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I. CHARACTERISTICS OF CIVIL PROCEEDINGS IN JAPAN

Unlike the United States, where there are both federal and state jurisdictions, Japan has a single judicial system with no allowance for jury trials or a pretrial discovery system. However, Japan does have a system for the preservation of evidence before suits are filed,[1] which functions in a similar fashion to pretrial discovery. Further, during litigation, the court may order the submission of documents which are in the possession of a defendant, respondent, or third party.[2] As would naturally be expected, the extent of these submission orders is fairly restricted.

The practice of claiming compensation for actual damage is overwhelmingly prevalent in Japan. This practice makes the production of evidence relating to the determination of damages extremely difficult. Hence, victims may effectively be deprived of the right to claim redress, and the system may not function adequately in preventing the recurrence of wrongs.

In Japan there are no special classes of litigation like American class action suits. It is thus necessary that persons intending to litigate file individually. Of course, litigation procedures may be simplified by filing joint suits or by entrusting and designating one or several persons involved in the relevant dispute with the filing of the litigation.[3] Nonetheless, it is difficult to protect the interests of a large number of plaintiffs as with class actions. In this respect, the Japanese system may be insufficient in providing redress to victims. In particular, parties seeking small amounts may simply give up any opportunity of receiving compensation.

Intensive trials are rare in Japan. During litigation proceedings,

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1. MINSOHŌ arts. 343-352.

2. *See id.* arts. 311-319. In particular, article 312 stipulates cases where courts may order submission of documents. However, the scope of such authority is limited.

3. *Id.* art. 47.

public hearings are held in court once every two or three months, or once every month. At these hearings, both parties present their case and give evidence, while the court directs its efforts towards finding a cause of action. Evidence and witnesses are introduced to assist the court in reaching a decision.

After taking the necessary action to locate the point of contention, the court will usually proceed with the examination of witnesses. Examination of witnesses also takes place on the hearing dates. Upon completion of these examinations, public hearings come to an end. The court will then deliberate the merits of the case.

Generally, it takes an average of 26.5 months after filing before a district court of the first instance will render a decision.[4] Urgent attention to the improvement and facilitation of the trial process is necessary, and these problems have been referred to the Legislation Deliberative Council of the Ministry of Justice for consideration.

II. POINTS IN ISSUE ON JAPANESE CIVIL PROCEEDINGS IN REGARD TO INTERNATIONAL DISPUTES

Discussions are now under way concerning the application of Japanese law, including the Securities and Exchange Law, and the determination of governing law in extraterritorial disputes. The lack of relevant judicial precedents makes it difficult to predict the kinds of international transactions to which Japanese Securities and Exchange Law may apply.

No judicial precedents indicate the extent to which Japanese courts may exercise jurisdiction over cases involving international securities transactions, and it is therefore difficult to forecast how the courts will behave in the future. However, precedents regarding jurisdiction over international cases generally are beginning to appear. But unlike U.S. law, which broadens the base for exercising jurisdiction and then imposes restrictions through the application of the principle of forum non conveniens, the Japanese judicial system requires that venue be considered in conjunction with jurisdiction. This involves the same evaluation of factors as under the principle of forum non conveniens.

4. During the period from April 1988 through March 1989, the average period of examination required in the first instance of an ordinary civil suit was 11.9 months. In the case of district courts, the average period of examination required 3.6 months. However, according to the Secretariat of the Committee of the Code of Civil Procedure of the Legislation Deliberative Council, the average length of trial, from the filing of cases to the rendering of judgments, was 26.5 months, in cases where the examination period exceeded six months. *See* Yanagita, *On Commencement of Review of Proceedings of Civil Cases*, NBL, Aug 15, 1990, at 6, 9.

The lack of systems in Japan similar to pretrial discovery and class actions constitutes a serious impediment to the efforts of plaintiffs who have filed suits seeking compensation for damages connected with insider trading transactions. If the way is opened to use these litigation strategies in the imposition of criminal sanctions under the Securities and Exchange Law, and in connection with private litigation seeking compensation for damages, the establishment of legitimate causes of action would be significantly aided.

III. POSSIBILITIES OF MANAGEMENT AND PREDICTABILITY OF LITIGATION

The lack of juries in Japan increases the possibility of getting to trial. However, Japanese judges are generally disinclined to illuminate the parties as to the legal reasoning employed in reaching their decisions during the examination process, or as to the convictions they form in the process of confirming the facts. Thus, the parties are often confused concerning which facts they should focus on in presenting evidence for their claim. It is not rare for judges to hand down totally unexpected decisions. Recently, there has been talk of the need for improvement of the manner in which judges carry out litigation procedures, in order to ensure adequate control and implementation of substantive procedures.[5]

IV. PROCEDURES FOR THE SETTLEMENT OF DISPUTES IN LIEU OF LITIGATION

Conciliation procedures are often pursued by Japanese courts and have been quite successful in family disputes and other civil cases. However, it is an open question whether these procedures can be used successfully in cases involving securities transactions.

