Judicial Cooperation

―The Cooperation between Judge and Parties and Cooperation among Judges―

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Ⅰ Introduction

The civil disputes are a matter of private concern of the parties involved, the parties are themselves the best judges of how to pursue and serve their own interests in the conduct and control of cases. Therefore traditional model of civil litigation was based on party autonomy so that individual litigants should have autonomy in commencement and constitution of the action[1]. Under an adversarial principal, the plaintiff chooses what to allege, and defendant ,what to contest and what to admit. The party plays a major, dominating role to persuade the court to adjudicate or otherwise resolve the dispute in their favor[2].

By contrast, the role of court was an impartial, passive arbiter that waited for parties to proceed. The court has no power or duty to determine what are the issues or questions in dispute between the parties. The court has no investigate process of its own. The passive role of the court greatly enhances the standing , influence and authority of the judiciary[3].

It is the duty and responsibility of the lawyers of parties to ensure that client is fully and effectively prepared and presented. The function of adversary system work properly if both parties are keen to pursue the case efficiently. Both parties are supposed to be equal resources and competence[4]. But these assumptions are not fulfilled[5].

The adversary system inevitably creates avoidable delays and escalates the labor and the costs. It is natural that litigants and their lawyers should seek to exploit procedure to their advantage[6]. It is not uncommon to financially stronger or more experienced party to enforce settlement and delay the process to increase the costs, by litigating on peripheral issues instead of focusing on

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[1] Mirjan R. Damaška, *The Faces of Justice and State Authority*,104-106(1986).
[2] Sir Jack I.H.Jacob, *The Fabric of English Civil Justice*,12(1987); Damaška, supra note1at 109ff; JonathanT. Molot, *An Old Judicial Role for a New Litigation Era*,113Yale.L.J. 27,61,78(2003).
[3] Jacob, supra note2 at9; Lon L. Fuller, *The Forms and Limits of Adjudication*, 92Harv.L.Rev. 353, 365 (1978).
[4]Damaška, supra note 1 at106ff.
[5]Damaška, supra note 1 at104-105: Judith.Resnik, *Failing Faith : Adjudicatory Procedure in Decline*, 53U.Chi.L. Rev 494,517-520 (1986).
[6] Adrian Zuckerman, *Reform in the Shadow of lawyers' Interests*, 62-67,in *Reform of Civil Procedure*(Ed: Adrian Zuckerman and Ross Cranston)(1995).

the real substance of cases[7].

The society is becoming more complex and the awakening of individuals to ever-increasing needs, rights and desire make a judge's role more active[8].

Therefore the discussion about the courts power of initiative and its influence in favor of the weaker party has been a traditional topic[9].

In complex litigation, the courts have begun to intervene to ensure that the litigation is properly marshaled. Depending the complexity of the cases, activist judges might schedule conference to check up on the evolution of the cases.

Court adjudication of civil dispute is not only a private matter but also a public service for enforcement of civil rights. In United Stets, civil rights class action of 1960 and 1970[10], mass tort litigation in the 1980 and 1990s.

The role of judge has changed dramatically and it is necessary to discuss the cooperation between parties and judge and the cooperation among judges.

Ⅱ Recent Reform of Civil Procedure and the Role of Judge

The complexity, high cost and delay are experienced by many contemporary civil justice systems. Civil procedure law and practice in most countries is undergoing a number of reform and modernized. The traditional view of the judicial role and party autonomy have been changed.

Until the 1970s, in United States, lawyers and parties largely controlled the pretrial development of lawsuits, and judge took little interest in them until the parties demanded attention by filing motions or seeking a trial date. In the federal courts, the change began in 1960s, increasingly employed a single assignment system, under which a case was assigned to a single judge at the filing ,and that judge would ordinarily preside over the case until final judgment was entered[11]. Many judges began issuing orders in all civil cases requiring lawyers to meet for a status conference shortly after the suit was filed. At these conferences, the judge asses the need to take active control of lawyers' activity, and also endeavor to develop a

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[7] Resnik, supra note5 at 523-524.

[8]Marojorie Rendell, *What is the Role of the Judge in our litigious Society*, 40Vill.L.Rev. 1115, 1118 (1995).

[9] For example ,in Germany some representatives of the so-called "social civil procedure" suggested replacing the principle of party presentation with so-called "principle of cooperation"(Astrid Stadler, *The Multiple Roles of Judges and Attorneys in Modern Civil Litigation*, 27Hastings Int'l and Comp.L.Rev.55,57(2003); Peter L. Murray and Rolf Stürner, *German Civil Procedure*, 176-177(2004)).

[10]Abram A. Chayes, *The Role of the Judge in Public law Litigation*, 89Harv.L.Rev.1281, 1304-1313 (1976).

[11] Resnik, supra note 5 at 523.

discovery plan[12].The status conference provides an opportunity to modify the standard complex pretrial procedures to suit the needs of a particularly simple or complex case.

In the 1970s this activity was only pursued by a limited number of judge.

After Federal Rule16 was amended in 1983 ,it required judges to set schedules for certain things soon after the suit was filed(FRCP16(b)), and authorized them to inquire into and make orders about a large variety of other topics(Fed.R.Civ.P.16(c))[13].

In 1993, additional rule changes mandated an early meeting of these attorneys and required that they develop a discovery plan and submit a report to the judge about the needs of the case before the scheduling order could be issued(Fed.R.Civ.P.26(f)).

As discovery grew more expensive and time consuming, these changes in rules and judicial orientation meant that the judge early involves in pretrial and discovery to keep pre trail process focused on the merits[14]. Attorneys who had a great latitude before trial to approach things as they pleased could no longer proceed without constraint[15].

Attorneys have neither cooperated voluntary to move cases through discovery nor policed each other by seeking sanctions for abusing discovery tactics[16]. Therefore the judge becomes an active manager of pretrial to make sure that pretrial practice is efficient and safe and in order to dispose of cases prior to trial[17].

One of the most important structural and procedural reform is the proposals by Lord Woolf. He produced his Interim Report in 1995 [18]and the Final Report in 1996[19].

The Civil Procedure Rules 1998(CPR) ,based on findings of Lord Woolf's inquiry, took effect in1999. The impact of Lord Woolf's Reform is impressive achievement not only it thoroughly modernized the civil procedure in England and Wales, it also epitomize a response of a modern civil litigation system to challenges of complexity, costs and delays. It also changed the

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[12] Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judge*, 27Hasting Int'l and Comp.L.,3,18(2003) ;Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*,69Cal. L. Rev.770,781(1981).

[13] David L. Shapiro, *Federal Rule16: A Look at the Theory and practice of Rulemaking*, 137U.Pa.L.Rev.1969,1985-87(1989);Michael E. Tigar, *Pretrial Case management under the Amended Rules: Too Many Words for a Good idea*,14 Rev.Litig.137,138-149(1994).

[14] Resnik, supra note 5 at306;Arthur R. Miller, *The pretrial rush to Judgment: Are the "Litigation Explosion ","Liability Crisis" and Efficiency Clichés eroding our day in Court and Jury Trial Comitments?*,78N.Y.U.L.Rev.982,1003(2003); Judith Resnik, *Managerial Judges,* 96 Harv. L. Rev374, 379 (1982).

[15]Marcus, supra note 12at 19.

[16]Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 Minn. L. Rev1, 15（1984）.

[17] Molot, supra note 2 at40, 93;Shapiro,supra note13 at1981-84.

[18] Lord Woolf, *Access to Justice; Interim Report to the Lord Chancellor on the Civil Justice System in England Wales*(1995).

[19]Lord Woolf, *Access to Justice; Final Report to the Lord Chancellor on the Civil Justice System in England Wales*(1996).

adversary character ,furthermore the role of parties and the court. The court and the parties, in order to achieve proper and prompt litigation , shall ensure the well-organized progress of court proceedings[20]. The court should become invested with the public duty to promote equality in procedure, especially where one party is not legally or even competently represented[21].

