

Civil Procedure Reforms in Japan: The Latest Round*

Luke NOTTAGE

I. Introduction

Delay has been cited repeatedly as a major disincentive to litigating in Japan. However, this has also been a longstanding problem in other complex industrialized democracies.¹⁾ Still, average delays have remained considerable over the 1990s, especially for contested cases (proceeding to the witness examination phase):²⁾

| District Court Delays (months) | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 |
|--------------------------------|------|------|------|------|------|------|------|------|------|------|
| All cases | 10.9 | 10.1 | 9.8 | 10.1 | 10.2 | 10 | 9.3 | 9.2 | 8.8 | 8.5 |
| Contested cases | 21.8 | 21.1 | 20.9 | 21.1 | 21.3 | 20.8 | 20.8 | 20.5 | 19.7 | 19.2 |

In addition, the first appeal from the District Court to the High Court is an appeal on facts as well as law, and this appeal is made in about one tenth of cases, meaning often further delays. The first comprehensive overhaul of Japan's *Civil Procedure Code*, since it was

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1) See e.g. J. M. RAMSEYER / M. NAKAZOTO, *Japanese Law: An Economic Approach* (Chicago 1999) 140-1. However, they compare only selected US District Courts, and empirical research by Professor Marc Galanter (University of Wisconsin-Madison), Professor Judith Resnick (Yale Law School) and others is uncovering significant transformations in case dispositions in US federal courts over the last decade. For aggregate data recently, see e.g. www.uscourts.gov/judbus2003/contents.html. For brief comparisons with Germany, see SHUSUKE KAKIUCHI, *Reform des Zivilprozessrechts in Japan* [Reform of Civil Procedure Law in Japan], manuscript of lecture presented at the University of Osnabrück, 16 November 2004 (on file with the Australian Network for Japanese Law).

2) *Zadankai—Minji Soshoho no Kaisei ni mukete* [A Round-table Discussion—Towards Reform of the of Civil Procedure Code], in: *Juristo* 1229 (2002), especially 129-35.

enacted in 1890 drawing primarily on German law,³⁾ took effect in 1998 and added discretionary restrictions on the final right of appeal to the Supreme Court. But the practice at that level did not change much either.⁴⁾

Nonetheless, other amendments to the Code seem to be finding more traction. The table above shows some decline in delays, as the proportion of District Courts concentrating the evidence-gathering phase increased from about one-third in 1998 to two-thirds since 1999. But a more significant impact lies in having generated the groundwork for further steps in the same direction, towards more active case management aimed at speedier proceedings. The reforms implemented in 1998 have helped keep this issue on the agenda, and contributed to a second round of significant reforms in 2003.⁵⁾ Even greater emphasis was placed on expediting proceedings, especially in complex cases. Also, albeit to a lesser extent, an aim of the latest reforms seems to be to make the courtroom less daunting, involving more laypersons. This parallels the reintroduction of a jury or lay assessor (*saiban-in*) scheme for serious criminal cases, enacted in 2004 and scheduled to take effect from 2006.⁶⁾ Both reducing delay and broader participation were stressed in the 2001 recommendations of the Judicial Reform Council, as crucial in moving Japanese law and society away from a system of *ex ante* regulation and towards more indirect controls through *ex post* remedies activated by private parties, and implementing other means to involve more people in the judicial system.⁷⁾

3) See generally Y. TANIGUCHI, *The 1996 Code of Civil Procedure of Japan—A Procedure for the Coming Century?*, in: *American Journal of Comparative Law* 45 (1997); and C. HEATH / A. PETERSEN, *Das Japanische Zivilprozessrecht: Zivilprozessgesetz und Zivilprozessverordnung nach der Reform von 1996* (Tuebingen 2002), reviewed by M. DENAUER in: *Zeitschrift fuer Japanisches Recht / Journal of Japanese Law* 13 (2003) 308.

4) Compare M. KAMIYA, *Narrowing the Avenues to Japan's Supreme Court: The Policy Implications of Japan's Code of Civil Procedure Reforms*, in: *Australian Journal of Asian Law* 4 (2002) 53; with SHOZO OTA, *Reform of Civil Procedure in Japan*, in: *American Journal of Comparative Law* 49 (2001) 561.

5) Further analysis is needed as to whether the 2003 reforms have scored better in terms of the benchmarks suggested by Shozo Ota (above note 4). One benchmark proposed by Professor Ota is a strong basis in empirical research (cf e.g. *Zadankai—Minjisaibanriyosha no Jittai Chosa no Bunseki* [A Round-Table Discussion—An Analysis of an Empirical Study of the Users of Civil Proceedings], in: *Juristo* 1250 (2003) 75). Another is thorough examination of alternatives, not just on the basis of comparative law borrowings. Other factors include transparency and public participation in the law reform process. Such issues were raised in broader perspective at a workshop co-hosted by Doshisha Law School and the Australian Network for Japanese Law, held in Kyoto on 26 November 2004.

