Recent Trends in Japanese Civil Procedure Reform of the Code of Civil Procedure

Toshiyuki Kono

A. Background

The Japanese Code of Civil Procedure (CCP) was promulgated in 1890. In substance, it was primarily drawn from the German Zivilprozessordnung of 1877, but it also reflected influences from Austrian law. The provisions on trials were fundamentally reformed in 1926, and remained valid until 1996 without major modifications. Other previous amendments concerned execution and temporary injunction and attachment.

The rapid development of the Japanese economy and the profound changes in Japanese society have led to increasingly complicated civil law cases. The CCP has become inadequate for situations occurring in contemporary Japan. One important criticism is that the procedure is not very user-friendly and is difficult to understand. For example, although the principles of the adversary system and oral presentation of evidence apply in the law (with the implication that all facts ought to be orally presented in the trial), in practice no such oral proceedings take place in the court room. Instead, the parties usually refer only to arguments which have already been submitted as documents in advance.

Another criticism is that the trial takes too much time and is too expensive. Oral proceedings are usually extended over quite a long period of time, in which various procedural actions are postponed and delayed. Since much of the evidence must be presented, either within or outside the framework of the oral proceeding, it takes quite a lot of time before the trial in the first instance can be concluded, especially in complicated cases.[1]

From as early as the 1980s, jurists became concerned with the tendency amongst the general public to avoid the judiciary. An ex-president of the Japanese Bar Association estimates that only 20 per cent of disputes on civil law matters are resolved through the judiciary. In 1994 one out of the three major business

---

[1] Yasuhei Taniguchi, in *Japanisches Handels- und Wirtschaftsrecht*, Harald Baum and Ulrich Drobnig (eds.) (1994) at p. 650.

European Journal of Law Reform, Vol. 2, No. 1

associations, Keizai Doyu Kai, expressed their opinion that court organization and procedure should be reformed and streamlined.[2]

In accordance with this social consensus in 1990 the Council of Legal Institutions, an advisory organ of the Ministry of Justice, decided to reform the CCP comprehensively and to complete the draft of the new law within five years. Following this schedule the new CCP was promulgated on 26 June 1996 and entered into force on 1 January 1998. This reform introduced many new institutions and revised numerous provisions. Moreover, the order of provisions in the law was adapted to the course of the civil procedure and the old Japanese language used in the old CCP was changed to the modern way of writing.

B. The Core of the Reform

The core of the reform lies with the following four modifications:

(1) identification of the precise points under dispute;
(2) strict taking of evidence;
(3) introduction of a new small claim proceedings; and
(4) limitation of the *jokoku* appeal.

I. Identification of Points under Dispute

Let us examine a case where a plaintiff files a lawsuit against the legal heir of a property seeking delivery of a painting which belonged to the deceased on the basis that the deceased left the painting to the plaintiff in his will. The issue in such a dispute primarily concerns the will and its effects, but in fact, there may be several other points of dispute. For example, the defendant may maintain that the will is composed in a misleading way and, therefore, the deceased had no intention to leave the painting to the plaintiff. Or they may contend that the will should be annulled due to the decedent's lack of legal capacity. Furthermore, the defendant may contest the fact that the deceased drafted the will himself. In such a case, the opinion of an expert in graphology might be sought as evidence. On the other hand, if the defendant's argument is based on lack of capacity, the medical doctor who treated the deceased should be examined as testimony. How to take evidence depends therefore upon what stands in dispute in the concrete case. The efficient taking of evidence presupposes that the factual points under dispute are precisely identified at the beginning of the proceedings.

This was not the case under the old CCP. Facts and evidence were submitted to the court by the parties intermittently in the course of the proceedings. Consequently the initial hearings served only for the preparation of the trial.

---

[2] *Gendai Nihon Shakai no Byori to Shoho* (Disease in Today's Japanese Society and Remedies) (1994) at p. 8.