The court should under a duty at all stages to endeavor by conciliation to promote the settlement and the use of alternative dispute resolution[22].

The effectiveness of Lord Woolf's reform influenced to scholar, legal practitioner and legislators across the world[23].

Ⅲ Cooperation between the Parties and the Court

The parties retain control not only over facts to be subject to proof but also over the sources of information to be used in proving these facts[24]. The parties should conduct themselves fairly in dealing with court and other party. The lawyer also owes duty to respect the interests of justice ,rather than blindly to professional duties to his client[25].

Allegations and evidence shall be advanced within an appropriate time in order to examine witnesses and the parties as intensively as possible. All the relevant information should be informed and shared with the parties and the courts.

In Germany, the German Civil Procedure Act of July 27,enacted on July 1,2002,intends to strengthen to judicial fact-finding in first the first instance. This is supposed to be done in two ways; first, courts were supposed to become more active and assist the parties in correctly presenting case; second, parties and non-parties are obliged to disclose documents and other objects relevant to the subject of the litigation[26].

According to the principle of party presentation, it is up to the parties and lawyers to determine the scope of lawsuits by the claims for relief (*Anträge*) in their

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[20] CPR 1.2.

[21] CPR1.1.

[22] CPR1.4(2).

[23] Keneth M. Vorrasi, *Note-England's Reform To Alleviate the Problems of Civil Process: A Comparison of Judicial Movement in England and the United States*,30 J.Legis,361 (2003).
In Netherland, the reform of Code of Civil Procedure(Burgerlijke Rechsvordering) in 2002(Daan Asser, *The Influence of the CPR on Civil Procedure and Evidence Reform in the Netherland*,379,393 ,in *The Civil Procedure Rules Ten Years On*(Ed: DèirderDwyer)(2009));In Poland, the Reform of Code of Civil Procedure in 1997(M.Tulibacka, *The Ethos of the Woolf Reforms in the Transformations of Post-Socialist Civil Procedures: Case Study of Poland.* 395,in *The Civil Procedure Rules Ten Years On.* ;In Hog Kong, the Civil Justice Reform in 2002(Gary Meggitt and Farzan Aslam, *Civil Justice Reform in Hong Kong-A Critical Appraisal*, 28CJQ111(2007); G. Meggitt, *The CPR and the CJR-Applying English Authorities on Civil Procedure in Hong Kong*, 29CJQ 235 (2010）).

[24] Murray and Stürner, supra note 9 at 165;S.Schmidt, Civil Justice in France, p.106(2010).

[25] In Germany, Stadler, supra note 9 at 57;InEngland, s42,Access to Justice Act 1999.

[26] Stadler, supra note9 at 60.

pleadings(*Dispositionsmaxime*) as well as the means of factual proof to be adduced in determination of case(*Verhandlungsmaxime*)present the facts of a case and evidence supporting the alleged facts to the court[27]. The scope of controversy and fact sources are the responsibility of parties[28][29].

The court is expected to support the parties and lawyers by clear court management in order to accelerate and concentrate proceedings on relevant issues(ZPO ∫ 139)[30]. The judge should ask for further information and details if a party's pleadings are too vague*(richterlice Aufklärungspflicht*).The judge is also expected to discuss the facts and legal arguments of a case in detail with the parties sharing allegations and evidence in order to avoid surprise and prevent injustice in the individual cases. It is an important feature of German civil justice[31]. If a party invokes, for example, contractual recovery and the judge independently finds that a tort is involved, a dispute over rights has been adjudicated different from the one originally contemplated by the party. The judge is expected to inform the parties if, and for what reason ,his evaluation of facts and legal arguments differs from the one of the parties （*Hinweispflicht*） [32].

The degree to which a German judge is expected to expose thinking process to the parties is an important feature of German civil justice. The judge's failure properly to exercise this role is often utilized as a procedural ground for a review appeal(*Revision*)[33]. It is important not to confuse the judge's obligation to ask for further information and details is an expression of inquisitorial responsibility for determining the truth of the case at hand. It is more aptly characterized as requiring the judge to advise and assist the parties in resolving their dispute according to law[34].

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[27] Murray and Stürner, supra note 9 at156-160, 165.
[28] Id at158-161.
[29] There are two fundamental differences between German and Anglo-American Civil Procedure. First, the court rather than the parties' lawyers takes the main responsibility for gathering and sifting evidence, although the lawyers exercise a watchful eye over the court's work. Second, there is no distinction between pretrial and trial, between discovering evidence and presenting it. Trial is not a single continuous event. Rather, the court gathers and evaluates evidence over a series of hearings, as many as the circumstances require(John H. Langbein, *The German Advantage in Civil Procedure,*52 U.Chi.L.Rev.823,826(1985).).
[30]For example, in the Italian system, there is nothing comparable to the "duty of clarification" vested in the German judge by art. 139 ZPO(Vincenzo Varano, *Civil Procedure Reform in Italy*, 45 Am. J. Comp. L.657, 669(1997).
[31] Murray and Stürner, supra note 9 at166.
[32] Stadler, supra note 9 at 69.
[33] In civil cases review appeals after second instance appeals are limited to questions of law and procedure(Murray and Stürner, supra note 9 at167,392).
[34] Id at167.

It is solely up to the parties to present new claims and defenses ,and the court should not suggest that a party enlarge demand or add another claim or element to enlarge the subject matter or change the "goal of the case"(*Prozesessziel*).[35] Nor may the judge warn a party about the consequence of an impending bar of the statute of limitations(Verjhärung)[36].

Courts assistance should be seen only a supplemental aid , to be used in the interest of justice and equality of opportunity. Therefore it should be restricted to helping parties make clearer and more detailed presentations, a result which is not totally different from the parties' initial position.

The court is under no obligation to give prior disclosure and an intended basis for decision if it has been mentioned in pleadings or briefs of at least one of the parties, or it has been mentioned in the pleadings or briefs of at least one of the parties, or if it has been mentioned in the pleadings or briefs of at least one of the parties, or if the basis for the decision is one of common everyday bases that one should expect to address in a case of the kind before the court. The New German Civil Procedure Act of 2002,stresses the duty of court to discuss the facts of a case and the legal arguments with the parties[37]. But the essence of the duty to provide advise and assist the parties has not really been fundamentally changed by the recent changes in statutory language. In this sense the statutory change is more a matter of convenience and refinement than creation of any new procedural right or obligation[38].

In Japan, the expectation of court to support the parties and lawyers by clear court management in order to accelerate and concentrate proceedings on relevant issues is much more. It is up to the parties to present new claims and defenses , but the judge should ask for further information and details if a party's pleadings are too vague(Art.149 of Code of Civil Procedure).

Soon after World War Ⅱ, the influence of the American adversarial legal culture was imported not only in legislation but also in lawyers' ways of thinking. The judges were led to believe that they should sit back unless asked by the party to intervene. Judges refrained from using their right of clarification in practice[39]. The Supreme Court also held that clarification was not a duty of judge[40]. But in view of the untrained attorneys and many litigation with per se litigation, it

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[35] Id at 70.
[36] Id at172.
[37] Stadler, supra note 9 at 70.
[38] Murray and Stüner, supra note 9 at169;Stadler, supra note 9 at 70.
[39] Yasuhei Taniguchi, *Between Verhandlingsmaxime and Adversary System,* In *Festchrift für Karl Heinz Schwab*, 487,495(Eds:Peter Gottwald and H.Prütting)(1990).
[40] Decision of the Supreme Court, 27 June1952, *Saikosaibannsyosaibansyuminnzi* Vol.6,p. 805（in Japanese）;27 November 1952, *Minshu* Vol.6,No.10,p.1062（in Japanese）; Decision of the Supreme

soon became clear that the paternalistic intervention of judges was necessary. In the later of 1950's the Supreme Court returned to the pre-war position. If the judge intervenes only when necessary, this is not inconsistent with adversary philosophy[41].

