

Class Actions 2021

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Class Actions 2021

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Class Actions*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and the Netherlands.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Jonathan D Polkes and David J Lender of Weil Gotshal & Manges LLP, for their continued assistance with this volume.



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Contents

Introduction	3	Netherlands	54
Jonathan D Polkes and David J Lender Weil Gotshal & Manges LLP		Jeroen van Hezewijk and Sandra Coelen Freshfields Bruckhaus Deringer	
Australia	4	South Korea	60
Andrew Morrison and Colin Loveday Clayton Utz		Joo-young Kim and Hyun-ju Ku Hannuri Law	
Canada	10	Switzerland	66
Jeremy Martin Cassels Brock & Blackwell LLP Myriam Brixi Lavery de Billy LLP		Philipp J Dickenmann CMS von Erlach Poncet AG	
France	20	Taiwan	74
Céline Lustin-Le Core EBA Endrös-Baum Associés		Alan TL Lin and Chun-wei Chen Lee and Li Attorneys at Law	
India	31	United Kingdom	81
Shubhabrata Chakraborti, Dhruv Malik and Madhura Kulkarni Juris Corp, Advocates and Solicitors		Hayley Lund, Jamie Maples and Sarah Chaplin Weil Gotshal & Manges LLP	
Israel	39	United States	91
Hadas Bekel, Naama Ehrlich, Ran Sprinzak and Tomer Weissman Erdinast, Ben Nathan, Toledano & Co		Stacy Nettleton, Eric Hochstadt, David Singh, Luna Barrington, Bambo Obaro, Matthew Connors, Harlan Rosenson and Audrey Stano Weil Gotshal & Manges LLP	
Japan	46		
Oki Mori and Eri Akiyama Nagashima Ohno & Tsunematsu			

Japan

Okii Mori and Eri Akiyama

Nagashima Ohno & Tsunematsu

OVERVIEW

Court system

- 1 | Outline the organisation of your court system as it relates to collective or representative actions (class actions). In which courts may class actions be brought?

Japan has no statutory class action legislation; however, Japanese law permits lawsuits filed by multiple plaintiffs. In addition, there exist special acts that permit particular organisations to represent the interests of consumers by bringing a claim as a plaintiff. Herein, we explain in detail the distinction between litigation carried out by a qualified consumer organisation (QCO) and court proceedings carried out by a specified qualified consumer organisation (SQCO), which are special litigation proceedings created to protect consumer interests that may be filed with any district court that has proper jurisdiction.

Lawsuits filed by multiple plaintiffs

When the number of victims who can be co-litigants is considerable, lawyers sometimes organise a team to search for all potential plaintiffs. In these cases, no special act is applied and the filing and procedures are handled under the Code of Civil Procedure.

Qualified consumer organisation actions

QCOs may, in the interest of multiple unspecified consumers, file a petition for an injunction or an order for necessary measures to be taken concerning certain acts of business operators (a QCO action) (article 12 of the Consumer Contract Act (Act No. 61 of 2000), article 30 of the Act against Unjustifiable Premiums and Misleading Representations (Act No. 134 of 1962), articles 58-18 to 58-24 of the Act on Specified Commercial Transactions (Act No. 57 of 1976) and article 11 of the Food Labelling Act (Act No. 61 of 2000)). There are 21 certified QCOs as of June 2020.

Specified qualified consumer organisation actions

Based on the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (Act No. 96 of 2013) (the Special Act), which was enacted in 2013 and came into effect in 2016, SQCOs may file for 'court proceedings for redress for damage' (an SQCO action) in certain cases where monetary damage has been incurred by a considerable number of consumers in relation to consumer contracts. There are three certified SQCOs as of June 2020.

An SQCO action involves the procedures outlined below.

Litigation regarding common obligations

In the case of 'litigation seeking declaratory judgment on common obligations' (litigation regarding common obligations) (article 3 of the Special Act), the court is tasked with confirming whether the defendant

business operator owes any monetary obligation to a considerable number of consumers based on existing facts and legal causes common to those consumers.

Procedures to determine the target claims

In the procedures to determine the target claims pertaining to the confirmed obligations (target claims), the court confirms whether or not any monetary obligations are owed by the business operator and the amount of damages in relation to each consumer.