What were the reasons for this practice? First of all, under the old CCP the parties were allowed to reserve presentation of their means of attack and defence until the conclusion of the oral proceeding (Art. 137, old CCP). Firstly, the principle of the submission of evidence and arguments in due time was not known. Secondly, although the old CCP stipulated a preparatory procedure for the purpose of clarifying the points in dispute, this procedure was seldom used in practice. Under this preparatory procedure the parties had to submit all relevant facts to the court in order to avoid the preclusive effect in the later trials (Art. 255, old CCP). Because of this, whenever the procedure was used, the parties tried to submit as many facts as possible, even those with only slight relevance to the case, in order to avoid the risk of preclusion later. In addition, the judges appointed for the preparatory procedure were not necessarily those who would be sitting in the trial. In practice, rather young judges with less experience were commissioned to the preparatory procedure. For these reasons the preparatory procedure became time-consuming and unpopular. As a result, even in complicated cases, the determination of disputed points occurred within the framework of the trial, as well as the taking of evidence.

In order to avoid these problems, the new CCP stipulates new provisions concerning the identification of disputed issues. First of all, the principle of the submission of facts and arguments in due time has been introduced (Art. 156). What constitutes 'due time' will be determined according to the concrete facts of each case. In principle, the next date of oral proceedings should be considered as 'due time'. If the submission is delayed and consequently considered as not 'in due time', the court can reject the evidence submitted late according to Article 157, paragraph 1 CCP. In fact, the old CCP had a similar provision (Art. 139, old CCP). However, the authority of the court has been strengthened through the introduction of the principle of submission in due time in Article 156 CCP.

In addition, to speeding up the proceedings, the preparatory procedure has been reformed. The basic idea of the reform is that when the parties sit together and discuss each aspect of the case, referring to submitted evidences in written form, points of dispute can be clarified more effectively. This is the way under which the Council of Legal Institutions intended to make the preparatory procedure more attractive. Also, the preclusive effect was abolished. But this does not mean that the parties may submit new facts and evidence anytime. If they seek to introduce new facts or evidence after the preparatory procedure, they must explain why the delay occurred. If the opposing party considers the delay to be unfair, the opposing party may apply for the rejection of the new facts and evidences based on Article 157 CCP.

Another practice of the preparatory procedure under the old CCP, namely that the preparatory procedure was conducted by judges who were not in charge of trials, has been reformed. Under the new CCP, the trial and the preparatory procedure should be held before the same judge. In addition, new authorities are given to the judge. For example, the judge may take evidence in writing during the preparatory procedure or use the telephone conference system with the parties (Art. 170).

However, even under the new CCP, preparatory procedure is still separate from the trial. Therefore, the preparatory procedure can take place in the office of the judge excluding the public, although the parties can request the attendance of certain audience members if they so choose (Art. 169, para. 2).

The court can institute the preparatory proceedings only after hearing the opinion of the parties (Art. 168). It is, however, not necessary for the parties to agree with the judge's decision to use the procedure. The date of the procedure must be determined so that both parties can attend (Art. 169, para. 1). In cases with numerous parties or whose social impact may be very big, the preparatory procedure may be inappropriate, since there is not enough access provided to the public. For these cases, the so-called 'preparatory oral proceeding' has been introduced in the new law (Art. 164 et seq.). This preparatory oral proceeding is of the same nature as that of the regular oral proceedings, but is only used to clarify what the issues of the case are. In such oral proceedings, in contrast with the preparatory procedure, all necessary procedural actions can be undertaken.

II. Strict Taking of Evidence

Documents and testimony are the most popular means of evidence. In addition, the interrogation and cross-examination of parties takes place in most cases. Experts are often consulted in order to clarify complicated issues. However, under the old law the process of taking evidence was extensive with many hearings. To reduce this extended process, the new law has introduced the so-called 'principle of concentrated taking of evidence' (Art. 182). In this context, two new features deserve explanation.

1. Obligation to Produce Documents

Although the old CCP included an obligation to produce documents, it was limited to the following cases in which the possessor of documents could not reject requests for the production of documents (Art. 312, old CCP):

(a) where the party who referred to a document in the proceeding is the possessor of the document;
(b) where the party tendering evidence is authorized to inspect or request to surrender the document;
(c) where the document was made in favour of the party tendering evidence, or concerns the legal relationship between the party and the possessor of the document.

This rule presupposed the existence of certain relationships between the party tendering evidence and the possessor of the document. However, in an increasing number of cases one party possesses most of the evidence and Article 312 of the old CCP does not apply. Article 312 of the old CCP was therefore considered inappropriate for the efficient taking of evidence.

