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## The Tendency of the Recent Reforms of the Japanese Code of Civil Procedure

### 1. Introduction

Twelve years ago the Japanese Code of Civil Procedure was thoroughly reformed. These modifications concerned in particular four sectors, namely the provisions concerning the procedure to organise the points at issue (preparation of the hearing), the gathering of evidence, the restriction of appeal and the small pecuniary claims procedure. Statistics show that these reforms have considerably accelerated proceedings in Japan (in 1994: 10.1 months; in 2003: 8.3 months; in 2004: 8.2 months).<sup>1</sup>

However, difficulties remain. Certain procedures like those on medical practitioners' liability, on cases concerning building disputes or on intellectual property are still very time-consuming. In these procedures especially the investigation of the facts of the case often takes a lot of time. Frequently a first instance procedure is only terminated after three or four years. The reason for this length of time is that the points at issue are normally difficult and complicated and that the judge, lacking of expertise, needs more time than would usually be necessary. The judge has the possibility to call for an expert's opinion by means of a clarifying order to enable him to understand the problems of fact. Nevertheless, this kind of an expert's opinion implies no little charge for the parties. This is why in Japan judges seldom use this option before taking evidence.

After the reform of the Japanese Code of Civil Procedure, the government, pressurised by the economy, has submitted a large reform of the judicial system. These propositions have been realised little by little since. They emphasise in particular the necessity of accelerating the procedures. For this purpose the law

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<sup>1</sup> Sato-Takeshita-Inoue: *Justiz-Reform*. Shihoseido Kaikaku, 2002. 42; Onose-Takechi: *Die reformierte Zivilprozessordnung*. 2003. Kaisei Minjisoshoho, 2003. 2004. 7.

concerning the promotion of procedure was adopted in 2004. According to its provisions, all aforementioned complicated procedures of first instance are to be decided within two years. For this, a reform of certain provisions of the Japanese Code of Civil Procedure was indispensable. Therefore the Japanese Code of Civil Procedure was again reformed also in 2003 and the amendment has come into effect since 1.1.2004. The main points that have been changed concerned the concentration of competence for intellectual property cases, the assistance of experts who are to complete the judge's knowledge when organising the technical points at issue and the introduction of a special instrument concerning the taking of evidence before filing the action. In the following, I would like to briefly present these modifications.

## **2. Concentration of competence in cases of intellectual property**

A suit with respect to patent, utility model, right to utilize circuit arrangement (Integrated Circuits) or copyright on computer programs lies within the exclusive jurisdiction of the Tokyo District Court and the Osaka District Court [§ 6 (1) Japanese Code of Civil Procedure]. The competence of appeal cases is concentrated at the Tokyo High Court [§ 6 (2) JCCP]. This provision has been introduced by the amendment of 2003. Before, these courts had concurrent jurisdiction.

As these proceedings require expert knowledge in the scientific field, qualified judges with large practical experience are needed to allow a correct and speedy procedure.<sup>2</sup> The district courts of Tokyo and Osaka are particularly suitable for these cases as many similar cases have been pending at these courts and therefore specialised sections in these courts already exist. Since the amendment of 2003 these sections have adopted the role of a patent court and the average period of investigation has been shortened considerably. Concerning the law of registered designs, trademarks and copyrights on other creations but computer programs these sections have a concurrent jurisdiction (§ 6a JCCP). Little after these specialised sections of the two district courts, in 2005 an independent specialised court for intellectual property has been established as an appeal court at the Tokyo High Court. Thus, a special judicial system for these cases has been developed. All of this shows the high priority which the Japanese government attributes to these affairs. The main reason for this strong interest in a well organised, efficient intellectual property law is the lack of

<sup>2</sup> Sato-Takeshita-Inoue: *op. cit.* 60ff, Onose-Takechi: *op. cit.* 62ff.

raw material in Japan wherefore intellectual property provides an important basis for economic activity in Japan.