- Simple determination proceedings: within one month after the judgment in a litigation regarding common obligations becomes final and binding, the SQCO delegated by the respective consumers with the target claims (target consumers) must file a petition for the commencement of 'simple determination proceedings' (articles 14 and 15 of the Special Act). If a court issues an 'order of commencement of simple determination proceedings', the SQCO carries out the proceedings (articles 19 and 31 of the Special Act). (Hereinafter, target consumers who participate in the simple determination proceedings are referred to as delegating consumers.) The purpose of such proceedings is to speedily determine the substance of the target claims; thus, these proceedings are primarily for the purpose of the SQCO presenting evidence regarding the target claims brought by the target consumers and, in turn, to obligate business operators to address such claims (article 30 of the Special Act). If the SQCO and business operator do not dispute the substance of the target claims, the target claims are deemed to be legitimate (articles 42(3) and 47(1) of the Special Act). If the SQCO and business operator dispute the existence or amount of target claims, the court conducts a hearing with both parties and issues a 'simple determination order' (articles 44(1) and (2) of the Special Act). In the simple determination proceedings, evidence is limited to documentary evidence. Other measures, such as the examination of witnesses, are not allowed (article 45(1) of the Special Act).
- Litigation after objection: the SQCO and the business operator may object and request the commencement of ordinary litigation (litigation after objection). In addition, delegating consumers, who are not parties to the simple determination proceedings, may object and initiate litigation after objection (articles 46(1) and (2) of the Special Act), through which the target claims are determined.

Provisional seizure procedures

SQCOs, without being delegated by any target consumers, may file a petition for an order for a provisional seizure regarding the target claims before filing for an SQCO action (article 56(1) of the Special Act). The procedures for a provisional seizure are generally based on the Civil Provisional Remedies Act.

Frequency of class actions

2 | How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

If the plaintiffs initiate normal lawsuits, in general, the plaintiffs are obliged to bear a considerable financial and mental burden in relation to time-consuming preparations. Moreover, regarding financial resources and information, the disparity between consumers and business operators makes it difficult for consumers to file and carry out an action. Therefore, the number of collective actions in Japan is small compared with that of class actions in the United States.

Considering this situation, the Japanese Diet established systems that make it possible for QCOs and SQCOs to file certain actions in the interest of multiple unspecified consumers. Specifically, a QCO can bring a claim, and, in the case of prevailing and obtaining an injunction, consumers receive the benefits thereof even if they did not participate therein. Regarding an SQCO action, it is not very challenging for consumers to join because they can decide whether to take part in the second stage after the common obligations of the business operator have been confirmed. Nevertheless, there have been few precedents regarding QCO and SQCO actions up to now. According to the Consumer Affairs Agency, as of June 2020, QCO actions have been filed against only 73 business operators since the introduction of QCO actions in June 2007. In addition, as of June 2020, SQCO actions have been filed against only five business operators since the Special Act took effect in October 2016.

It is our belief that the judiciary is receptive to the concept of class action lawsuits.

Legal basis

3 | What is the legal basis for class actions? Is it derived from statute or case law?

QCO and SQCO actions are given legal standing through statutes.

Types of claims

4 | What types of claims may be filed as class actions?

Qualified consumer organisation actions

QCOs may file a petition for either an injunction or an order for necessary measures to be taken concerning the unjust acts of business operators listed under the relevant acts. For instance, under the relevant acts, acts of business operators that constitute unjust solicitation, entering into contracts that include clauses that are considered to be unreasonable, and providing representations that are considered to be false or exaggerated, may be subject to a QCO action.

Specified qualified consumer organisation actions

Claim limitations

First, the claims that may be brought in an SQCO action are limited to those concerning consumer contracts (article 2(iii) of the Consumer Contract Act and article 3(1) of the Special Act). Therefore, for instance, SQCOs may not bring a claim for damages against the issuer of an annual securities report based on false information because there is generally no direct contract between the issuer and consumers.

In addition, SQCOs are only permitted to bring monetary claims (article 3(1) of the Special Act). This means that SQCOs do not have the right to bring a claim for other relief, such as the recall, replacement or repair of defective products.

Moreover, the claims that may be brought are limited to those that fall under the categories listed below (article 3(1) of the Special Act):

- a claim for the performance of a contractual obligation;
- a claim pertaining to unjust enrichment;

- a claim for damages based on the non-performance of a contractual obligation;
- a claim for damages based on a warranty against defects; and
- a claim for damages based on a tort under the Civil Code.

SQCOs may only bring a claim for damages arising in tort under the provisions of the Civil Code; thus, a claim for damages under special acts such as the Product Liability Act may not be brought in an SQCO action.