The court is also expected to suggest that a party enlarges demand or adds another claim or element to enlarge the subject matter in order to correct superficial application of the adversarial system and resolve true dispute[42].

The judge should not expected to warn a party about the consequence of an impending bar of the statute of limitations (Verjhärung)[43],but the practice at summary court has been changed to warn a party in order to help financially and socially weak parties to provide an equality of chance to the parties[44].

Professor Miki explains the paternalistic role of judge as follows[45]. First, there has been little adversarial legal culture within the Japanese legal profession. Second, under the bureaucratic career system, the quality of Japanese judges has been maintained at a relatively high and homogeneous level.

Third, since before World War Ⅱ ,judges were regarded as the best, the brightest and the guardians of the legal professional circle: some vestiges of the perception still remain. Fourth, Japanese attorneys have not yet been exposed to the full scale competitive market mechanism because they are still small in number. Consequently , they do not always have to be zealous advocates. Finally, because parties can represent themselves without attorneys under the Japanese civil procedure system, if the parties are just in person, the judge's role must also play

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Court, 25 June1963, *Saikosaibannsyosaibansyuminnzi* Vol.66,p.723（in Japanese）.

[41]Decision of the Supreme Court,27 November 1952, *Minshu* Vol.6,No.10,p.1062（in Japanese）;Decision of the Supreme Court, 26 June 1964, *Minshu* Vol.18,No.5,p.954（in Japanese）;Decision of the Supreme Court ,24 June 1969, *Minshu* Vol.23,No.7,p.1156（in Japanese）;Decision of the Supreme Court,11 June 1970, *Minshu* Vol.24,No.6,p.516（in Japanese）.

[42] Decision of the Supreme Court,11 June 1970;Decision of the Supreme Court,17 July 1997,*Hanreijiho* Vol.1624,p.72（in Japanese）.

[43] Decision of the Supreme Court,28 December 1956, *Minshu* Vol.10,No.12,p.1369（in Japanese）.

[44] Sintaro.Kato,*Shakumei(richterlice Aufklärungspflicht)* ,In T*etsudukisairyo to sonokiritsu*(Procedural Discretion and Its Discipline),133(Eds: Tadashi Ooe, Sintaro Kato and Kazuhiko Yamamoto(2005)(in Japanese）;Sintaro Kato, *Syakumeinokozotozitumu (Struktur des richterlice Aufklärungspflicht)* in Festchrift für Yoshimitsu Aoyama, 103,117 (Eds: Makoto Ito ,Hiroshi Takahashi et al,(2009)) （in Japanese）.

[45] Koichi Miki, *Roles of Judges and Attorneys under the Non-Sanction Scheme in Japanese Civil Procedure*, 27Hastings Int'l and Comp.L.Rev.31,43(2003).

the role of attorney for both parties[46].

Ⅳ Case Management and the Role of Courts

A judge who takes an active role in the early pretrial proceedings can often use his status and experience to persuade the parties to eliminate many immaterial or uncontested issues that arise at the outset of a typical lawsuit, issues, thereby avoiding unnecessary discovery, hearings, and presentation of evidence[47].

In United States, the case management is divided into the status conference and pretrial conference. The primary functions of the status conference are to resolve scheduling matters, shape further pretrial procedures, and formulate a discovery plan that will be cost-efficient. also flow from this early meeting of attorneys and judge. The status conference is usually the first personal contact between the judge and the attorneys, and the judge can use his considerable influence to set the tone of a relationship in which he and the attorneys are likely to be engaged for the duration of the litigation[48].

The pretrial conference can also assure that attorneys are well-prepared for trial. Thus, the aspect of pretrial that attorneys tend to find most objectionable-the seemingly unnecessary burden of preparing pretrial statements, proposed findings of fact, and evidentiary objections before trial-may be one of its greatest virtues.

The key to effective pretrial planning is judicial flexibility. A judge should always be open to modifying the plan should that become necessary. If judges are sensitive to the parties' needs and flexible if it turns out that the pretrial procedures are wasting more time than they save, the problem of over-regulation, which has so disturbed participants on both sides of the bench, can be avoided[49].

In England, case management is a corner-stone of Lord Woolf's procedural reforms[50].

Both England and United States authorize the judge to have pretrial hearings with parties, to establish timetables for discovery, pretrial motion and to encourage settlement of disputes. This illustrates the insight each legal system shares in which the cost and delay of common law process can be diminished with empowerment of judges to intervene and participate in pretrial procedure with adversaries[51].

Under CPR, not only can the judge direct hearings and fix schedules, but the judge furthermore authorized, for example, decide which issues to be resolved, which issues to be

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[46] Taniguchi, supra note 39at495.
[47] Peckham, supra note 12 at 772-73.
[48] Id at782.
[49] Peckham, supra note 12 at 781-782.
[50] Neil Andrews, *English Civil Procedure, Fundamentals of New Civil Justice System, 337*（2003）.
[51] Vorrasi,supra note 23 at 381.

excluded and give preliminary judgment on claims[52].

When adjudication, a judge should not be actuated by bias, notably a pecuniary or personal interest in the outcome of the case. Judges are generally confined to the record. They rely on upon traditional adversarial exchanges of issues and evidence, publicly explain their decisions, and know that their work may be reviewed on appeal[53].

In contrast, as pretrial case managers, judges operate in freewheeling arena of informal dispute resolution. Having supervised case preparation and pressed for settlement ,judges can hardly be considered untainted if they are ultimately asked to find the facts and adjudicate the merits of a dispute.

Judicial case supervision is a departure from the traditional role of judges and is inconsistent with notions of due process and proper function of adversarial system.

It is true that privacy and informality of pretrial have some genuine advantages; attorneys and judges can discuss discovery schedules and explore settlement proposals without the constraints of the formal courtroom environment. But substantial dangers also inhere in such activities. The extensive information that judges receive during pretrial conferences has not been filtered by the rules of evidence. Some of this information is received ex parte, a process that deprives the opposing party of the opportunity to contest the validity of information received[54].

In limiting the scope of discovery, setting schedules, and narrowing issues, the court restricts somewhat the attorney's freedom to pursue their actions in an unfettered fashion and eliminates entirely some theories or lines of inquiry.

Professor Resnik proposed to prohibit ex parte communication and to require judges to conduct all meetings with litigants on the record.[55]

We recognize that the cause of justice can no longer be served by a laissez-faire judicial model. Adversarial system is a mere instrument by which to achieve the just resolution of disputes. If it can no longer fulfill that function effectively, it must be modified.

A judge generally enjoys latitude in exercising a discretion based on the nature and issues of cases. Judges also varies in their ability and willingness to make effective use of such techniques, and because "local legal cultures" vary in their receptiveness to certain techniques and practices[56].

However, there is a danger that judges will exercise inconsistent and unpredictable fashion.

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[52] CPR3.1.

[53] Professor Damaška emphasized that a regular and comprehensive system of appeals is typically regarded in hierarchical judicial organizations as an essential guarantee of fair and orderly administration of justice (Damaška, supra note 1at 48-49).

[54] Resnik, supra note 14at 427.

[55] Id. at 433.

[56]D. Shapiro, supra note13 at 1995;Vorrasi, supra note 23 at 384.

The case management will vastly expand the judge's power and it causes lawyers to do more work under judicial scrutiny, with the judges pressing the lawyers to get the job faster and efficiently.

Variation of style of case management between judges can reduce the predictability of litigation. The judge's managerial discretion is usually off the record, with no obligation to provide written, reasoned opinions. The review of appellate court generally distanced itself from reviewing exercise of managerial discretion[57].

The case management and the court's broad discretion will create an unjustified danger of judicial meddling and the appearance of bias. The managerial role of judge is affecting the neutral position of the decision maker because the lawyers will recognize that it is necessary to curry favor with judge since many critically important decision are treated as discretionary and therefore not to subject to careful review on appeal.