### 3. The institution of an expert

The reform of the system of civil justice was intended to cope with the growth of disputes which demanded expertise. As a part of this reform, the amending law of 2003 had introduced provisions on the assistance of an expert during the procedure into the Japanese Code of Civil Procedure. It was intended to halve the investigation period of disputes with technical difficulties.<sup>3</sup>

As economy and society advance and grow more complicated, the comprehension of the facts of a case becomes more and more demanding and delays the procedure. Expertise is needed in this kind of lawsuits to understand the facts of a case completely. The assistance of an expert of the matter completes the judge's knowledge with further professional competence. Good examples for technically demanding procedures are the disputes on medical practitioners' liability, building disputes or processes concerning intellectual property. However, a common procedure like a sales contract may also raise difficult technical questions and turn into a challenging procedure, e.g. if a defect of a computer's software is concerned. In this kind of lawsuit it is very difficult to properly understand the parties' allegations without profound knowledge of the technical matter. A lengthy investigation period is often the consequence. For example, in disputes on medical practitioners' liability in 2003, the investigation period took an average 30.4 months. Compared to the average investigation period of common civil cases of 8.2 months, the investigation period of these medical practitioners' liability disputes is very long.

Therefore, the Reform Commission of the Japanese Code of Civil Procedure recommended instituting the assistance of an expert to amend the situation. His/her mission was to help the judges understand the allegations and evidence more easily and correctly. The technical procedure would be accelerated by an easier organisation of the points at issue and a better understanding of documents or testimony. The establishment of the technical expert was accompanied by discussions about a possible loss of transparency of the procedure as the parties—not knowing what the expert's suggestion had been—would lose the possibility to file an objection, and therefore also lose the guarantee of their right of a fair hearing. Despite these and further concerns the expert's role was established.

<sup>3</sup> Sato-Takeshita-Inoue: *op. cit.* 41.

If the judge wants to use this new instrument for the investigation of the facts of the case, he/she can summon one or several technical experts by court order to help him/her clarify the contents of the allegations or the documents of the procedure [§ 92a (1) JCCP]. On this, the judge must hear the parties. Moreover, the expert's statement must be made in a written or during the hearing in an oral form [§ 92a (1) JCCP]. Under the same rules, the judge may also apply the institution of the technical expert during the taking of evidence [§ 92a (2) JCCP]. The technical expert may directly ask questions during the hearing of witnesses, of the parties and of other experts. If the parties negotiate a court settlement, the judge can ask for the expert's assistance in order to hear his technical estimation of the matter [§ 92a (3) JCCP]. The parties' consent to this is mandatory. As court settlement is a mutual agreement, based upon the intention of the parties, their intention has to be respected throughout the negotiations for a court settlement. The technical expert's advice may be helpful to determine the subject matter of the court settlement.

The technical expert is nominated as a public servant by the Supreme Court. In order to guarantee an equal standard of the technical experts in the whole country, not every court, but only the Supreme Court is entitled to nominate the technical experts. As the expert plays a very important role for the parties, the provisions on the exclusion of or the objection to a member of the court apply to him/her [§ 92e (1) JCCP]. On demand of both parties, the court must reverse its order which appoints a certain expert (§ 92c JCCP).

#### **4. The usability of investigators' statements**

In the courts of Tokyo and Osaka, in-court specialists are employed as a kind of investigators, e.g. patent attorneys for procedures concerning intellectual property (§ 92g JCCP). Unlike the technical experts these are only in-court subsidiary organs. Considering the guarantee of the right of a fair hearing, the JCCP describes clearly their role in procedure. These investigators are only established for cases that concern intellectual property law. If the judge wants to require the presence of such an investigator, he/she does not have to ask for the parties' consent. It is a question of role assignment during the process. The court expects these investigators to provide general knowledge whereas the technical experts are to provide highly specialised skills. The court can decide at its own discretion how to include these persons in the process. It is not difficult to decide whether or not to include an investigator in the process. The court can already ask for his/her participation in the process if this seems of only little value. The investigator may directly ask questions during the hearing of

witnesses, of the parties and of other experts [§ 92g (2) JCCP] or give an opinion [§ 92g (4) JCCP]. He/she may also assist the negotiations for a court settlement because of his/her technical knowledge with further opinions [§ 92g (4) JCCP]. The involvement of the paralegals aims at an accelerated dispute resolution by party agreement. The provisions on the exclusion of or the objection to a member of the court apply also to the investigators, as their function requires impartiality and neutrality as well (§ 92h JCCP).