In addition, secondary losses, loss of profit, damages owing to harm done to the life or body of a person, and damages owing to mental suffering (consolation money) are excluded from the last three points above (article 3(2) of the Special Act). Consequently, if an SQCO brings a claim for damages based on a warranty against defects, the claim is limited to the equivalent of the purchase price of the product and default interest. Further, SQCOs may not bring a claim for consolation money based on the leakage of personal information.

Scope of business operators

In principle, regarding a consumer contract, the business operator that is party thereto is the defendant in an SQCO action (article 3(3) of the Special Act). For example, if products sold by retailers turn out to be defective, SQCOs may not sue the manufacturer of the products, but may sue the retailers who directly sold the products to consumers. However, regarding a claim for damages based on a tort, SQCOs may sue not only the business operator but also the party who is to perform the obligations under the consumer contract or the party who solicited, had another person solicit or encouraged the solicitation of the consumer contract.

Even if the manufacturer may not be sued by SQCOs, the retailers can bring a claim against the manufacturer for reimbursement if an SQCO files an action against the retailers based on a warranty against defects and the retailers pay damages to consumers. Therefore, if an SQCO action is filed, the manufacturer should consider filing an application to intervene and argue the non-existence of any defect.

Transitional limitations (article 2 of the Supplementary Provisions of the Special Act)

SQCOs may not make a claim concerning consumer contracts that were entered into (or torts where the wrongful acts were committed) before the Special Act took effect (ie, 1 October 2016).

Relief

5 | What relief may be sought in class proceedings?

Plaintiffs may seek various types of relief in normal lawsuits; however, QCOs may seek only injunction and SQCOs may seek only monetary payment. Nevertheless, it is possible for QCOs and SQCOs to seek other types of relief by settling with the business operator in a QCO action or in the procedures to determine the target claims.

Initiating a class action and timing

6 | How is a class action initiated? What is the limitation period for bringing a class action? Can the time limit for bringing a class action be paused? How long do class actions typically take from filing to a final decision?

Special requirements prior to filing a complaint

QCOs must, in advance, issue a prospective defendant in a QCO action by way of a written demand for injunction, and, in principle, may not bring a QCO action until one week after this written demand has been received (article 41(1) of the Consumer Contract Act).

With regard to SQCO actions, there are no special requirements to be fulfilled prior to the filing.

Statute of limitations

With respect to a QCO action, no statute of limitations exists.

With respect to an SQCO action, there is no specific statute of limitations other than the general rules of the Japanese Civil Code, which prescribe that a claim shall be extinguished if not exercised within three years from the time that the obligee comes to know that the claim is exercisable or within 10 years from the time that the claim is exercisable (article 166(1) of the Civil Code (Act No. 89 of 1896)). In addition, there is a longer statute of limitations for a claim for damages arising from harm to one's life or person. Namely, a claim involving a breach of a contract is extinguished if not exercised within five years from the time that the obligee comes to know that the claim is exercisable or within 20 years from the time that the claim is exercisable, and a claim involving a tortious act is extinguished if not exercised within five years from the time that the victim comes to know of the damages and the identity of the perpetrator or within 20 years from the time of the tortious act (articles 167, 724 and 724-2 of the Civil Code).

The statute of limitations shall be tolled without filing a lawsuit for a certain period of time upon the demand by an obligee for the fulfillment of an obligation or acknowledgment of obligation by the obligor, upon reaching an agreement to negotiate a claim, and in other specific circumstances (articles 147-152 of the Civil Code). However, SQCOs are not entitled to toll the statute of limitations as target claims substantially belong to target consumers. Therefore, there are no means to toll the statute of limitations for all potential target consumers.

Timing of final decision

The length of time until a final decision is entered varies greatly from case to case. First instance courts shall aim (but are not bound) to render a decision in less than two years from the filing of the lawsuit (article 2(1) of the Act on the Expediting of Trials (Act No. 107 of 2003)). According to the statistics published by the Supreme Court in 2019, for civil lawsuits, the average period of time until a final decision (other than a default judgment) is rendered in the first instance is 13.2 months; however, 4.9 percent of civil lawsuits take two to three years until their conclusion (including cases where a settlement is reached) and it is possible for an intricate case to take more than three years. Additionally, it takes an additional six months on average for appeals. Moreover, if a party appeals to the Supreme Court, additional time would be necessary. Although the average time for the Supreme Court to render a decision is around 2.5 months, if the Supreme Court finds it necessary to examine the case substantively, it would take much longer.