The parties no longer have any absolute right to insist on the calling of any evidence they choose provided only that it is admissible and arguably relevant. The court may exclude admissible and relevant evidence or cross-examination which is disproportionately expensive or time-consuming. The appeal court is supposed to act as the supervisory body of civil justice.

Coordination obviously requires that each judge learn of numerous information relevant to coordination, such as relation among counsel, parties' different priorities and stage of preparation, possibility of settlement, and related cases pending in other court system. Attorneys can be helpful in that regard because they often have important information, especially about related cases pending and generally favor intersystem coordination because it can spare them and their clients unnecessary cost and duplication of effort[58].

Coordination requires not only that attorneys communicate with the court, but also cooperate with one another[59].

Yet, cooperation among attorneys has limits because the interests of lawyers may be differ and do not want to see the significance of that decision diminishes[60].

If the court has greater involvement in the case, and the ability of lawyers to pursue and expose is unduly limited, it would undercut the assumption that the activity of lawyer in America is a suitable method of enforcing those public norms[61].

In United States, increasing court management of judges to rule on discovery is generally welcomed and it does not indicate that there is currently a severe problem with constraining

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[57]Adrian Zuckeman, L*itigation Management under the CPR; A poorly-used management infrastructure* ,In *The Civil Procedure Rules Ten Years On*, supra note 23at 103.
[58]William WSchwarzer, Nancy E. Weiss,Alan Hirsch , *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*,78 Va.L.Rev.1689,1737 (1992).
[59] Id.at 1737.
[60] Id. at 1740.
[61] Marcus, supra note 12 at 20.

lawyers' pursuit of case[62].

The schedule of treatment in chronological order in order to clarify the fact of the process of examination and treatment is to produce in advance .

The subject of regulation by the judicial management, the timing of trial and the scope of far-reaching discovery- do not inherently create a danger of receiving information without filtering by the rules of evidence[63].

Timing decisions such as setting the trial date involve primary procedural discretion is that they are largely divorced from the underlying substance of case[64].

The lawyer still has a primary duty to prepare the case sensibly, carefully and with reasonable speed. The judge is supposed to intervene the process of finding the truth for reasons of justice and providing each parties equality of chances to win the case.

The incentive for lawyers to prepare and properly conduct a case will certainly decrease if the responsibility is shifted almost completely to the court, with attorneys being able to count on court's assistance whenever they make a mistake. For judges, the consequence would be an overwhelming workload that would result in longer trials and loss of equality[65]. It also affects the neutrality of court.

Therefore court management should not release the lawyers out of responsibility for their case.

The Discretion of Court and Sanction

1 The Discretion of Court

Good litigation management consists of laying down an appropriate case management plan at an early stage of the litigation, for the resolution of the dispute and implementing it.

In Belgium, where the parties agree directions for trial ending with time limits for the exchange of final submissions, the judge has no power to intervene; The judge's role is restricted to informing parties to as to the earliest date when the court can hear the case, sending out a formal order(within six weeks of introductory hearing) and fixing the final hearing, which must be within three months after the exchange of final submission[66].

If the parties fail to follow or if the parties do not agree to opt-out of judicial control by jointly applying for the case to be transferred to the general cause list, or if one party does not appear at the interlocutory hearing, then the judge must, within six weeks of the introductory hearing, fix a procedural time table and a final hearing date.

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[62] Id at22.
[63] Id at 23.
[64] Richard L. Marcus, *Sloughing toward Discretion*, 76Notre Dame L.Rev.1561,1606 (2002).
[65]A.Stadler, supra note9 at 58.
[66] Stephen Stewart and Annik Bouché, *Civil Court Case management in England and Wales and Belgium: Philosophy and Efficiency*, 28CJQ. Issue 2, 208(2009).

It is necessary for a court to make a case management plan and to make a proper order for compliance. The court also has a duty to encourage the parties to cooperate with each other in the conduct of the proceedings.

sts of laying down an appropriate case management plan at an early stage of the litigation, for the resolution of the dispute and implementing it.

In Japan, The Code of Civil Procedure of 1996 reinforces preliminary proceedings to arrange issues and enhance the means of collecting evidence in order to expedite civil litigation[67].

The Act on Expediting of Trials(*Saiban no jinsokukanikansuru Horitsu)* was established in 2003. The objective of it is to conclude the proceedings of the first instance in as short a time as possible within a period of two years(Art.2).

In order to clarify the matters required for promoting the expediting of trials, the Supreme Court shall conduct a comprehensive review of the expediting of trial investigation and analysis of the conditions of the proceedings at the court (Art. 8).

the average of time between the filing and final judgment of civil litigation in course of first instance within two years[68].

However in specialized litigation such as medical malpractice ,architectural disputes and mass tort cases, many of them still last more than five or sometimes even ten years in courts of first instance alone.

In order to improve complex litigation, the reform of Code of Civil Procedure in 2003 to introduce the schedule of Proceedings. [69]

The court and the parties, in order to achieve proper and prompt trial ,shall ensure the well-organized progress of court proceedings(Art.147-2). The court, when it finds it necessary in order to achieve a proper and prompt trial in light of the complexity of a case which involves a number of or complicated matters to be examined or any other shall consult with both parties and formulate a plan for trial(Art.147-3). The schedule should include a time frame for the arranging of issues and evidence , a time frame for the examination of witness and the expected dates and times to close oral hearing and render judgment. Each procedural step should be carried out in accordance with the schedule. If the court finds that it is necessary to implement the schedule, it may set a dead line for producing allegation or evidence with regard to a

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[67] For general information of the 1996 reform of the Code of Civil Procedure, see Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan-A Procedure for the Coming Century*?,45Am.J.Comp.L.767(1997); Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective* ,46U.Kan. L.Rev.687(1998); Masahiko Omura, *A Comparative Analysis of Trial preparation: Some aspects of the New Japanese Code of Civil Procedure* , in T*oward Comparative Law in the 21 st Century* 723(Ed: Takayuki Shiibashi ,1998)) ;Shozo Ota, *Reform of Civil Procedure in Japan*,49Am.J.Comp.L.561(2001).

[68] Ikuo Sugawara and Eri Osaka, *Costs of Litigation in Japan*, in T*he Costs and Funding of Civil Litigation: A Comparative Perspective*, 381(Eds:C.Hodges and M.Tulibacka ,2010) .

[69] Miki supra note 45 at 46.

specific matters.

The court can also dismiss allegations or evidence in breach of the deadline if it finds that the breach may cause a significant disturbance to the progress of litigation resulting from a delay in the schedule.

As a result in 2010, the average of time between the filing and final judgment of civil litigation is 6.5months (including default judgment). This is mainly the number of bad loan cases is increasing. The issues of bad loan cases are limited and examination of witness is seldom conducted. The average of time between the filing and final judgment of civil litigation excluding bad loan 8.1months[70].

The average of time between the filing and final judgment of medical malpractice has been also improved from 35.6 months in 2000 [71]to 24.6 months in 2010,[72] but it still takes longer time for preparation and examination of evidence compared to other civil cases.

If the factual or legal issues is clarified in dispute, it helps to illuminate possible grounds for motion to dismiss and for summary judgment. It will facilitate pretrial disposition. Increased reliance to summary judgment as preferable to other features of case management , particularly settlement promotion.

2 Sanction

The courts have extensive powers to issue various sanctions against litigants or lawyers who unreasonably delay in individual cases.

In England, namely by the following: costs orders; an order to stay proceedings: striking out , whether in part or whole, a claim or defense[73].

Once such a sanction has been prescribed by the rules or orders issued by the court in exercise of its managerial powers[74], it will apply automatically unless a defaulting party succeeds in an application to the court to challenge it.

The court is also given power to grant a relief from a sanction imposed for non-compliance ,are designed to balance the need for enforcement and flexibility[75].

The court will consider following factors when deciding whether to exonerate a party who has failed to comply with a rule, direction or order [76]:

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[70] General Secretariat of the Supreme Court, *Review Report of the Expediting of Trials*(Summary),1302*Hanrei Times*,9, 10-11(2009) （in Japanese）.