6) See, in extensive detail, K. ANDERSON / M. NOLAN, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System from Domestic Historical and International Psychological Perspectives*, in: *Vanderbilt Journal of Transnational Law* 38 (2004) 935; and a forthcoming annotated translation by K. ANDERSON / E. SAINT, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials* (on file with Australian Network for Japanese Law).

7) *Judicial Reform Council Recommendations (2001)*: translated at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>. Another step in this direction is a further round reforms soon to go before the Diet, designed to move litigation procedures onto an online platform, as part of a broader trend to develop an "e-judiciary" in Japan. See S. KAWASHIMA / T. UEDA, *Umarekawaru Minji Soshō* [Civil Procedure Rebirth], in: *Jiyu to Seigi* 55/10 (2004) 20.

II. The Latest Round

One of the Council's recommendations was to halve delays. Perhaps perceiving this as an easy benchmark to sell to the electorate as a measure of success in judicial system reform, the response from the Koizumi government has been quite rapid. In its 156th session in 2003, the Diet enacted the *Law related to Speeding Up Court Proceedings*, urging case disposition within two years. This was yet another exhortatory piece of legislation, like Basic Laws enacted in various years since the 1960s, which seem to have experienced a revival under the Koizumi administration. But some more concrete measures have accompanied the "Hurry-Up Law". The *Civil Procedure Code* was further reformed in the same session, with the following major changes coming into effect from 1 April 2004:⁸⁾

1. Article 6 was amended to give Tokyo and Osaka District Courts sole first-instance jurisdiction for intellectual property disputes involving patents, utility models, integrated circuit topographies and copyright in computer programs.
2. Jurisdiction was expanded for procedures in Summary Courts, and their recommendations as to settlement became enforceable as rulings in the absence of prompt objection from a party (Art 275-2: the *wakai ni kawaru kettei* system modelled on the 1950 Civil Conciliation Law).
3. More generally, a remarkable new system allows a potential plaintiff to send an "advance notice" (*teiso yokoku tsuchi*) to opponents indicating what sort of lawsuit s/he intends to initiate and a summary of the dispute (less comprehensive than in a Statement of Claim, as provided in Art 133(2)). Then, within 4 months, s/he may send them a written request for information which will become necessary for that suit. There are limited exceptions to disclosure, such as privacy and trade secrets (Art 132-2). This procedure goes well beyond the system of written interrogatories codified in 1998, which only applies after suit is brought and which many lawyers had circumvented by applying directly through the Court pursuant to the latter's power to clarify the legal situation. The new pre-trial request system builds on some informal practice of exchanging written information among lawyers, as well as a system under the Lawyers Law whereby a lawyer can request information (e.g. from banks) through the local Bar Association. But the scope is broadened, and the new system does not require involvement of lawyers. (Indeed, some are concerned that this may lead to abuse.) Once the request has been made, the potential party can also ask the court to obtain evidence (Arts 326 and 186). In addition, s/he may seek opinions by expert advisors (*senmonka no iken chinjutsu*), adapting a German system, except that Japan's

8) This overview draws particularly on H. TAKAHASHI, *Juten Kogi—Minji Soshoho (Ge)* [Lecture—Code of Civil Procedure II] (Tokyo 2004) 544-54; and K. SADAOKA, Dispute Resolution, in: Minion (ed.), *Doing Business with Japan: Investment Regulations and Commercial Strategies* (Hong Kong 2004).

innovation will not preclude application for a formal opinion from an expert or kanteinin. S/he may also seek investigations by bailiffs as to the present situation regarding property etc. in dispute (shikokan no genjo chosa), adapting a French system (Art 132-4).

4. A further change to procedures for obtaining evidence is that questioning of kanteinin must first be undertaken by the court, not the parties or their lawyers (Art 215-2). This is also designed to expedite dispute resolution, but probably aims too at protecting the sensibilities of experts called upon.
5. In addition, where special expertise is required to clarify or expedite matters (e.g. in IP, medical malpractice or construction disputes), after hearing from the parties (Art 92-2), the court may now call upon “expert commissioners” (semmon iin). They can provide explanations in writing or orally before the parties and, with their consent, even attend settlement conferences or witness examinations to ask questions (Art 92-2). The latter veto right for a party partially meets concerns by trial lawyers, especially for plaintiffs in medical malpractice suits, that these experts will tend also to be doctors and therefore pro-defendant.
6. Another striking aspect of the 2003 reform requires all courts and parties to try to establish a schedule to follow for proceedings (Art 147-2). If the court deems it necessary to conduct an appropriate and expeditious proceeding, due to the complexity and other circumstances of the dispute (eg for IP or construction disputes), a schedule must be established after conferring with the parties (Art 147-3). The schedule should set deadlines for completion of:
 - 1) written arguments and evidence (e.g. within 8 months);
 - 2) witness examinations (4 months);
 - 3) rendering of the judgment (another 3-6 months).

In addition:

- 4) the presiding judge may, after hearing from the parties, set a timetable for submissions regarding their methods for prosecuting their claims and defences regarding specified matters (Art 156-2).