CLASS FORMATION

Standing

7 | What are the standing requirements for a class action?

Only qualified consumer organisations (QCOs) may file a QCO action.

In a specified qualified consumer organisation (SQCO) action, only SQCOs may carry out the litigation regarding common obligations, and the simple determination proceedings (articles 3(1), 12 and 87(1) and (2) of the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (the Special Act)). Moreover, consumers may not intervene in the litigation regarding common obligations (article 8 of the Special Act). On the other hand, after an objection to a simple determination order is filed, not only an SQCO but also the delegating consumers themselves, may carry out the litigation after objection as a party (articles 52(1) and 53 of the Special Act).

Participation

8 | Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

Participation of consumers

Consumers are not required to opt in or opt out of a QCO action.

The system for SQCO actions adopts an opt-in process. Namely, it is necessary for target consumers to delegate powers regarding the filing of proofs of claims and carrying out simple determination proceedings to an SQCO in order to receive monetary payment through the SQCO action (article 31(1) of the Special Act).

Notice and announcement regarding a specified qualified consumer organisation action

When simple determination proceedings commence, the following information is announced or notified to target consumers to invite them to participate in the proceedings.

Notice and announcement by the court

When the court issues an order of commencement of simple determination proceedings, the court immediately provides public notice of the fundamental matters by publishing them in a specific Official Gazette (kanpo) (article 22 of the Special Act).

Notice and announcement made by the specified qualified consumer organisation

The SQCO notifies the known target consumers of the fundamental matters concerning simple determination proceedings, the outline of the SQCO action, and other matters in writing or by electronic means (article 25(1) of the Special Act). In addition, the SQCO must give public notice of the matters above by a reasonable method such as posting an announcement on its website (article 26(1) of the Special Act).

When the SQCO requests a business operator to disclose documents (including electronic records) containing the name and addresses or contacts of target consumers during the period for filing proofs of claims, the business operator may not refuse to disclose them unless an unreasonable amount of expenses or time would be required for the business operator to specify the scope of the documents to be disclosed (article 28(1) of the Special Act). The SQCO may file with the court a petition for an 'order to disclose information' to have the business operator perform the obligation and to have the court issue an order to disclose information, unless the court finds that the case falls under the exception above (article 29 (1) and (3) of the Special Act). An order to disclose information is different from an order to submit documents under the Code of Civil Procedure and it is not prevented from being issued by the fact that the documents fall under the categories in article 220(iv) of the Code of Civil Procedure (Act No. 109 of 1996). Additionally, the business operator may not refuse to disclose documents for the reason that the information is related to the personal information of the target consumers.

Publication by business operator

When requested by an SQCO, a business operator must publish the matters announced by the court in the Official Gazette in a manner readily recognised by the public (article 27 of the Special Act).

Certification requirements

9 | What are the requirements for a case to be filed as a class action?

For a case to be filed as an action regarding common obligations, the following requirements must be met.

Multiplicity

An SQCO action must be related to damage suffered by a considerable number of consumers (article 2(iv) of the Special Act). In a case where there are likely to be several victims (ie, more than a dozen), it is considered that the case satisfies this requirement.

Commonality

An SQCO action must be based on facts and legal causes common to a considerable number of consumers (article 2(4) of the Special Act). It is considered that if an essential part of the facts and fundamental legal causes are common, this requirement is satisfied, and it is not necessary for the causation and damage suffered by each consumer to be common.

Predominance

If it is likely that the court would be required to substantively examine each target consumer in simple determination proceedings to determine matters such as the damage or loss suffered by each target consumer and causation, the court will dismiss the action regarding common obligations for the reason that the requirement regarding predominance is not satisfied (article 3(4) of the Special Act). The following cases are not considered to satisfy this requirement:

- where it is difficult to determine whether the product purchased by each consumer is defective even though the malfunction of a certain product has been confirmed in the litigation regarding common obligations to be the result of a defect;
- where an insurance company refuses to pay insurance money regarding non-life insurance and it is difficult to determine whether the insured event occurred; and
- where comparative negligence is at issue and it is difficult to determine the degree of negligence of each consumer.

10 | How does a court determine whether the case qualifies for a class action?

There is no special procedure for determining whether the requirements for QCO and SQCO actions are satisfied and the court may make such enquiry at any time at its discretion under the Code of Civil Procedure.

Consolidation

11 | Is there a process for consolidating multiple class action filings?