[71] Moriaki Okada,*Overview of Recent Issues of Medical Malpractice based on Judicial Statistics*,226*Minji Joho*2,5(2005). （in Japanese）

[72] General Secretariat of the Supreme Court, supra note 70 at 19-20.

[73] Andrews, supra note 50 at364.

[74] CPR3.8.

[75] Andrew Higginss, *The Cost of Case Management: What should be Done Post-Jackson?*, 29 C J Q 317 (2010).

[76] CPR3.9.

(a) The interests of the administration of justice;
(b) Whether the application for relief has made promptly;
(c) Whether the failure to comply was intentional;
(d) Whether there is a good explanation for the failure;
(e) The extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
(f) Whether the failure to comply was caused by the party or his legal representative;
(g) Whether the trial date or the likely trial date can still be ,et if relief is granted;
(h) The effect which the failure to comply had on each party;
(i) The effect which granting of relief would have each party.

The discretionary enforcement of compliance [77] means that the consequence of non-compliance is not known in advance but rather require court decision for their determination[78]. Defaults therefore have the potential of creating more litigation because in most cases each party can reasonably assume that they have good prospects of succeeding or opposing an application[79]. It distracts the court from the task of deciding the dispute on the merits. How large this risk is depends on the way that the court exercises its discretion. If the court considers accuracy of decision and the function of protecting rights as important but does not make much of considering the avoidance of unnecessary delay or cost, discretion will be exercised to forgive default as a matter of routine ,the defaulting party's case is not defeated on procedural grounds and without a proper determination of substantive merits. It inevitably increases delays and costs, undermining the CPR's overriding objective of dealing with case justly[80]..

Prior to CPR, the approach was governed by the decision *Birkett v. James*;

" The power［to dismiss an action for want of prosecution］should be exercised only where the court is satisfied either(1) that the defendant has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court ;or (2)(a)that there has been inordinate and in excisable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to substantial risk that is not possible to have a fair trial of the issue in the action or is such s is likely to cause or have caused

[77] The lists of factors of CPR 3.9 is not exclusive and in an appropriate case the court was required to "stand back " and assess the significance of all relevant circumstances in deciding whether to grant relief(Woodhouse v Consignia plc ［2002］1WLR2558,CAat paras40-45; hansom v Erex Makin & Co ［2003］ EWCA Civ180at ［20］.)

[78] Zuckeman, supra note57 at 96.

[79] Higgins, supra note 75 at 320.

[80] Id 317.

serious device the defendant either between themselves and the plaintiff or between each other or between them and third party[81]."

The result is that notwithstanding the assertion of court control of the litigation process, Professor Zuckerman argued that the civil justice system is a vital public services that must be managed efficiently and criticized that some judges[82] still remain reluctant to enforce adherence to its own management orders under CPR[83]. The CPR provide the court with all possible means to make decision of own initiative, but it is relatively rare for court to do so because there is no judge with overall responsibility for the case and therefore no one in a position to exercise initiative[84].

A litigant who has complied with case management directions has a legitimate expectation that his opponent should do the same so that the litigation may be concluded within the original time-frame set by the court. To allow the opponent to drag out the process for no legitimate reason is to disappoint the non-defaulting litigant's expectation of expeditious adjudication[85]. It would weaken the binding force of time limits any rule or court order and undermine the orderly and effective determination of disputes. Over time it will weaken the effective protection and enforcement of rights[86].

The parties can agree upon a timetable of arranging issues and evidence and extend the time limits which they are require to observe under the rules or orders of the court when the court ratified as suitable.

In deciding between dismissal and monetary sanctions, two primary considerations often collide. Monetary sanctions for violations of pretrial rules are less drastic and are often favored because they enable a judge to minimize the burden on an innocent client. However, a judge must also weigh the hardship and expense to the opposing party and considerations of judicial efficiency in the balance[87].

In Australia, reversing the decision of the full Federal Court, which upheld the primary judge's refusal to grant leave to amend the defence, The High Court in *Queensland v J L Holdings Pty Ltd* held case management principles to be relevant, but said that they could not be used to

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[81] ［1978］ AC297,318;2 AllER 801,805;Andrews,supra note50 , Paras15.62-15.64;Zuckerman, supra note 57 at 97.

[82] For example, in Brampton v Rusk, the court granted the defendant a three-month adjournment of trial even when the court admitted that the application to adjourn has been made unjustifiably late by the defendant(〔2008〕EWHC216, para16(QB)).

[83] Zuckerman, supra note 57 at96, 106.

[84] Id at104.

[85] Id at 96.

[86] Id at 96; Miki, supra note45 at 50.

[87] Peckham, supra note 12 at 800.

prevent a party from litigating a fairly arguable case.[88]

"Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion[89]."

In *JL Holdings*,the high Court found that the proposed amendment would not likely raise any complex factual issues, and that it might be possible to allow the amendment without vacating the trial date[90].

The *J L Holdings* has preserved a view that the requests for amendments and adjournments ought to be allowed as long as any prejudice can be compensated with an appropriate costs order from 1997[91].

In 2006, Australian National University(ANU) commenced a civil action against its insurers and its insurance broker, Aon Risk Services Australia Limited(Aon) in relation to losses suffered by ANU when several of its properties were destroyed by fire[92].

For a tactical reasons, ANU had chosen to limit the scope of its pleaded case against Aon and had maintained that approach up to the trial date[93]. The effect of the intended amendment was that ANU would be pleading a substantially different case against Aon[94]. The adjournment of trial was granted, the application for the amendment was heard two weeks later and a judgment allowing the amendments was delivered 11 months later. This decision was appealed. The appeal succeeded but only to the cost order was replaced with one for cost on an indemnity basis. The majority agreed that the decision to amend was unreasonably delayed and that no satisfactory explanation had been offered[95], but they found that any amendments could be compensated with an appropriate order for costs.

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[88] *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146.

[89] *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155.
Dawson, Gaudron and McHugh JJ reaffirmed

[90] *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 154.

[91] Camile Cameron, *New Directions for Case Management in Australia*, 29CJQ337(2010); Jeremy .Sher, *Aon Risk Services Australia Limited v Australian National University: The triumph of case management*, 29CJQ13,15(2010).

[92] *AON v ALU* ［2009］ HCA at 27and 38-53.

[93] *AON v ALU* ［2009］ HCA at 27.

[94] *AON v ALU* ［2009］ HCA 27at 39 , 47-48.

[95] *AON v ALU* ［2008］ ACTA 13at 13 , 63.

The High Court allowed the appeal and replaced the decision with an order that ANU's application for leave to amend be dismissed with cost.

"An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *J L Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.

A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient *opportunity* to identify the issues they seek to agitate.

In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

Rule 21 of the Court Procedures Rules [96]recognises the purposes of case management by the courts. It is to facilitate the just resolution of the real issues in civil procedure with minimum delay and expense. The Rule's objectives, as to the timely disposal of cases and the limitation of cost, were to be applied in considering ANU's application for amendment. It was significant that the effect of its delay in applying would be that a trial was lost and litigation substantially recommenced. It would impact upon other litigants seeking a resolution of their cases[97]. What was a "just resolution" of ANU's claim required serious consideration of these matters, and not merely whether it had an arguable claim to put forward. A just resolution of its claim necessarily had to have regard to the position of Aon in defending it. An assumption that costs will always be a sufficient compensation for the prejudice caused by amendment is not reflected in r 21. Critically, the matters relevant to a just resolution of ANU's claim required ANU to provide some explanation for its delay in seeking the amendment if the discretion under

[96] Court Procedure Rules2006(ACT).
[97] J.Sher, supra note 91 at 18.

r 502(1) was to be exercised in its favour and to the disadvantage of Aon. None was provided[98]."