### **5. Improvement of the expert's opinion**

Prior to the reform the question of the expert's conception was solved according to the provisions on hearing of witnesses, namely those on cross examinations. This frequently caused inconveniences for the experts as the party aggrieved by the expert's opinion often asked the expert inappropriate questions during the contents clarification. This occurred in particular in procedures on medical practitioners' liability. It therefore became difficult to find experts, because many competent experts refused to accept court assignments after their aggravating experiences through impolite questions at cross examinations. To improve this situation, an amendment of the provisions on the questioning of experts was absolutely essential. Since the amendment [§ 215 (2) JCCP] no cross examination is applied for the questioning of experts and judges pose their questions first. This means, it does not follow the provisions on hearing of witnesses anymore, but it is simple questioning (§ 215a JCCP). In this way inappropriate questions are expected to be avoided.

### **6. The gathering of evidence before lodgement of a complaint**

If it is possible to gather evidence before the lodgement of a complaint, the plaintiff can often estimate whether he/she can win the process or not. It is probable that he/she might abstain from filing the claim if he/she believes that he/she will lose the process. This would also be advantageous for the adversary who otherwise would have to supply evidence. Notwithstanding the cases in which the plaintiff refrains from filing the action after the gathering of evidence, it is more probable that both parties will agree to a settlement if they know their chances of winning the process. Should the plaintiff really file the action, the organisation of the points at issue can be concluded early due to the prior gathering of evidence. This would accelerate the process further. Consequently, it is considered best to gather evidence before the lodgement of a complaint in

order to avoid unsuccessful claims and encourage a speedy procedure. However, the gathering of evidence before the lodgement of a complaint implicates certain problems that have to be resolved, such as how to oblige the adversary party to provide information without a claim to be entitled. Which sanction can be imposed if the adversary does not satisfy the request for information? Isn't there a risk of malpractice? Should the adversary who is not legally represented bear the negative consequences if he/she answers too widely or in an unfavourable way for his/her own position? These and many other questions are aroused by the gathering of evidence before the lodgement of a complaint.

The possibilities of malpractice were strongly discussed during the elaboration of the reform. The new provisions on the gathering of evidence before the lodgement of the complaint were formulated to avoid any malpractice. The amending law stipulates an application of the existing legal device of the parties' interrogatories (§ 163 JCCP, a kind of written interrogatories) already before the action is filed, although this usually requires the pendency of the complaint (§ 132a JCCP). The amendment adds a few provisions to avoid an abuse, e.g. a ban on investigation concerning secrets of the adversary's or third person's private life, if answering the question might imply social disadvantages for the adversary or the third person [§ 132a (1) No. 2 JCCP] or a ban on investigation concerning business secrets [§ 132a (1) No. 3 JCCP].

The second important point which has been discussed was of more theoretical nature: It concerns the legal basis for the duty to reply. Before the lodgement of a complaint there is usually no procedural relationship between the parties. Why should one party be authorized to demand information before the action is filed? The Japanese answer to this question is the following: Whoever wants to benefit from this instrument must first announce the future lawsuit in writing. This written announcement must contain the main points of the intended claim and describe the subject matter of the dispute. In this respect, the written announcement replaces the written complaint. Through it the adversary finds out what kind of lawsuit the announcing party plans to file. After the announcement the action must be filed within 4 months. This means that there is a delay of 4 months for the gathering of evidence after the announcement. The legislator seems to consider the announcement as the beginning of some kind of pendency. Further scientific debate will be necessary to decide whether this is true.

Apart from the investigations of the parties, the facts of the case can also be clarified by court orders like a request for transmission or for further investigation. Possible transmission objects are as follows: medical record of an injured, inspection transcript of a traffic accident, documents on securities or commodities transactions, etc; the results of these measures can be exploited as

documentary evidence. The examination of the actual condition by a bailiff can also be ordered; its results can be exploited [§ 132c (1) No. 1, 2, 4. JCCP]. The adversary is committed to give the requested information. However, having answered the request, he/she on his/her part can claim an investigation of the relevant fact.

