

# Class Actions

*Contributing editors*

**Jonathan Polkes and David Lender**



**2019**

GETTING THE  
DEAL THROUGH 

GETTING THE  
DEAL THROUGH 

# Class Actions 2019

*Contributing editors*

Jonathan Polkes and David Lender  
Weil, Gotshal & Manges LLP

Reproduced with permission from Law Business Research Ltd  
This article was first published in December 2018  
For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

Publisher  
Tom Barnes  
[tom.barnes@lbresearch.com](mailto:tom.barnes@lbresearch.com)

Subscriptions  
James Spearing  
[subscriptions@gettingthedealthrough.com](mailto:subscriptions@gettingthedealthrough.com)

Senior business development managers  
Adam Sargent  
[adam.sargent@gettingthedealthrough.com](mailto:adam.sargent@gettingthedealthrough.com)

Dan White  
[dan.white@gettingthedealthrough.com](mailto:dan.white@gettingthedealthrough.com)

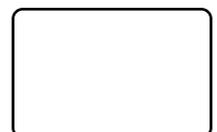


Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3780 4147  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018  
No photocopying without a CLA licence.  
First published 2015  
Fourth edition  
ISBN 978-1-78915-000-1

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between October and November 2018. Be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

|  |           |  |           |
|--|-----------|--|-----------|
| <b>Introduction – GTDT Class Actions</b>   | <b>5</b>  | <b>Japan</b>   | <b>43</b> |
| Jonathan Polkes and David Lender<br>Weil, Gotshal & Manges LLP   |           | Oki Mori and Eri Akiyama<br>Nagashima Ohno & Tsunematsu  |           |
| <b>Argentina</b>   | <b>6</b>  | <b>Korea</b>   | <b>48</b> |
| Gastón Dell’Oca and Federico Sánchez Cortina<br>Forino – Sprovieri – Dell’Oca – Aiello – Attorneys at Law          |           | Joo-young Kim and Jeong Seo<br>Hannuri Law   |           |
| <b>Australia</b>   | <b>9</b>  | <b>Mexico</b>  | <b>51</b> |
| Colin Loveday and Andrew Morrison<br>Clayton Utz   |           | Adrián Magallanes Pérez<br>Von Wobeser y Sierra, SC  |           |
| <b>Austria</b>   | <b>13</b> | <b>Portugal</b>  | <b>56</b> |
| Alexander Klauser<br>Brauneis Klauser Prändl Rechtsanwälte GmbH  |           | Sandra Ferreira Dias and Sandra Jesus<br>Caiado Guerreiro  |           |
| <b>Brazil</b>  | <b>17</b> | <b>Russia</b>  | <b>59</b> |
| Fernanda Ferrer Haddad, Ricardo Quass Duarte and<br>Tiago Vaitekunas Zapater<br>Trench, Rossi e Watanabe Advogados |           | Sergei Volfson and Elza Dauletshina<br>Jones Day   |           |
| <b>China</b>   | <b>21</b> | <b>Switzerland</b>   | <b>62</b> |
| Frank Li, Yanhua Lin, Ellen Zhang and Tianyi Gao<br>Fangda Partners  |           | Philipp J Dickenmann<br>CMS von Erlach Poncet Ltd  |           |
| <b>Colombia</b>  | <b>27</b> | <b>Taiwan</b>  | <b>66</b> |
| Nathalie Lozano-Blanco and Christian Cadena<br>Lozano Blanco & Asociados   |           | Alan TL Lin and Chun-wei Chen<br>Lee and Li, Attorneys-at-Law  |           |
| <b>Denmark</b>   | <b>31</b> | <b>United Kingdom</b>  | <b>70</b> |
| Martin Christian Kruhl and Anders Julius Tengvad<br>DLA Piper Denmark  |           | Jamie Maples, Hayley Lund and Sarah Chaplin<br>Weil, Gotshal & Manges (London) LLP   |           |
| <b>France</b>  | <b>35</b> | <b>United States</b>   | <b>76</b> |
| Céline Lustin-Le Core<br>EBA Endrös-Baum Associés  |           | Stacy Nettleton, Eric Hochstadt, David Singh, Luna Barrington,<br>Matthew Connors and Erin James<br>Weil, Gotshal & Manges LLP |           |

# Preface

## Class Actions 2019

Fourth edition

**Getting the Deal Through** is delighted to publish the fourth edition of *Class Actions*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**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 **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

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.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editors, Jonathan Polkes and David Lender of Weil, Gotshal & Manges LLP for their assistance with this volume. We also extend special thanks to Joel S Feldman and Joshua E Anderson of Sidley Austin LLP, who contributed the original format from which the current questionnaire has been derived, and who helped to shape the publication to date.

GETTING THE  
DEAL THROUGH 

London  
November 2018

# Japan

Oki Mori and Eri Akiyama

Nagashima Ohno & Tsunematsu

## 1 Outline the organisation of your court system as it relates to collective actions. In which courts may class actions be brought?