As a result of the reform, a general obligation to produce documents has been

added to the above-mentioned list. New Article 220, No. 4 prescribes that the parties can apply to the court and contend that the opposing party should produce certain documents. When the court holds that the application is reasonable, it orders the opposing party to produce the documents. Exceptions to this general obligation exist when the possessor of the documents has the right to refuse to testify, or when the document sought was exclusively made for the use of the possessor. The latter exception is a sort of compromise, since the business sector raised objections against too rigid an obligation to produce documents. This exception allows enterprises to refuse to produce certain documents drafted for their business.[3] Another exception refers to documents possessed by government employees in the course of their official functions, insofar as general rules on the protection of the data as official information apply. Even at the early stages of the CCP reform work, strong concern was expressed by the business sector that the proposed provision might have the similar effect to that of pre-trial discovery in the United States, which can be easily abused. As a result of this opposition and in order to prevent abuse, the following prerequisites must be fulfilled for the production of documents, for which the applicant bears the burden of proof:

(a) the production by the possessor with the help of the court's ruling must be indispensable, i.e. the equivalent documents cannot be obtained in another way (Art. 221, para. 2);
(b) the possessor of the documents must be precisely identified (Art. 221, para. 1, no. 3);
(c) tendering evidences by means of documents must be necessary in the proceeding (Art. 221, para. 2);
(d) the documents to be produced must be specified (Art. 221, para. 1, No. 1 and 2).

The last requirement is especially useful to avoid abuse, because it is not possible to require the production of all documents that are somehow related to the particular case. This requirement may have negative effect for the applicant when he or she cannot specify the relevant documents possessed by the opposing party. Therefore when the applicant has difficulty in specifying the documents to be produced, it is sufficient to distinguish the documents from others. Then the court can take over the task of specification (Art. 222). This can be illustrated with the following example. Suppose that in a tort liability case where the defendant is a car maker, the issue is whether the car maker deliberately omitted a safety system to reduce costs. It is clear that there are minutes of the meeting in which the decision was made. But it is impossible for the plaintiff to determine the hierarchy level within the company where the decision was made. The injured plaintiff can apply for the production of

---

[3] (1997) *Juristo* no. 1125 at p. 120.

the minutes without identifying the precise meeting. The court then requires the possessor of the documents to specify.

In such a case, the party requiring the production of the documents in question must prove that no damage will be caused by the production of the documents. The car maker as the defendant can hinder the production on the grounds that the documents include technical or professional secrets, which provide privileges to reject production of evidence (cf. Art. 197, para. 1, no. 3). When the court considers the objection of the defendant to be sufficient, the application should be dismissed. Unless such a privilege exists, the documents should be produced to the court.

For the court to decide if the production of certain documents should be ordered or if the documents fall under the exceptions in Article 220, no. 4 CCP, the court can require the possessor to submit the documents for inspection (Art. 223, para. 3). The documents submitted for inspection should not be accessible to the opposing party or a third party. Some concern was expressed about this provision during the reform work: the judge might use, as a basis for his opinion, the documents submitted for inspection only, even if he rejects that they be produced for the opposing party. However, it was contended that the judge shall not derive conviction from the documents which were not the object of taking of evidence, and therefore there is no risk.[4]

If the possessor refuses to produce a document despite the obligation to do so, the court can consider the contention of the applicant concerning the contents of the document as true (Art. 224, para. 1). In addition, refusal to produce can lead to a sanction of up to 200,000 yen.

2. *Reciprocal Inquiries between Parties*

Under pre-reform practice, when one party wanted to obtain information known only to the opposing party, it had to apply to the court to exercise its power to clarify the circumstances and require the opposing party to disclose the information (Art. 127, old CCP). This route is also available under the new CCP (Art. 149). The Japanese Bar Association, however, requested a more effective instrument for the purpose of investigation of facts and evidences, since the old clarification system was time-consuming and often insufficient to produce satisfactory solutions. The original proposal of the Bar Association was to introduce in Japan a system similar to pre-trial discovery in the United Kingdom. However it was not adopted.[5] Instead, the new CCP introduces the right of the parties to inquire, from the opposing party, about information necessary for the preparation of future trials of the pending legislation (Art. 163). Although the opposing party is obliged to inform, the failure to act does not lead to any sanction. The representatives of the court in the Council rejected the basic idea that the court should take an active role in assisting the parties with their mutual

---

[4] Cf. (1997) 48 *Mutsuo Tahara, Jiyu to Seigi* (Freedom and Justice) 10 at p. 30.
[5] *Juristo* no. 1116 at p. 103.

inquiries.[6] Rather, it is expected that the attorneys will co-operate with each other to accelerate the proceedings, in accordance with their professional ethical requirements.