In an SQCO action, when multiple 'actions for declaration of common obligations' (actions regarding common obligations), the subject matter and defendants of which are common, are pending simultaneously, the oral arguments and judicial decisions in such actions must be consolidated (article 7(1) of the Special Act). On the other hand, when multiple actions regarding common obligations, which are based on the same kind of facts and statutory cause, are pending simultaneously, the court may consolidate the actions at its discretion (article 152(1) of the Code of Civil Procedure). An SQCO may not file multiple petitions for the commencement of simple determination proceedings (article 23 of the Special Act); thus, there is never more than one proceeding for a particular matter.

In a QCO action, there are similar procedures regarding the case where multiple actions for injunction, the defendants and subject matter of which are common, are pending simultaneously. However, the court may decide not to consolidate the actions upon considering the progress of the proceedings or other circumstances (articles 44 and 45 of the Consumer Contract Act).

PROCEDURE

Discovery

12 | How does discovery work in class actions?

In Japan, there is no discovery rule similar to that of the United States. Under Japanese law, there are some systems that may be used by parties for collecting evidence, such as a petition for an 'order to submit documents' and making an enquiry through the bar association. However, the scope of the evidence the parties can request to have disclosed is very limited compared to discovery in the United States.

Qualified consumer organisations (QCOs) and specified qualified consumer organisations (SQCOs) may use the system above to collect evidence for QCO and SQCO actions. However, as an exception, the court may not issue an order to submit documents in simple determination proceedings (article 45(2) of the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers).

Privilege and confidentiality

13 | What rules and standards govern non-disclosure of documents on the grounds of professional privilege, litigation privilege or other confidentiality considerations?

There is no attorney-client privilege in Japan. However, the scope of documents subject to disclosure is fairly limited and certain kinds of documents, such as documents relevant to the business secrets of the business operator or those prepared exclusively for the internal use of their holder, are exempted from disclosure obligations (articles 220(iv) (c) and (d) of the Code of Civil Procedure).

Testimony

14 | What rules apply to submission of factual and expert witness testimony? In what circumstances will the court order witness-examination?

In general, written statements and expert opinions are submitted to the court in the course of exchanging arguments, and the timing of submission is not restricted by law. If a party submits them much later than expected, the court may reject the submission (article 157(1) of the Code of Civil Procedure); however, in practice, this rarely happens. Thereafter, upon the parties' request, the court will order witness examinations only if the court finds them necessary.

DEFENCE

Defence strategy

15 | What mechanisms and strategies are available to class-action defendants?

It is essential for business operators to consider reputational risk, because qualified consumer organisation (QCO) and specified qualified consumer organisation (SQCO) actions tend to draw public attention. Even if the business operator ultimately prevails, it is possible that its reputation will be seriously harmed by the filing of the lawsuit. Therefore, appropriate measures should be taken when being contacted by a QCO or SQCO prior to filing. Additionally, while only SQCOs and delegating consumers are legally bound by the judgment in litigation regarding common obligations, in practice, when a court renders judgment in favour of the plaintiff, other courts refer to the judgment in similar cases thereafter; thus, such judgment may trigger similar actions. Therefore, business operators would need to consider entering into a settlement out of court.

Joint defence agreements

- 16 | What rules and standards govern joint defence agreements? Are they discoverable? What are the advantages and disadvantages of these agreements?

Joint defence agreements are not restricted in Japan; however, they are not common in practice. In general, as the scope of documents subject to an 'order to submit documents' is limited to those relevant to the cause of action, it is unlikely that the court will order the submission of a written joint defence agreement.

SETTLEMENT

Approval of settlements

- 17 | Describe the process and requirements for approval of a class-action settlement.

Settlement between a qualified consumer organisation and business operator

There are no special requirements or restrictions in qualified consumer organisation (QCO) actions. However, QCOs may not receive any economic benefit for exercising their right to demand an injunction under any name, in principle (article 28(1) of the Consumer Contract Act), and a QCO may not enter into a settlement agreement by which the business operator pays money to the QCO. On the other hand, it is possible to prescribe a clause regarding a penalty that the business operator shall pay to the QCO in the settlement (article 28(1)(iv) of the Consumer Contract Act).