The relevant rules in the Australian Capital Territory had changed to incorporate a more robust case-management focus, similar changes had occurred in other Australian jurisdictions, and various law reform initiatives at the state and federal levels had discussed the problems created by the cost and delay and the importance of judicial case management[99].

The Procedural reforms in New South Wales are the most robust and explicit attempt, among all Australian jurisdictions, give case management a central place in the administration of justice[100]. The Commonwealth of Australia also enacted legislation[101].

Professor Miki criticized the reform of Japanese civil procedure practice without implementing containing sanction provision for implementation or enforcement of their legal effect[102].Under non- sanction scheme, diligence often does not apply leading to a significant unfairness . The court may take that one of the party acted unfaithfully into consideration. Such de facto sanction, however, might be unpredictable and irresponsible[103].

Civil courts are expected to reach determinations of facts and law which are accurate within a reasonable time and at a proportionate cost. A litigant who is defeated by the negligence of his own lawyer will lose the trust of legal profession. The judge generally believes that it is better to reach judgments that true application of the law to the true facts than to insist on compliance with court orders. However non-compliance with process requirements can cause delays, increase costs, or deny litigant an opportunity to adequately prepare or present their case. The court must protect the integrity or fairness of litigation process[104].

The question whether to allow deviation from the pretrial order requires the judge very delicately to balance the competing interests of the opposing parties and society's interest in an efficient and smoothly running judicial system[105].

Parties are adjured to bring forward factual and legal material supporting claims and defenses, especially, assertions, contraventions, objections, evidence and arguments on evidence as is appropriate to the state of the case and to careful conduct of the litigation with a view to expedition of the proceeding[106].

After the close of preliminary oral arguments, the opposite party is supposed to trust that

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[98]AON v ALU［2009］HCA 27at 111-114.

[99] Cameron, supra note91 at 343.

[100] Part 6 of Civil Procedure Act 2005(NSW);Part 2 of Uniform Procedure Rules 2005.See also, Cameron, supra note 91 at 343.

[101] The Access to Justice(Civil Litigation Reforms)Amendment Bill 2009.

[102] Miki, supra note45 at 32,49.

[103] Id at 50.

[104] Higgins, supra note75 at 332.

[105] Peckham, supra note 12 at 800.

[106] In Germany, ∫ ZPO282(1);Murray and Stürner, supra note 9 at 236-37.

the judgment is decided based on the allegation and evidence advanced in preliminary proceedings. A party who has advanced allegations or evidence after the close of preliminary oral arguments, shall explain to the opponent the reasons why he was unable to advance the allegations or evidence prior to the close of preliminary oral hearing. Dismissal order of allegations or evidence not produced within the appropriate time intentionally or by gross negligent should be allowed（Art 157-2 of Japanese Code of Civil procedure）[107].

Draconian rule, such as a claim would be automatically strike out if the claimant did not, within 15months from the date that pleadings were closed, apply to the court for the case to be set down for trial[108]. It inevitable produced very harsh results and it will create tension between parties and the court. It will cause dispute over justification [109]. It might operate unfairly because at the early stage, the court can only conduct a summary trial of merits of application upon limited knowledge of the case.

I think it is still necessary to balance the justice ,delay and cost and it should be the last resort to strike out in order to encourage the cooperation between parties.

Ⅴ Duplicable Litigation and Cooperation among Judges

1 Duplicable litigation and aggregation of case

Although filed separately, cases can be so clearly related that they should be so looked at as part of the same piece of litigation. If such cases are tried separately, without considering their relationship to other pending litigation, the objective of just and efficient resolution of disputes may be frustrate. Allowing separate cases between the same parties on the same or similar issues to proceed independently is not only wasteful ,but encourages parties to forum shop where applicable law is more favorable for claimant and to try to obtain an advantage by multiple litigation of the same matters . Even when separate cases have only some of the same parties or issues, separate litigation can be wasteful and can result in inconsistent or conflicting

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[107] Michiharu Hayashi, *Current Issues in Civil procedure Following the 1996 Reform of the Code of Civil Procedure*, 181 *Mijiho Joho* 2,7-8(2001)(inJapanese).
Professor Miki criticizes that the sanction may be ineffective. The requirement of sanction ("significant" disturbance, "considerable" reason)is too strict and Japanese Judges are reluctant to exercise the power to dismiss allegations and evidence after the appropriate stage has passed under theArt.157(Miki,supra note45 at 48).

[108] Ord. 17,r.11.

[109] Michael Zander, *The Woolf Report: Forwards or Backwards for New Lord Chancellor?*, 16 CJQ208, 213(1997)；Dick Greenslade, *A Fresh Approach: Uniform Rules of Court*, in *Essays on Access to Justice*, supra note6 at 122.

as to impact of judgment in other suits.

Duplicative litigation is the simultaneous prosecution of two or more suites in which some of the parties or issues are so closely related that the judgment in one will necessarily have a res judicata effect on the other[110]. There are three basic types of duplicative litigation have been identified[111].First, multiple suits on the same claim by the same plaintiff against the same defendant("repetitive" suites). Second, a separate suit filed by a defendant to the first action against the plaintiff to the first action, seeking a declaratory judgment that it is no liable under the conditions of the first action or asserting an affirmative claim that arises out of the same transaction or occurrence as the subject matter of the first action ("reactive" suits) and Thirdly, separate action by class members on the same cause of action raised in the class action, seeking to represent the same or similar class.

The cooperation among judges is eminent to handle duplicable litigation proper and efficiently.

In United States, a plaintiff is permitted to combine all clams it has against the same defendants(F.R.Civ.P.18).Plaintiffs are also permitted to sue in combination, or to sue multiple defendants ,whenever their claims arise out of the same transaction occurrence, so long as the claims raise common questions(F.R.Civ.P.20). It is necessary for class action to be certified[112]

（F.R.Civ.P.23(c)).

If the cases are related each other, judges consider informal arrangement to coordinate related litigation. It will save time and reduce cost by eliminating duplication and providing economy scale[113]. It is a fundamental principle of justice that like cases should be accorded like treatment of achieving consistent results. Aggregate treatment does not necessary guarantee consistent results, but a single proceeding is able to avoid the inconsistent outcomes that may result from proceeding and trying similar cases at different times before different judge or jury. Coordination will help judges to take charge of cases.

Thus , when cases are tried individually, the vagaries of time may make an enormous difference in the relevant recovery possibilities of individual plaintiffs. Aggregation will ensure that all case will be resolved together at a particular point in time.

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[110] The terms" parallel proceedings" and "exercise of concurrent jurisdiction" are also used to describe this situation（Note, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings*, 44 U.Chi.L.Rev641(1977)）.

[111] The repetitive and reactive terminology is taken from Allan D Vestal, *Repetitive litigation*, 45 Iowa.L.Rev.525(1960); Allan D. Vestal, *Reactive Litigation*, 47Iowa. L. Rev.11 (1961); Note, supra note 110at 642.

[112] Richard L. Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 Geo. Wash. L. Rev. 324,327 (2010).

[113] Schwarzer et all, supra note 58 at1732 .

When judges work together, they can jointly develop strategies to manage the litigation and facilitate global settlement[114].

Mass torts occur when the conduct of one or more tortfeasors cause a group injury where the individual tort claims within the group have some common factual basis. The two most common types of mass tort mass disasters and mass distribution of defective products. Mass disasters occur when a large group of individuals suffer personal injuries or death at one time and place, such as in airplane crash or a fire. Mass disasters also result when sudden environmental pollution injury persons or property near the pollution source, such as in chemical spills or harmful side effects of medicine.

By contrast the injuries which result from the mass distribution of defective products occur in many different places and at various time. The same defective product may cause injuries to a large group of consumers, or a large group of workers may be injured as a result of contact with toxic products such as asbestos[115].

If these cases proceed separately, duplication and a consequent drain on judicial and private resources. The balancing of efficiency versus fairness leads to the conclusion that the substantial damage claims of mass tort victims deserve an uncompromised due process.