An example illustrates the type of information expected under Article 163 CCP. Suppose that a claim concerns damages caused by a traffic accident, and that the point in dispute is the causation between the accident and bodily harm. If the defendant knows that the plaintiff had already been treated in hospital before the accident, the defendant can request from the plaintiff details about the name and address of the hospital according to Article 163 CCP. This is faster than the clarification of circumstances with the assistance of the court according to Article 149 CCP.

III. New Small Claim Proceedings

Japanese civil procedure is based on a three instance court system. Even under the old CCP a simplified procedure was available for smaller cases. This procedure, which is also available under the new CCP, is designed for cases where the claim is no more than 900,000 yen. A Summary Court (Kani Saibansho) has competence in the first instance. In this procedure an action can be submitted orally and no preparatory written statement is required (Arts. 353, 357, old CCP; 271, 276 new CCP). However the taking of evidence and the procedure of appeal are the same as those in the procedure before the District Court (Chiho Saibansho) in the first instance. Therefore, even the simplified procedure is often burdensome and time-consuming. For this reason, a new small claims procedure has been introduced (Art. 368 et seq.). This procedure is available exclusively for cases where the claim does not exceed 300,000 yen. In practice, this type of case constitutes approximately 50 per cent of all the cases before Summary Courts. In the new small claims proceedings there is only one oral session (Art. 370) and the judgment is reached immediately after the conclusion of the procedure (Art. 374). All means of attack and defence must be submitted at the very latest on the day of the oral proceeding. Only evidence which can be taken immediately is admitted (Art. 371). No counterclaim is allowed (Art. 369), while joinder of claim, amendment of claim or partial claim can be made. Appeal is not available, with the exception of an objection (*igi*) against the final judgment of the Summary Court (Arts. 377, 378). Since execution is rarely worthwhile due to the small amount under dispute, an agreement including payment by instalments within three years can be made (Art. 375). It is anticipated that these features will make the new small claims proceedings more user-friendly.

The plaintiff can choose between a lawsuit under the normal procedure before the Summary Court and the new small claims proceedings. If the plaintiff chooses the former, his or her claim is treated under the normal procedure. If the plaintiff chooses the new small claims proceedings, the defendant can contend that the case

---

[6] *Supra*, at p. 104.

should be treated under the normal procedure, so long as the defendant has not yet commenced any procedural act (Art. 373). Moreover, the court can decide *ex officio* to deal with the case in a normal procedure. The legislator expected the new small claims proceedings to be used without the participation of an attorney, since it is not worth employing one for the small amount under dispute. On the other hand abuse of this procedure by litigious people should be avoided. Therefore, the new law only allows an individual to use this new procedure up to ten times per year (Art. 368, para. 3). When a plaintiff requests the use of this procedure, they must declare the number of times they have applied to use this procedure in the past year. The key factor is the number of applications, rather than the actual use of the procedure.

IV. The Limitation of Jokoku *Appeal*

1. Background

In Japanese law there are two means of appeal for civil cases: *koso* appeal and *jokoku* appeal. The *jokoku* appeal is directed against final judgments of the High Court before the Supreme Court and against judgments of the District Court in the second instance before the High Court. The *jokoku* appeal does not open trial proceedings, it serves only to clarify legal issues. The parties who file a *jokoku* appeal must put forward an error of procedural, substantive, or constitutional law in the judgment of the High Court. Under the old law there were three grounds for a *jokoku* appeal: violation of the Constitution, a gross violation of procedural provisions, and a 'violation of procedural law which influenced the judgment of the lower instance'. The last ground was often widely interpreted by the parties and abused. Under the old CCP the Supreme Court was obliged to take into consideration all arguments presented by the *jokoku* appellant and to make a judgment on merit, as long as the *jokoku* appeal fulfilled the formal requirements. Since the Supreme Court is the highest court in Japan and has only 15 justices, the Supreme Court had been overburdened due to the *jokoku* appeal system under the old CCP. In 1994, for example, 2,726 new *jokoku* appeals for civil and administrative cases were filed besides *jokoku* appeals for criminal cases.