Settlement between a specified qualified consumer organisation and business operator

First, a specified qualified consumer organisation (SQCO) and business operator may enter into a settlement with regard to the existence of a common obligation in litigation regarding common obligations (article 10 of the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (the Special Act)). In other words, the SQCO may not enter into a settlement agreement that contains clauses that affect the substantive rights of target consumers, such as a clause regarding a monetary payment, repair of defect or replacement of a product by the business operator. In addition, it is considered that an SQCO may not enter into an out-of-court settlement with a business operator before being delegated by the target consumers in simple determination proceedings. On the other hand, it is out of the scope of the Special Act for an SQCO to settle with a business operator out-of-court as a normal consumer organisation. Therefore, unless the settlement disposes of the substantive rights of the target consumers, the SQCO may enter into an out-of-court settlement agreement that contains a clause concerning the withdrawal of the SQCO action.

As to a settlement in simple determination proceedings, there are no special restrictions; therefore, it is also possible for an SQCO to enter into an out-of-court settlement (articles 37, 65(1) and (2)(i) of the Special Act).

Objections to settlement

- 18 | May class members object to a settlement? How?

There is no article that prescribes the right of consumers to object to a settlement in QCO and SQCO actions. However, a settlement between the QCO and business operator in a QCO action does not bind consumers. In addition, if consumers are dissatisfied with a settlement regarding the existence of obligations of the business operator in the litigation regarding common obligations in an SQCO action, they are not bound by it unless they opt in to the simple determination proceedings.

Separate settlements

- 19 | How are separate class action settlements handled?

In cases where some parties are inclined to reach a settlement, the court may, at its discretion, order the separation of oral arguments and proceed with settlement discussions (article 152(1) of the Code of Civil Procedure). However, in cases where multiple actions for injunction filed by QCOs or multiple actions regarding common obligations filed by SQCOs must be consolidated, these actions cannot be separated.

JUDGMENT AND APPEAL

Preclusive effect

- 20 | What is the preclusive effect of a final judgment in a class action?

Qualified consumer organisation action

When the judgment regarding a qualified consumer organisation (QCO) action becomes final and binding, the judgment binds not only the parties but also other QCOs, and, in principle, QCOs that are not plaintiffs in the QCO action may not demand an injunction identical to that in a previous QCO action with respect to a business operator that was a defendant in the previous case (article 12-2(1)(ii) of the Consumer Contract Act). On the other hand, the judgment has no legal effect on consumers.

Specified qualified consumer organisation action

Litigation regarding common obligations

The final and binding judgment in litigation regarding common obligations has legal effect not only on the parties but also other specified qualified consumer organisations (SQCOs) and delegating consumers (article 9 of the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (the Special Act)). Therefore, when the court dismisses an SQCO action, every SQCO is bound by the judgment, whereas there is no possibility that consumers are bound by it, because, in this case, the SQCO may not initiate the simple determination proceedings and there is no delegating consumer because there is no occurrence of the delegation of target consumers, which is to be done in the simple determination proceedings. On the other hand, when an SQCO prevails in the litigation regarding common obligations, target consumers may choose whether to opt in to the SQCO action and receive benefits stemming from the result of the SQCO action.

Procedures to determine target claims

When the content of target claims is finally determined in the simple determination proceedings or litigation after objection, parties and delegating consumers may not argue against the content of target claims thereafter (articles 42(5), 46(6) and 47(2) of the Special Act). However, the scope of the binding power of the judgment is limited to matters concerning the obligation of business operators in the litigation regarding common obligations, and delegating consumers may file another action based on statutory causes other than the causes on which the previous SQCO action was based.

Appeals

- 21 | What type of appellate review is available with respect to class-action decisions?

With respect to the simple determination proceedings in an SQCO action, parties and delegating consumers who are dissatisfied with a simple determination order may object and request to commence the litigation after objection (articles 46(1) and (2) of the Special Act). As to a QCO action and litigation regarding common obligations in an SQCO action,

there is no special rule regarding appeal, and parties who are dissatisfied with a judgment may appeal to the High Court and further to the Supreme Court (or file a petition for the acceptance of a final appeal).

REGULATORY ACTION

Regulators

22 | What role do regulators play in connection with class actions?

The Consumer Affairs Agency that supervises qualified consumer organisations (QCOs) and specified qualified consumer organisations (SQCOs) never intervenes directly in QCO and SQCO actions. However, QCOs and SQCOs are certified under strict requirements by the Prime Minister and supervised by the authorities, and the Prime Minister has the power to rescind the certification (articles 13 and 30 to 34 of the Consumer Contract Act and articles 65, 85 and 86 of the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (the Special Act)). Therefore, it is considered that these systems prevent QCOs and SQCOs from conducting inappropriate acts such as vexatious actions.

