve electronically stored information have no parallel in Japan.

Courts have imposed billions in punitive damages and adverse inference sanctions against companies that failed to preserve data or delayed issuing holds, and we walk clients through these examples early because they make the stakes concrete.

Key legal terms like litigation hold, proportionality, and spoliation have no direct Japanese translation, and Japanese-language data sets create unique e-discovery obstacles including difficulty identifying search terms.

We frequently work with multiple translators and local vendors in Japan to ensure information is collected, reviewed, and transferred correctly, particularly where regional dialects, honorific language levels, or technical terminology require specialized expertise. You are not just explaining a legal obligation. You are translating an entire legal framework into cultural and linguistic terms for people who have never encountered anything like it

Faulkner: The breadth of it.

Most Japanese companies arrive at U.S. litigation with some image of American-style discovery in mind and fully expect to produce their “official” records, e.g., laboratory notebooks, R&D files, production specifications, etc. That much they anticipate, and they are fully prepared to provide it.

It is this granularity of U.S. discovery that is most surprising, and the sense of intrusion that comes with it. What gets produced is not just a set of documents. It is a reconstruction of peoples’ thoughts and interactions—from revisions of draft documents and disagreements over business strategies to the engineer who said the system would fail without certain changes.

No one writing those messages imagined a third-party reader would later scrutinize their content, especially not a judge or a jury.

Sato: The strongest reaction usually comes from the fee estimate, to be honest. But conceptually, I think the concept of this sort of all-ranging discovery is, in and of itself, very surprising.

The fact is that the default sort of position is that you have to disclose everything, right? That is how U.S. litigation works. You know, both sides disclose everything that is relevant, and you know the jury decides based on that, right? That's like the whole American system. That concept itself is very surprising to Japanese people.

What is hardest to explain about the American deposition process to someone accustomed to Japanese litigation?

Zogby: That a lawyer, not a judge, questions a witness under oath for hours on a broad range of topics. In Japan, witness examination is controlled by the court through a letters rogatory process. The U.S. discovery or trial preservation deposition, where opposing counsel probes for inconsistencies and pushes emotional buttons while a court reporter transcribes every word, has no equivalent.

Japanese business professionals are shaped by cultural distinctions that often result in formal responses distinct from the Q&A in an American deposition, including hesitation or over-qualification answers to vague questions.

The American deposition is an exercise in communication and composure, in addition to recollection and factual accuracy. The witness must understand what they will be asked, how, and why to avoid any surprises.

Faulkner: Explaining that the witness's job is not to be helpful, complete, polite, or understood. It is to answer only the question that was asked and then stop.

That instruction contends with years of ingrained cultural habit cultivated by the best intentions of a polite society. Japanese communication is high-context, cooperative, and harmony-oriented.

So, the witness is asked to be sparing with substance while precise with grammar. That is a demanding chore and sustaining it for hours is difficult for anyone.

Sato: Well, the strongest reaction usually comes from the fee estimate. To be honest, but conceptually, I think the concept of this sort of all-ranging discovery is, in and of itself, very surprising too.



Koichiro Sato, with Masuda, Funai, Eifert & Mitchell, Ltd. Courtesy photo.

It's incomprehensible to Japanese-trained lawyers when they hear for the first time that there is a process in which testimony is taken as a form of discovery. They're like, what? What the hell is that, right? Why are we doing this before the real day? Taking depositions is very different from cross examination or direct examination at an actual jury trial. That is very surprising to Japanese people because they're like, 'Well, it's the same, isn't it?'

And the fact that you can fish for things—you can be a little bit more exploratory in depositions, obviously, compared to what you would be allowed in in a trial, right?

Do Japanese companies have a different appetite for settlement than U.S. companies?

Zogby: Japanese culture emphasizes harmony, but since Japanese companies are often not familiar with U.S. courts or discovery obligations, there is a structural difference in responses to resolution. Invest in the relationship before the legal strategy. In cross-border litigation, cultural fluency and trust are prerequisites.

Paying money to resolve a dispute can imply fault and threaten reputational damage, even without an admission of liability. Executives may believe that any payment signals fault to business partners, regulators, and the public. Dispositive motions, narrowing of claims, or other non-monetary paths give management options that preserve reputation while moving toward closure.



York M. Faulkner. Courtesy photo

Faulkner: There is some competing folklore about Japanese companies and settlement. One version suggests that Japanese companies resist settlement because they seek vindication by the court. The other surmises that they settle quickly to keep the dispute out of public view.

In my experience, both notions miss the mark. Settlement decisions at Japanese companies tend to be more deliberative than in a U.S. company. Authority is shared, and the decision ultimately arrives from a collaborative process that produces internal consensus. That collaboration takes time, and it often produces useful insights supporting either a decision to settle the case or to recalibrate strategies for continued litigation.

It is easy to misread this internal process as a different appetite for settlement. Usually, it is just a different way of reaching the same kind of business decision made by other

sophisticated litigants.

Sato: Japanese companies do not necessarily have a higher or lower appetite for settlement than U.S. companies. They often approach settlement decisions differently. U.S. companies are more likely to frame the issue as an expected-value calculation, weighing potential damages, litigation costs, and the probability of success against a proposed settlement amount. Japanese companies may be less inclined to reduce the decision to that type of quantitative analysis and may instead place greater weight on qualitative and judgment-based considerations, including reputation, business relationships, internal accountability, and whether the company believes its position is substantively right.

To the extent there is a general perception that Japanese companies are more willing to settle, I think that perception is too simplistic. Japanese companies may sometimes seek settlement where a U.S. company would litigate, and sometimes litigate where a U.S. company would settle.

The difference is not a simple preference for or against settlement, but a difference in how the decision is framed and which considerations carry the most weight.

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