5. In the past it was commonly understood that it was strictly the duty of the court to deal with the application of laws, and that no serious consideration was to be taken of the functions of the parties in connection therewith. In recent years, however, the trend has been toward stressing the functions of the parties in connection with the legal reasoning to be employed in reaching a decision (*i.e.*, the determination of appropriate legal provisions for decision of the case, determination of the scope of specific facts necessary and required for application of such provisions, presentation of cases, and responsibility for burden of proof). It is now the predominant view among legal scholars that, in order to prevent unexpected decisions, discussions should be conducted between the parties, and between the court and the parties. *See* Yamoto, *On So-Called 'Rechtsgesprach' in Civil Proceedings* (pts. 1-4), [69 No. 1] HOGAKU RONSO 1 (1985), [69 No. 3] HOGAKU RONSO 1 (1985), [69 No. 5] HOGAKU RONSO 1 (1985), [70 No. 1] HOGAKU RONSO 32 (1986); Yamamoto, *Process of Examining Legal Problems Involved in Civil Proceedings* (pts. 1-4), [105 No. 4] HOGAKU KYOKAI ZASSHI 552 (1988), [106 No. 9] HOGAKU KYOKAI ZASSHI 1606 (1989), [106 No. 10] HOGAKU KYOKAI ZASSHI 1751 (1989), [107 No.3] HOGAKU KYOKA ZASSHI 323 (1990).

Given the nature of such cases, a considerable level of expertise is required in dealing with the issues involved. Thus, it may be difficult to find members of the conciliation committee who are thoroughly familiar with the Securities and Exchange Law. Settlement of transaction disputes by judges during litigation procedures is a far more likely possibility. While summary jury trials are quite unlikely in Japan, a judge presiding over a legal proceeding may recommend settlement after considering the development of the case and confirming the direction in which the case is moving. In other words, the judge will make settlement proposals in light of the likely conclusion of the litigation. This system functions similarly to a summary trial, and, therefore, is an acceptable procedure to parties who are in direct confrontation with each other.[6]

It is possible, in theory, to devise and utilize a mini-trial system in Japan. However, although such a system may be effective in the settlement of disputes between businesses, the extent of its usefulness in litigation by investors is open to question.

The appointment of a special master for the calculation of damages is inconceivable under current Japanese compensation laws. The calculated amount of damages is as vital an element in the establishment of the right to claim compensation as is the establishment of liability for the damages. It is considered a matter for determination by a judge.

Arbitration is unpopular in Japan in the securities industry, as well as in other industries. The reasons are that the Japanese are not accustomed to arbitration, and disfavor it as a type of black and white solution which is generally repugnant to the Japanese.

Dispute resolution through grievance solution mechanisms established by the government, government related organizations, or industry associations, is widely utilized in Japan because it is informal, speedy, inexpensive, and not public. In addition, industry experts are available within the context of these mechanisms to assist the parties in reaching an agreement. The securities industry has established such grievance solution procedures, which are conducted by the Securities Industry Association.

V. CONCLUSION

Civil cases concerning securities transactions are very uncommon in

6. Admin. Gen. Affairs Bureau, Supreme Court of Japan, *1988 Annual Report on Judicial Statistics*, in 1 CIVIL AND ADMINISTRATIVE AFFAIRS 134 (1988). Out of the 119,566 ordinary civil actions brought to the district courts in the first instance, 39,726 (33.2%) were settled out of court. 21,536 cases (18.0%) were withdrawn.

Japan. The paucity of judicial precedents in this area makes it difficult to predict the direction such cases will follow.[7] It could be said that Japan's interest in the problems of international securities litigation may lie in the reform of its juridical system to ensure that these currently submerged disputes are brought to the courts and other institutions for settlement under reasonable terms and conditions. In that sense, it is urgent that the merits of the introduction of class action suits and a discovery system into Japanese law through legislative amendment be considered.

7. In Japan, regarding civil cases as a whole, including disputes over securities transactions, the rate at which the civil proceedings system is employed is assumed to be considerably lower than that in foreign countries. K. ROKUMOTO, SOCIOLOGY OF LAW 258-60 (Yuhikaku ed. 1986) (estimating that utilization of courts in West Germany occurs 9.5 times as often as compared with Japan).