Regarding the SQCO action, when three years have passed from the enforcement of the Special Act, the government is to review the status of the enforcement of the Special Act, and, if it finds it necessary, take the required measures based on the results of the review (article 5(2) of the Supplementary Provisions of the Special Act). Three years have now passed since the enforcement of the Special Act, and, therefore, the review of the Special Act is anticipated to commence shortly. We believe that during this review it is likely that the government will address the issue of the number of SQCO actions, which has been fairly low.

In addition, as courts are going to utilise IT in litigation proceedings (eg, e-filing and online hearings), it is likely that e-case management will be introduced in QCO and SQCO proceedings as well.

Private enforcement

23 | Describe any incentives the civil or criminal systems provide to facilitate follow-on actions.

There is no system with the direct purpose of facilitating follow-on actions. However, QCOs and SQCOs must strive to provide consumers with information relevant to QCO and SQCO actions they have filed, such as information regarding judgment and settlement (article 27 of the Consumer Contract Act and article 82 of the Special Act), and the secretary general of the Consumer Affairs Agency must publish the information regarding these actions (article 39(1) and (3) and 48-2 of the Consumer Contract Act; article 3 of the Order for Enforcement of the Consumer Contract Act; articles 90(1) and (3) and 92 of the Special Act; and article 3 of the Order for Enforcement of the Special Act). Consumers who would like to initiate a follow-on action may use this information.

ALTERNATIVE DISPUTE RESOLUTION

Arbitration and ADR

24 | What role do arbitration and other forms of alternative dispute resolution play in class actions? Can arbitration clauses lawfully contain class-action waivers?

Even if there are clauses regarding alternative dispute resolution in the contract between a business operator and consumers, qualified consumer organisations (QCOs) are not bound by them and may file a QCO action because QCOs exercise their own right to demand an injunction in a QCO action. On the other hand, it is likely that QCOs may file an arbitration petition based on an arbitration agreement with a business

operator because the Consumer Contract Act contains articles that take into account the situation above (articles 23(4)(iii) to (vi) of the Consumer Contract Act).

There is no article regarding alternative dispute resolution in the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers, so it is not clear how these clauses between a business operator and consumers are treated in a specified qualified consumer organisation action.

Court-ordered mediation

25 | Do courts order pretrial mediation in class actions? Does the appointment of a mediator make it more likely that the court will approve a settlement?

The court may, at its discretion, refer the case to mediation (article 20 of the Civil Conciliation Act (Act No. 222 of 1951)); however, with the exception of certain kinds of cases, the court initiates settlement discussions by itself and rarely refers a case to mediation.

If the parties reach an agreement, the court generally respects it and makes a record of settlement in accordance with the content of this agreement.

FEES, COSTS AND FUNDING

Contingency fees

26 | What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?

It is necessary to consider two matters: the fees for a qualified consumer organisation (QCO) or specified qualified consumer organisation (SQCO) owed by consumers; and the fees for attorneys-in-fact paid by a QCO or SQCO.

Fees for a qualified consumer organisation or a specified qualified consumer organisation

The relief in respect of QCO actions is an injunction and consumers never participate in a QCO action regardless of the result. Therefore, there is no possibility that a QCO will receive any fees from consumers.

With respect to SQCO actions, an SQCO may receive a payment regarding remuneration or expenses relevant to an SQCO action, and there is no prohibition against contingency fees. However, the secretary general of the Consumer Affairs Agency confirms the amount or the calculation method of the remuneration or expenses above in the application procedure for the certification as an SQCO (articles 66(2)(viii) and 92 of the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (the Special Act) and article 3 of the Order for Enforcement of the Special Act), and certification in respect of a consumer organisation that intends to charge excessive fees may not be granted or may be rescinded (articles 65(4)(vi) and 86(1)(ii) of the Special Act). The Consumer Affairs Agency released a guideline that states that, in respect of the fees for the procedures after filing proofs of claims, SQCOs should allocate more than half of collected monies to the delegating consumers.

Fees for attorneys-in-fact

There is no statutory restriction.

Cost burden

27 | What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?

Attorneys' fees

There is no special rule regarding QCO and SQCO actions. In Japanese litigation, generally attorneys' fees are not included in the litigation costs below and the parties should pay their respective attorneys' fees.

Litigation costs

In principle, the losing party bears the litigation costs under the Code of Civil Procedure (article 61 of the Code of Civil Procedure). Accordingly, the litigation costs consist only of procedural expenses such as the fees for the filing. Thus, the parties' internal expenses for the preparation of litigation such as labour costs are not included in the litigation costs, nor are attorneys' fees.