2 Policies disfavoring aggregation

A federal district court, if actions before it involves a common question of law or fact to join for hearing or trial any or all the matters at issue in the action or to consolidate the action(F.R.Civ.P.42). This value encompasses both the right of the plaintiff to manage the case, select the time and forum for asserting his claim and the right of all parties to control the strategies for individually developing their cases[116]. In a mass tort case several factors affect the plaintiff's interest in individual control over his personal injury or wrongful death claim. The individual plaintiff may perceive a number of tactical advantage in proceeding alone.

If a class action is certified, the individual plaintiff may find the law applied by the forum court is not as favorable as the law which would have been applied had he been able to choose his forum. Class members lack the direct control that an individual tort litigation can exercise over his own personal lawyer. Class counsel comes to play an ever-increasing role in decision-making, discovery, proceeding, and settlement of mass tort litigation, whether such litigation is organized as a formal class action or as a consolidation of separate cases[117]. But even with

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[114] Id at1707,1733 .

[115] Roger H. Trangsrud, *Joinder alternative in mass tort litigation*, 70Cornell.L.Rev.779, 780-781 (1994).

[116] Id at 816.

[117] Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 Stan.L.Rev.1475, 1495(2004).

personal injury plaintiffs, it is suspicious that personal control is the norm[118].

Aggregation of cases can at least ensure that the parties on equal footing in a single case that will provide a definitive outcome for all.

The root cause of problem is the inescapable tension between the interest of individual litigants in preserving individual control of claims and procedural fairness, and the interest of the judicial system in the efficient joinder of related claims on the other[119].

Managing complex mass tort litigation fairly and efficiently pos The root cause of problem is the inescapable tension between the interest of individual litigants in preserving individual control of claims and procedural fairness, and the interest of the judicial system in the efficient joinder of related claims on the other es a number of intractable procedural problems. Some judges are concerned about the pleading, services to the parties themselves are very time consuming unless the common lawyers are appointed[120].

Critics also question the necessity for, indeed the desirability of, uniform outcome in related case. If the side effect of product liability is admitted by the judgment , the defendant will offer remaining parties outside of court settlement. Therefore, it is not necessary for remaining parties to take a following action for remedy. On the contrary, if the side effect of product is denied by the judgment, the following court will easily deny the causation even if remaining parties take an action. Therefore it is not right to emphasize the uniform resolution[121].

3 Cooperation among courts to consolidate related actions

A The Judicial Panel on Multidistrict litigation

In United States, the Judicial Panel on Multidistrict litigation(Panel) may consolidate related tort actions before a single judge over the objection of individual plaintiffs, an individual plaintiff has no right to opt out of the consolidated proceedings(1968 Multidistrict Litigation Act 28 U.S.C.A. § 1407)[122]). If the suits are filed in different district court, consolidation is impossible(F.R.Civ.P.42(a)).[123]

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[118] Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*2256, 82 Tul. L. Rev. 2245(2007） .

[119] Trangsrud, supra note115 at780.

[120] Momoji Tao, *With regards to Dispute Resolution as a whole*,42Journal of Civil Procedure37,42-43 （1994）(in Japanese). He was an eminent judge and handled complex litigation.

[121] Id at55-56.Professor Marcus mentioned that gatekeeping about aggregation is a traditional role of judge(Marcus, supra note 118 at327).

[122]The Panel traces its origins to the 1960s when some 2,000 suites were filed in 35different districts involving conspiracy allegations of the electrical equipment price-fixing(J.Heyburn Ⅱ, A View from the Panel: Part of Solution,82 Tul. L .Rev. 2225(2007);P.Neal and Goldberg, The Electrical Equipment Antitrust Cases:Novel Judicial Administration,50A.B.A.L.J.621(1964)).

[123] *Manual for Complex Litigation*(Fourth) § 20.13(2004).

The Panel [124]has a broad power to transfer groups of cases to a single district court for the purpose of developing uniform pretrial procedures to avoid repetitious and overlapping discovery without consideration for personal jurisdiction over the parties. Professor Marcus [125]points out that this model resembles the hierarchical one sketched by Professor Damaška[126].

The court may order consolidation of claims for pretrial proceedings only, for joint trial of common issues, or for joint trial of all issues[127].But the Panel mainly focuses solely upon the potential for convenience, efficiencies, and fairness in pretrial proceedings centralized before a single court. In doing so, the Panel evaluates whether the parties' legitimate discovery needs are substantially similar in all of the proposed transferee actions[128]. Thus the panel achieves aggregate handling of the litigation process, not an aggregate resolution of dispute.

Multiple Litigation to transfer groups of cases to a single district court for the purpose of conducting pretrial. The location of the most parties, witness and evidence is an important factor[129]. But the ideal transferee judge is one with already tight supervision of discovery, coordination of counsel, and judicial promotion of settlement[130].

Transferred case should remain with the transferee court for pretrial court purposes only and must be remanded back to the transferor court for trial[131]

Transferee judge tries to put the litigation into posture to settle or summary judgment order[132] to avoid inefficiency and lack of uniformity of returning all cases to their originate court[133].

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[124] The Panel is consist of seven eminent judges; The Panel's current member is as follows; Judge John G. Heyburn II, Chairman,(United States District Court for the Western District of Kentucky),Judge Kathryn H. Vratil(United States District Court for the District of Kansas),Judge W. Royal Furgeson, Jr.(United States District Court for the Northern District of Texas),Judge Frank C. Damrell, Jr.(United States District Court for the Eastern District of California),Judge Barbara S. Jones(United States District Court for Southern District of New York), Judge Paul J. Barbadoro(United States District Court for District of New Hampshire) and Judge Marjorie O. Rendell(United States Court of Appeals for Third Circuit).

[125] Marcus, supra note118 at2261.

[126] Damaška ,supra note 1 at 19-20, 25, 48-49.

[127] Trangsrud,supra note 115 at801-802;Professor Miki proposes a coordinated litigation unit for complex litigation (*godo shinri*) for complex litigation(Koichi Miki, *Coordinated Litigation Unit for Complex Litigation, Hogakukenkyu*, Vol.70, Nr.10, 38, 78(1997))(in Japanese).

[128] The panel does not look to similarity of the party's legal claims in its centralization analysis(Heyburn, supra note 122at 2237).

[129] Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is not possible*. 82 Tul. L. Rev. 2205,2211(2007)

[130] Id at 2211.

[131] Lexecon Inc.v. Milberg Weiss Bersa & Lerach 523U.S.26,49-41(1998).

[132] Professor Miller analyzed three Supreme Court decisions in 1986 and the judge decides on summary judgment without the benefit of hearing fully developed testimonial evidence in a trial setting. Therefore overly enthusiastic use of summary judgment means that trial worthy case will be terminated pretrial motion paper(Miller, supra note 14at 1041-1077.

[133] Sherman,supra note 129at 2211;Marcus, supra note118 at2275.

Joint or coordinated discovery by plaintiffs and defendants on common issue is desirable because duplicative discovery, serving the same interrogatories on the same parties, taking deposition on the same matters of the same witness, and producing the same documents and physical evidence in two courts rather than a common depository, is wasteful[134]. The substantial costs of discovery and preparation for trial can be reduced if related claims are consolidated for pretrial discovery on the common issues in a single forum.

In complex litigation, consolidation of dispersed litigation and case management have a synergistic effect on one another[135].

In Japan, it is eminent to conduct a preparatory procedure for a complex litigation, but it was not held in major pollution related disease cases such as *Minamata Disease*[136], because setting a schedule and communication between court and parties were difficult. It is also pointed out that Japanese Judges are reluctant to handle complex litigation, they prefer separating cases rather than aggregating cases[137].

Pleading stage screening case

The Panel considers only two issues in resolving transfer motion under § 1407 in new dockets.