However the court may change the schedule if deemed necessary (Art 147-3). Otherwise, if a party is in delay (without justifiable cause) after the last-mentioned timetable is set and this is likely to cause significant delays in proceedings, that party’s method can be excluded by ruling (kettei) by the court on its own initiative or upon application by the other party (Art 157-2). By contrast, exclusion under the existing Art 157 requires intentional or grossly negligent behaviour by the party seeking to invoke the method. Overall, this new case management system goes significantly further than the compromise reached in the Code reform in effect from 1998, as to methods of asserting and defending one’s case (Art 167). More generally, setting deadlines even for other aspects of the case should at least add to the psychological impact on parties, their lawyers, judges and court officials.

III. Broader ramifications

The last-mentioned innovation encouraging stricter scheduling, and the other inter-related reforms recently, are clearly driven by further initiatives since 2001 to reduce delays in civil dispute resolution. Like the 1996 overhaul of the Code implemented in 1998, they continue to build on evolving practices among legal practitioners. But the scope of the reforms of 2003 is more limited. Perhaps for that reason, as well as the evolving political climate, the latest amendments manage to go significantly further in important areas compared to the first round of reforms, where more compromises had to be made to achieve the overall package of amendments.

In addition, as arguably already in the 1996 amendments to the Code, the latest round of reforms appears to reflect more the interests of judges (keen to reduce disposition times), rather than lawyers (more concerned about the extra preparation probably involved). This may be related to an ongoing decline in influence over policy-making on the part of 19,523 practicing lawyers (as of 2003) still heavily dependent on court work (*bengoshi*) and their Federation (*Nichibenren*). Such decline was already evidenced by their inability over the 1990s to maintain tight control over the numbers of those permitted to pass the national Bar Examination each year, and indeed the process of generating those numbers.⁹⁾ For their part, Japan's 3139 full-time judges may be keen to build up more legitimacy about their role, even though Japan's judges retain enormous public confidence, especially as trust in politicians and bureaucrats declined markedly over the 1990s (as in other industrialized democracies). The Judicial Reform Council had not only criticised delays in court proceedings, but also had indicated that judges needed more knowledge of the outside world and specialised areas.¹⁰⁾

9) See generally S. MIYAZAWA, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, in: *Asian Pacific Law and Policy Journal* 2 (2001) 89 (available at <http://www.hawaii.edu/aplpj/pdfs/v2-19-Miyazawa.pdf>).

10) Intriguingly, however, Kakiuchi (above, note 1, part II) suggests that pressing for faster disposition times may be a double-edged sword: while some litigants do wish for speedier proceedings, he believes that the average Japanese citizens expects a substantively just outcome from the courts—and that judges have responded to that, even at the risk of lengthier proceedings. This is plausible, given also a seemingly universal yearning for procedural justice (even if a party eventually loses the case) uncovered by contemporary social psychologists. However, it may be that expectations do differ significantly depending on the type of case. Parties may be more willing to have faster proceedings—and, indeed, demand them—in cases involving smaller monetary stakes. This can be related to another concluding observation made by Kakiuchi, namely that the 2003 reforms may well lead at last to a clearer differentiation between district courts and summary courts. In particular, the latest amendments not only raised the latter's general jurisdiction from 900,000 to 1,400,000 yen, as well as allowing for more possibility of settlement (as mentioned above). They also raised the jurisdiction for the very popular expedited (usually one-day) procedure, with no appeals and hence more scope for substantive justice, from 300,000 to 600,000 yen.

Finally, although the trend is towards earlier disclosure of factual information and legal arguments as well as more case management, and some of the specific innovations enacted in 2003 also follow the continental European legal tradition, American and then English courts have increasingly moved in that direction since the 1990s as well.¹¹⁾ Civil procedure in Japan therefore should continue to become increasingly more familiar to legal practitioners from a variety of legal traditions. However, the details will differ, especially as the drought seems to have broken, so there are bound to be more reforms in this area. Ironically, then, even as Japan joins a wave of convergence in civil procedure world-wide, “local knowledge” remains essential. An increasingly attractive option may be the “joint ventures” between local *bengoshi* and foreign law firms, permitted since 1998, and especially the full partnerships allowed between Japanese and foreign lawyers which will begin operation from April 2005.¹²⁾

* This article is dedicated to the memory of University of Sydney Emeritus Professor David Harland, who passed away unexpected in Sydney in 2004. Professor Harland was a world-renowned consumer law specialist who visited Ritsumeikan University and published in this journal a decade ago, and became a founding member of the Australian Network for Japanese Law.

11) See generally e.g. M. ANDENAS et al. (eds.), *The Future of Transnational Civil Litigation* (London 2004); and the articles by Professors Gottwald and Storme in this issue of the *Ritsumeikan Law Review*.

12) Cf. e.g. C. DONALD, *Japan Opens Closed System to the “Gaiben”*, 15 November 2004, www.theherald.co.uk/business/27935-print.shtml (on file with the Australian Network for Japanese Law, www.law.usyd.edu.au/anjel).