With regards to collective actions in Japan, apart from normal lawsuits filed by multiple plaintiffs, there are lawsuits where particular organisations can be plaintiffs based on special acts. Herein, we explain in detail 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 and may be filed with a district court that has jurisdiction.

### Normal lawsuits filed by multiple plaintiffs

When the number of victims who can be co-litigants is considerable, lawyers sometimes organise a team and search for participants and then initiate a collective action on a large scale. In this case, the filing and procedures are to be handled under the Code of Civil Procedure.

### Qualified consumer organisation actions

QCOs may, in the interests 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, article 30 of the Act against Unjustifiable Premiums and Misleading Representations, articles 58-18 to 58-24 of the Act on Specified Commercial Transactions and article 11 of the Food Labelling Act). There are 19 certified QCOs as of September 2018.

### Specified qualified consumer organisation actions

SQCOs may file for 'court proceedings for redress for damage' (an SQCO action) regarding financial damage incurred by a considerable number of consumers in relation to consumer contracts based on the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (Special Act), which was enacted in 2013 and came into effect in 2016. There are three certified SQCOs as of September 2018.

An SQCO action involves the procedures outlined below.

### Litigation regarding common obligations

In the 'litigation seeking declaratory judgment on common obligations' (litigation regarding common obligations) (article 3 of the Special Act), the court confirms whether the defendant business operator owes monetary obligations to a considerable number of consumers based on 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 the existence of the business operator's monetary obligations and the amount of damages in relation to each consumer.

- Simple determination proceedings: the SQCO delegated by the respective consumers with the target claims (target consumers) must file a petition for the commencement of 'simple determination proceedings' within one month of the judgment in the litigation regarding common obligations becomes final and binding (articles 14 and 15 of the Special Act). When the 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, the target consumers who delegated the SQCO in the simple determination proceedings are referred to as the delegator consumers. The purpose of these proceedings is to speedily determine the substance of the target claims; thus, these proceedings are primarily for the SQCO to file proofs regarding the target claims of the target consumers and for the business operator to confirm them (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 determined (articles 42(3) and 47(1) of the Special Act). If the SQCO and business operator argue about the existence or amount of the 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: if there is dissatisfaction with the simple determination order, the SQCO and business operator, but also the delegator consumers, may object and request the commencement of ordinary litigation (Litigation after Objection) (articles 46(1) and (2) of the Special Act), through which the substance of the target claims is determined.

### Provisional seizure procedures

SQCOs, without being delegated, 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.

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

With respect to normal lawsuits, in general, it is necessary for the plaintiffs to initiate such lawsuit themselves and be a party thereto (whereas consumers who did not participate in the initial action sometimes file follow-on actions). Therefore, 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 fairly small compared with that of class actions in the United States.

Considering such situation, the Japanese Diet established systems that make it possible for QCOs and SQCOs to file certain actions as a plaintiff in the interest of multiple unspecified consumers. Specifically, if a QCO has prevailed in a QCO action and obtained 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 July 2018, only 56 QCO actions have

been filed since the introduction of QCO actions in June 2007. Also, no SQCO actions have been filed since the Special Act took effect in October 2016.

It is likely that the judiciary is in support of the collective resolution of certain matters.

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

QCO and SQCO actions are derived from statutes.

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

#### Qualified consumer organisation actions

QCOs may file a petition for an injunction or an order for necessary measures to be taken concerning the unjust acts of business operators listed under the relevant acts (see question 1 for the relevant acts). For instance, acts of business operators that constitute unjust solicitation, entering into contracts including clauses that are considered to be unreasonable and representations that are considered to be false or exaggerated under the relevant acts 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.

Also, SQCOs may bring only a monetary claim (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.

It should be noted that 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. Also, 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 for reimbursement against the manufacturer 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 defects.

### 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).

### 5 What relief may be sought in class proceedings?

Plaintiffs may seek various types of relief in normal lawsuits but QCOs may seek only an injunction and SQCOs may seek only a monetary payment. However, 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.

### 6 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 made in consolidation (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 would be no more than one of such proceedings.

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).

### 7 How is a class action initiated?

QCOs shall, in advance, issue a prospective defendant in a QCO action a written demand for injunction that includes certain information such as the gist of the claim and the points in dispute, and, in principle, may not bring a QCO action until one week after such written demand was received (article 41(1) of the Consumer Contract Act).

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

### 8 What are the standing requirements for a class action?

Only QCOs may file a QCO action.

In an 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 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 delegator consumers themselves may carry out the litigation after objection as a party (articles 52(1) and 53 of the Special Act).

### 9 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 induce 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 the official gazette (article 22 of the Special Act).

**Notice and announcement 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 such as the method and period of the delegation of powers in writing or by electronic means (article 25(1) of the Special Act). Also, the SQCO must give public notice of the matters above by a reasonable method such as 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). In other words, the business operator has an obligation to provide a copy of the information above to the SQCO. The SQCO may file with the court a petition for an 'order to disclose information' to have the business operator perform the obligation and 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 because it is not prevented from being issued by the fact that the documents are relevant to the business secrets of the business operator or prepared exclusively for internal use (articles 220(iv) (c) and (d) of the Code of Civil Procedure). 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 noticeable by the public (article 27 of the Special Act).