On the other hand, under the old CCP there was no possibility of a *kokoku* appeal at the Supreme Court against rulings (*Kettei*) or decrees (*Meirei*). Therefore, for example, the Supreme Court had no instrument to unify various interpretations in the High Court judgments from the *kokoku* appeals procedure under the Civil Execution Law (the High Court being the forum of *kokoku* appeals against rulings and decrees of District Courts).

2. Reform

To avoid the abuse of *jokoku* appeals and the resulting heavy burden on the Supreme Court, 'violation of procedural law which influenced the judgment of the lower instance' was eliminated as a grounds for appeal. Therefore under the new CCP there are only two absolute grounds for *jokoku* appeal: violation of the Constitution and a

gross violation of procedural provisions (Art. 312, para. 1). Parties who wish to contend on other grounds must apply to the Supreme Court for acceptance of a *jokoku* appeal (Art. 318). This application can be sustained when the judgment of the inferior court deviates from the precedent of the Supreme Court or when important questions of interpretation are included. The latter case may occur when a legal interpretation of a provision is necessary and there is no relevant judgment of the Supreme Court, or when the Supreme Court wants to deviate from its own precedent.

While the regular *jokoku* appeal based on one of the two absolute *jokoku* appeal grounds must be submitted to the High Court whose judgment is under appeal, the application for the acceptance of *jokoku* appeal must be made directly to the Supreme Court. The Supreme Court decides if the *jokoku* appeal should be accepted. If it is accepted, the *jokoku* appeal is considered as 'filed'. It is possible for a *jokoku* appellant to file a *jokoku* appeal at the High Court against its judgment and at the same time to make an application at the Supreme Court for the acceptance of *jokoku* appeal.

Under the new CCP, the Supreme Court can dismiss the *jokoku* appeal with its ruling without oral proceedings or judgment on the merits when the *jokoku* appellant fails to explain the violation of the Constitution or other absolute grounds for *jokoku* appeals (Art. 317, para. 2). If the judgment of a High Court violates the Constitution or there is a absolute ground for *jokoku* appeal, the Supreme Court must reverse the judgment of the High Court (Art. 325, para. 1). If there is another kind of error in the judgment of the High Court and it obviously influenced the judgment, the Supreme Court may reverse the judgment (Art. 325, para. 2).

Besides the above-mentioned possibilities for *jokoku* appeals, the new CCP also prescribes a *kokoku* appeal at the Supreme Court. Under the old CCP the *kokoku* appeal against rulings or decrees of lower courts was possible only when they are alleged to violate the Constitution (Art. 419-2, old CCP). The new law also allows a *kokoku* appeal in other circumstances (Art. 337, para. 1). The application for admission of a *kokoku* appeal must be made at the High Court. This is because allowing applications at the Supreme Court would again lead to a heavy burden of the Supreme Court.

C. Untouched Field and Reform Projects

We have to see how the new CCP will be received in practice and if the aim of the reform can be achieved, although the new law has already been criticized by some authors.[7] One critical comment can be made with reference to the regulations on international civil procedure. Except for minor changes in the provision on the

---

[7] For example, *Shigeru Mogi*, *supra* note 5 at p. 87.

recognition of foreign judgments (Art. 118, cf. Art. 200, old CCP), international civil procedure is untouched. For example, there is still no provision on the international competence of the Japanese courts. This unfortunate omission was made on the grounds that the theories in this field have not yet been sufficiently discussed and that, therefore, it is too early to include them in the law.

On the other hand, the reform of the CCP can be seen as the first step towards the reform of civil procedure in a broader sense. Another step after that will be to draft a law on legal aid, since presently legal aid is made without legal basis. In March of 1998, the first report which includes various proposals has been produced to the Minister of Justice.[8] In 1997, the reform work of the entire insolvency law has begun and should be completed within five years. It is expected to reform the strict territorialism of the Japanese international bankruptcy law (Art. 3, Bankruptcy Law). Further movements should be carefully watched.

---

[8] *Juristo* no. 1137 at p. 30.