However, with respect to the simple determination proceedings in an SQCO action, the Special Act prescribes that the parties bear their own expenses other than the particular expenses for each of the target claims, namely 'individual expenses' (article 48(1) of the Special Act). For instance, the SQCO bears the fees for filing the petition for the commencement of the simple determination proceedings and the petition for an order to disclose information. In addition, it is considered that the expenses for the notice and announcement to target consumers are not included in the expenses in the simple determination proceedings above, and the SQCO is to bear them regardless of the result of the SQCO action. On the other hand, as to the individual expenses, the court determines the burden of expenses according to the principle under the Code of Civil Procedure above (articles 49(1) and (3) of the Special Act).

Calculation

28 | How are costs calculated? What costs are typically recovered? Does cost calculation differ in the litigation and settlement contexts?

As litigation costs are limited to procedural expenses only, the calculation thereof is not complicated.

In the case of a settlement, the parties generally agree to bear their own litigation costs and attorneys' fees.

Third-party funding

29 | Is third-party funding of class actions permitted?

Although third-party funding is not prohibited under Japanese law, it is not common in Japan. However, the National Consumer Affairs Centre of Japan may provide security in place of an SQCO to prevent financial problems from discouraging the SQCO from filing a petition for an order for provisional seizure prior to the SQCO action (article 10(vii) of the Act on National Consumer Affairs Centre of Japan (Act No. 123 of 2002)).

Public funding

30 | Is legal aid or other public funding available for class actions?

With respect to a petition for an order for provisional seizure prior to the SQCO action, the National Consumer Affairs Centre of Japan may provide security in place of an SQCO to prevent financial problems from discouraging the SQCO from filing the petition (article 10(vii) of the Act on National Consumer Affairs Centre of Japan). There is no other official legal aid available, and, although private third-party funding is not prohibited under Japanese law, it is not common.

Insurance

31 | Are adverse costs, adverse litigation judgment or after-the-event insurance available?

There is no restriction regarding litigation insurance.

In practice, many Japanese major companies, especially manufacturers, have insurance for legal expenses and product liability. However, after-the-event insurance is not common.

Transfer of claims

32 | Can plaintiffs sell their claim to another party?

QCOs and SQCOs may not sell their claims to another party because only certified QCOs and SQCOs may file a QCO action and an SQCO action, respectively. With respect to the target consumers, it is, in principle, possible to assign a claim under the principle of the Civil Code; however, if a number of target claims are assigned to a person and the person claims a considerable amount in damages, the person would be deemed to be in violation of the Attorney Act because no person may engage in the business of obtaining the rights of others by assignment and enforcing these rights under the Act (article 73 of the Attorney Act (Act No. 205 of 1949)).

Distributing compensation

33 | If distribution of compensation to class members is problematic, what happens to the award?

As the relief in respect of a QCO action is an injunction, there is no distribution. There is no specific rule regarding the distribution of compensation in an SQCO action.

UPDATE AND TRENDS

Legal and regulatory developments

34 | What legislative, regulatory or judicial developments related to class actions are on the horizon?

An SQCO action was filed on 17 December 2018 for the first time since the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers took effect. An SQCO filed a petition against a private medical college that set unjust standards for screening prospective students (eg, gender and the number of failed entrance examinations) and brought a claim for compensation in respect of examination fees on behalf of applicants who were not admitted to the college. In the first stage (ie, litigation regarding common obligations), the court rendered a declaratory judgment on 6 March 2020 in favour of the SQCO, determining that the discriminatory screening of the college constitutes a tort, and, therefore, the applicants are entitled to seek compensation in respect of examination fees. The second stage (ie, procedures to determine the target claims) has not yet commenced.

Additionally, three SQCO actions have been filed to date. These actions are still in the first stage and the media and the public are awaiting their outcome.

Coronavirus

35 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

With respect to QCO and SQCO actions, no special relief programmes are available.

Notably, during the period of the 'state of emergency' declaration in April and May 2020, most of the designated trial dates were postponed and almost all trials were suspended in all courts throughout the country, with the exception of particularly urgent cases. Upon lifting this declaration, the courts have gradually started to designate new trial dates, but even on the newly designated dates, measures to prevent the spread of the pandemic are required (eg, restricting the number of representatives and parties or observers present in open courts, requesting infection prevention measures such as wearing masks and sometimes changing a public hearing to a non-public hearing) and it seems it will take some time for court operations to return to normal.

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