**10 What are the requirements for a case to be filed as a class action?**

It is necessary for an action regarding common obligations in an SQCO action to fulfil the following requirements.

**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 dozen victims, 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 needs 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). It is considered that the following cases would not 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 is confirmed to result from a defect in the litigation regarding common obligations;

- where an insurance company refuses to pay insurance money regarding nonlife 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.

**11 How does a court determine whether the case qualifies for a collective or 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 inquiry at any time at its discretion under the Code of Civil Procedure.

**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.

QCOs and 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 Special Act).

**13 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 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**

Firstly, an 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 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. Also, 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, so 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).

**14 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. Also, 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.

**15 What is the preclusive effect of a final judgment in a class action?****Qualified consumer organisation action**

When the judgment regarding a QCO action becomes final and binding, the judgment binds not only the parties but also other QCOs, and

### Update and trends

In May 2018, a company launched a new service that provides an online platform for collective actions to solicit victims who intend to assert a claim based on facts or statutory cause common to them and to connect multiple victims and attorneys. This new service is attracting attention, as a national newspaper featured it and reported that the number of registrants of this service exceeded 10,000.

in principle QCOs who 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 who 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 SQCOs and delegator consumers (article 9 of 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 delegator 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 delegator 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 delegator consumers may file another action based on statutory causes other than the causes on which the previous SQCO action was based.

### 16 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 delegator 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).

### 17 What role do regulators play in connection with class actions?

The Consumer Affairs Agency that supervises QCOs and 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 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 (ie, after 1 October 2019), 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).

### 18 What role does arbitration play in class actions? Can arbitration clauses lawfully contain class-action waivers?

Even if there are arbitration clauses in the contract between a business operator and consumers, 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 arbitration in the Special Act, so it is not clear as to how arbitration clauses between a business operator and consumers are treated in an SQCO action.

### 19 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 QCO or 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 of 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 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 of proofs of claims, SQCOs should allocate more than half of collected monies to delegator consumers.

#### **Fees for attorneys-in-fact**

There is no statutory restriction.

### 20 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). In this context, the litigation costs consist of only 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 the filing of 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).

**21 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 National Consumer Affairs Centre of Japan, an Incorporated Administrative Agency Act).

**22 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 is in violation of the Attorney Act because no person shall engage in the business of obtaining the rights of others by assignment and enforcing such rights under the Act (article 73 of the Attorney Act).

**23 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.

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

There is no system the direct purpose of which is to facilitate follow-on actions. However, in practice, when a court passes judgment in favour of the plaintiff, other courts refer to the judgment for similar cases thereafter; thus, such judgment may trigger similar actions. For instance, if an SQCO prevails in an SQCO action, target consumers may file a petition for damages excluded from the scope of claims in the SQCO action. QCOs and SQCOs must strive to provide consumers with information relevant to a QCO action and an SQCO action, respectively, 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 is to 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). Such information would be useful for consumers who intend to raise a follow-on action.

## NAGASHIMA OHNO & TSUNEMATSU

Oki Mori  
Eri Akiyama

oki\_mori@noandt.com  
eri\_akiyama@noandt.com

JP Tower, 2-7-2 Marunouchi  
Chiyoda-ku  
Tokyo 100-7036  
Japan

Tel: +81 3 6889 7000  
Fax: +81 3 6889 8000  
www.noandt.com

## *Getting the Deal Through*

Acquisition Finance  
Advertising & Marketing  
Agribusiness  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Appeals  
Arbitration  
Art Law  
Asset Recovery  
Automotive  
Aviation Finance & Leasing  
Aviation Liability  
Banking Regulation  
Cartel Regulation  
Class Actions  
Cloud Computing  
Commercial Contracts  
Competition Compliance  
Complex Commercial Litigation  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Corporate Reorganisations  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Equity Derivatives  
Executive Compensation & Employee Benefits  
Financial Services Compliance  
Financial Services Litigation  
Fintech  
Foreign Investment Review  
Franchise  
Fund Management  
Gaming  
Gas Regulation  
Government Investigations  
Government Relations  
Healthcare Enforcement & Litigation  
High-Yield Debt  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Joint Ventures  
Labour & Employment  
Legal Privilege & Professional Secrecy  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Banking & Wealth Management  
Private Client  
Private Equity  
Private M&A  
Product Liability  
Product Recall  
Project Finance  
Public M&A  
Public-Private Partnerships  
Public Procurement  
Rail Transport  
Real Estate  
Real Estate M&A  
Renewable Energy  
Restructuring & Insolvency  
Right of Publicity  
Risk & Compliance Management  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
Sovereign Immunity  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
Trade & Customs  
Trademarks  
Transfer Pricing  
Vertical Agreements

*Also available digitally*

# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)