First, it considers whether "common questions of fact" among several pending civil actions exist such that centralization of those actions in a single district will further the convenience of the parties and witnesses and promote the just and efficient conduct of the actions. It considers that eliminating duplicable discovery in similar cases, avoiding conflicting judicial rulings, and conserving valuable judicial resources[138]. Second, it considers which federal district and judge are best situated to handle the transferred matters at the coordinated or consolidated pretrial[139].

In United States, a number of federal courts have increasingly stringent requirements for class certification, particularly for cases arising in multiple states.[140]

The Class Action Fairness Act 2005 was another blow to centrality of the class action for resolving mass complex litigation. CAFA allows defendant the unilateral ability to remove most multistate class action to federal court. Given the aversion of many federal courts to class certification of multi state class actions, CAFA could often mean that a case would not be

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134 Schwarzer, et al, supra note 58 at 1707.
135 Marcus, supra note118 at2275.
136 Disease caused by eating fish contaminated by methyl mercury in Kumamoto.
137 Tao, supra note 120 at 48.
138 Heyburn, supra note 13at 2236.
139 Id at 2228.
140 Sherman, supra note129 at2206;Robert G.Bone and David S.Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J.1251(2002); Molot, supra note2at 49.

certified as a class action in the federal court[141] .

In order to avoid this, plaintiffs lawyers might file state-only class actions in state courts or avoid class actions entirely be filing individual suites . However ,this increases the likelihood of disparate litigation in multiple courts and overlapping class actions, making serious problems of judicial administration and global settlement more difficult[142].

Joint or coordinated discovery

Joint or coordinated discovery by plaintiffs and defendants on common issue is desirable because duplicative discovery, serving the same interrogatories on the same parties, taking deposition on the same matters of the same witness, and producing the same documents and physical evidence in two courts rather than a common depository, is wasteful[143]. The substantial costs of discovery and preparation for trial can be reduced if related claims are consolidated for pretrial discovery on the common issues in a single forum[144].

The most basic forms of coordination is scheduling discovery to proceed in tandem. This enables lawyers to prepare simultaneously for discovery in both courts, and gives judge an opportunity to exchange information and discuss discovery matters. Joint scheduling may also extend to other kinds of coordination ,such as sharing resources. It also enhances the chance of a global settlement because all the parties are at the same stage of discovery and privy to the same information, and thus are more likely to make similar assessments about their prospects[145].

The court can ensure that materials discovered in one case can be used in companion cases. Courts may simply accept discovery initially developed in other cases or it issues orders providing that discovery taken in another court's case could be used in the proceedings of the court issuing order[146].

When a court denies formal joinder or consolidation of related claims in a mass tort case, minimize the inefficiencies and cost of trying such claims on an individual basis.

The parties , the counsel, or individual judge can informally coordinate related litigation[147]. Although informal coordination of pretrial coordination of pretrial discovery is often desirable, it is rarely used in practice. It is pointed out that coordination will cause plaintiff's lawyers lose control of their cases and fees. Moreover, the advantages of joint discovery are possible only when the defendant agrees to allow the discovery to be admissible in related cases before the courts. But few defendants have been willing to make such agreements. Therefore courts should

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141 Sherman, supra note129 at 2207.
142 Id at 2208; Marcus, supra note118 at 2270.
143 Schwarzer et al, supra note 4 at 1707.
144 Trangsrud,supra note 115 at849.
145 Id.at 1708.
146 Id. at 1710.
147 Trangsrud, supra note 115 at810.

require the consolidation of claims for pretrial consolidation.

B Group Litigation Order

In England, court can order consolidation of action whenever it is expedient and interests of efficiency(CPR3.1(2)(f))[148].

A series of multi-party cases arose from the mid-1980S and involved unprecedented high number of claimants seeking damages from the same defendants arising out of broadly the same issues mostly personal injury or death claims[149]. The judges involved successive cases invoked their inherent powers to manage cases and constructed a new approach. It was subsequently enshrined in CPR[150].

The Group Litigation Order (GLO) provides that all claims that fall within a definition of the group are included and will be managed together, in the same court by the same judge. A court can make a GLO when there are number of similar claims that 'give rise to common or related issues of fact or law'(CPR19.10.)[151]. A single judge will be appointed to manage the case and will make directions as procedure continues, usually at periodic case management conference.

Claimants who wish to join the group must join a register kept either by the court or by one of the lawyers(CPR19.11.).

The court may appoint lead solicitors, control any advertising of case and set a cut-off date for people to join the procedure ,which is based on opt-in approach[152].

Large group actions require sophisticated collaboration by several judges: one judge to be responsible for managing the substantive issues('the managing judge');another judge to handle procedural matters(this procedural judge will be a Master or District Judge);and a third judge to consider cost(a cost judge)(PD(19B)8)[153].

I t may be decided that all cases should be stay except for one, or a small number of ,test case(s) , in which a ruling may be made on a point of law that arises in other cases. Alternatively , it may necessary to proceed for some time with pleading and investigation of all individual claims, and then select one or more as 'lead case' to be tried first.

The GLO is regarded simply as one of the court's management tools because it is a court's tool for managing cases that have been commenced, even if they may be subsequently extended , on an opt-in basis[154].Therefore if there is a duplication of redress processes such as courts and

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[148] Andrews, supra note 50 at para41.07.

[149] Christopher Hodges, Multi-Party Actions(2001);Andrews, supra note50 at 975

[150]Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe*, 53(2008).

[151] Id at 53;Andrews,supra note 50 at977.

[152] Hodges, supra note147 at54.

[153] Id at 58.

[154] Andrews, supra note50 at 979.

Financial Services Ombudsman, serious issues can arise over the scope for inconsistence[155].

Ⅵ Conclusion

The traditional view of the fundamental difference between the so-called "civil" and "common" law systems in the allegedly crucial different responsibilities of the judge, on the one hand, and of the advocates for the parties, on the other, makes these systems are basically opposite each other[156].

Similar and grossly simplistic conception of the common law judge is that of a passive moderator between presentations organized and directed by rival advocates. The fundamental responsibility for identifying the legal contentions to be considered, the evidence to be considered, and the ultimate basis of judgment remains with the advocates.

However, in both common law and civil law systems, the judge maintains a pivotal role in managing the development of the case and the sequence of addressing and resolving issues, as well as a general managerial role in setting each single hearing.

In both civil and common law systems, the courts have authority to permit amendments to the initial pleadings. Despite this trend, it remains the exception in civil law procedure, where the general philosophy still favors limiting the occasions for the judge to intervene and allow amendments.

In the common law procedure, the much broader power to frame the case conferred to the parties must be considered, as it allows them to intellectually shape the basis of a legal controversy. Hence, in practice most common law judges do not interfere with parties' formulation of the issues, particularly where experienced advocates are involved[157]. In England, the judge has a power to interfere with parties' formulation of the issues, CPR changed the adversary character ,furthermore the role of parties and the court.

In the common law procedure, especially American managerialism deals with discovery: civil law system and other common law countries employ much-less extensive party-initiated discovery.

The civil-law judge's control is over other aspects of pretrial procedure-scheduling, issue definition and narrowing, and settlement promotion[158].

The traditional view of the judicial role and party autonomy have been changed dramatically,

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[155] Hodges, supra note147 at67.

[156] Geoffrey C. Hazardt and Angelo Dondi, *Responsibilities of Judges and Advocates in Civil and Common Law;:Some Lingering Misconceptions Concerning Civil Law Suits*,39Cornell Int'l L.J.59,60(1980).

[157] Thomas D. Rowe,Jr., *Authorized Managerialism Under the Federal Rule- and the Extent of Convergence with Civil-Law Judging*, 36Sw.U.L.Rev. 191,205(2007).

[158] Edward F. Sherman, *The Evolution of American Civil Trial Process towards Greater Congruence with Continental Practice*,7 Tul.J.Int'l and Comp.L.125(1999)..

especially in pretrial and complex litigation. The broad discretion and flexibility of judge is eminent, but it is also necessary to balance the expeditious dispute resolution and protecting the right of parties.