Both parties are obliged to give information, but there is no penalty if they don't. The court can consider the parties behaviour as an indication while establishing the facts and appreciate a refusal as a negative aspect.

During the preparation of the reform, it was discussed whether mandatory representation was necessary for the application of these instruments considering the danger of malpractice or injustices. However, as legal representation is never obligatory in Japan, the reformers hesitated to introduce mandatory representation only for this stage of trial.

The expenses of this investigation period are not considered as costs of litigation.

## **7. Procedural plan**

Every procedure has to follow a regular schedule (§ 147a JCCP). This bears in mind a clear perspective as to the time-schedule of the procedure which is of interest to the parties and the fact that all first instance procedures should be ended within two years. The court must even establish a formal procedural time-schedule if the dispute is very complicated and contains many points at issue (§ 147b JCCP), like a multi-party-litigation, underwriting business litigation and litigation on the claim on the allowability of the shortening of the compulsory portion etc.<sup>4</sup> Due to the complicated circumstances of the case, the investigation in this kind of dispute often takes longer than in other disputes. The court establishes this procedural time-schedule on its own responsibility, but it must negotiate with the parties.

The procedural schedule sets a deadline for the organisation of written arguments, for the completion of the taking of evidence, i.e. testimonial evidence, for the last hearing and for the rendering of the judgment. However, the concrete date and time are not yet set. The presiding judge of the panel may set a timetable for submissions regarding the parties' methods for prosecuting their claims and defences regarding specified matters (§ 156a JCCP). If a party does not comply with the procedural time-schedule, late submissions will be

<sup>4</sup> For more detailed examples see the report of the Tokyo district court, 500 days after the reform of the JCCP (4), Hanreijiho No. 1914. 4.

precluded (§ 157a JCCP). Considering the record as it stands, the conduct of the case by the parties and the further circumstances, the court may change the schedule if deemed necessary [§ 147c (4) JCCP]. The schedule for the investigation should be set depending on the concrete dispute. This might lead to a work overload for the lawyers, but one should not spare these efforts on behalf of the parties. The main ambition of the Japanese courts is to carry out a better investigation.<sup>5</sup>

### 8. Some effects of the reform

In the reformed parts mentioned above technical experts often have to be consulted especially in building disputes, disputes on medical practitioner's liability, disputes on intellectual property and general civil law suits.<sup>6</sup> As the provisions on expert evidence have been amended, expert opinions can now be obtained more frequently.<sup>7</sup> The procedural schedule leaves room for improvement. The cooperation of the parties is necessary when the court establishes the investigation schedule. The details of the cooperation between the parties and the court are still to be considered and elaborated with care. Regrettably the gathering of evidence before the lodgement of a complaint has not been used very often. It seems that the use of this institution is not yet common. The differences between this institution and the preservation of evidence are not sufficiently known either.<sup>8</sup> It will take some more time to make this institution known and to make use of it.

According to latest statistics, the following average duration of investigation could be observed:<sup>9</sup> disputes on medical practitioner's liability 27.1 months, building disputes (compensation) 25.6 months, disputes on intellectual property 14.0 months. The promotion of procedure is still required for some disputes.

### 9. Final remarks

The main target of the latest reforms is the acceleration of procedure. At the same time, these reforms intend also to guarantee and promote just decisions. Especially for the intellectual property law both have been claimed by the

<sup>5</sup> Report of the Tokyo district court (4), Hanreijiho No. 1914. 9.

<sup>6</sup> Report of the Tokyo district court (2), Hanreijiho No. 1911. 5.

<sup>7</sup> Report of the Tokyo district court (4), Hanreijiho No. 1914. 13.

<sup>8</sup> Report of the Tokyo district court (4), Hanreijiho No. 1914. 13.

<sup>9</sup> Supreme Court, Report on the confirmation of the promotion of procedure, 2005. 33.



economy for a long time. The new provisions are also a result of the Japanese economic policy. Time will tell whether these new provisions are effective and whether other states will accept the Japanese decisions and have confidence in the Japanese judicial system. In the end, it is the main function of the whole judicial system to serve economy and society. We believe therefore that the Japanese court system may not only be of interest for Japanese citizens, but also for foreigners.