

THE CLASS ACTIONS
LAW REVIEW

FIFTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

THE CLASS ACTIONS
LAW REVIEW

FIFTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in April 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Camilla Sanger

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Gracie Ford

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Martin Roach

SUBEDITOR

Anne Borthwick

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

© 2021 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at April 2021, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-764-5

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARENDE & MEDERNACH

ARNTZEN DE BESCHE

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

CRAVATH, SWAINE & MOORE LLP

GORRISSEN FEDERSPIEL

HENGELER MUELLER

JOHNSON WINTER & SLATTERY

KACHWAHA & PARTNERS

KENNEDYS

LOYENS & LOEFF

NAGASHIMA OHNO & TSUNEMATSU

PINHEIRO NETO ADVOGADOS

RONEN ADINI & CO

SIM CHONG LLC

SLAUGHTER AND MAY

TAMAYO JARAMILLO & ASOCIADOS

URÍA MENÉNDEZ

CONTENTS

PREFACE.....	v
<i>Camilla Sanger</i>	
Chapter 1 AUSTRALIA.....	1
<i>Robert Johnston, Nicholas Briggs and Sara Gaertner</i>	
Chapter 2 BELGIUM.....	14
<i>Hakim Boularbah and Maria-Clara Van den Bossche</i>	
Chapter 3 BRAZIL.....	28
<i>Sérgio Pinheiro Marçal and Lucas Pinto Simão</i>	
Chapter 4 COLOMBIA.....	36
<i>Javier Tamayo Jaramillo</i>	
Chapter 5 DENMARK.....	47
<i>Christian Alsoe, Soren Henriksen and Morten Melchior Gudmandsen</i>	
Chapter 6 ENGLAND AND WALES.....	57
<i>Camilla Sanger, Peter Wickham and James Lawrence</i>	
Chapter 7 FRANCE.....	78
<i>Alexis Valençon and Nicolas Bouckaert</i>	
Chapter 8 GERMANY.....	92
<i>Henning Bälz</i>	
Chapter 9 HONG KONG.....	101
<i>Wynne Mok and Ruby Chik</i>	
Chapter 10 INDIA.....	113
<i>Sumeet Kachwaha and Ankit Khushu</i>	

Contents

Chapter 11	ISRAEL.....	124
	<i>Ronen Adini</i>	
Chapter 12	JAPAN.....	134
	<i>Oki Mori, Aki Watanabe and Natsumi Kobayashi</i>	
Chapter 13	LUXEMBOURG.....	147
	<i>François Kremer and Ariel Devillers</i>	
Chapter 14	NORWAY.....	154
	<i>Andreas Nordby and Jan Olav Aabo</i>	
Chapter 15	PORTUGAL.....	164
	<i>Nuno Salazar Casanova and Madalena Afra Rosa</i>	
Chapter 16	SCOTLAND.....	173
	<i>Colin Hutton, Graeme MacLeod and Kenny Henderson</i>	
Chapter 17	SINGAPORE.....	183
	<i>Sim Chong and Wesley Liang</i>	
Chapter 18	SPAIN.....	193
	<i>Alejandro Ferreres Comella and Cristina Ayo Ferrándiz</i>	
Chapter 19	UNITED STATES.....	201
	<i>Timothy G Cameron, Bradley R Niederschulte and Megan Eloise Vincent</i>	
Appendix 1	ABOUT THE AUTHORS.....	213
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	225

PREFACE

Class actions and major group litigation can be seismic events, not only for the parties involved, but also for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, as reflected in this fifth edition of *The Class Actions Law Review*.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in technology, as well as greater recognition and experience of its limitations, is giving rise to ever more stringent standards, offering the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more sophisticated and active in promoting and pursuing such claims, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this review, this updated publication aims to provide practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the world's most important jurisdictions.

Camilla Sanger

Slaughter and May

London

March 2021

JAPAN

Okii Mori, Aki Watanabe and Natsumi Kobayashi¹

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Until recently, Japan did not have a special system regarding class actions or similar collective actions. Therefore, when the number of victims who can be co-litigants is considerable, such as in pollution or chemical damage cases, lawyers have generally organised a team to search for all potential plaintiffs. In these cases, no special Act is applicable and the filing and procedures are handled under the Code of Civil Procedure (Act No. 109 of 1996). However, if the plaintiffs initiate these normal lawsuits, in general, the plaintiffs would be obliged to bear considerable financial and mental burdens 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 the class actions in the United States. Considering this situation, regarding consumer litigation, special Acts were recently enacted that permit particular consumer organisations certified by the Prime Minister to represent the interests of multiple 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.

i Qualified consumer organisation actions

In June 2007, the Act that permits QCOs to carry out litigation came into effect. 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).² Consumers can receive the benefits thereof even if they did not participate therein. There are 21 certified QCOs as of December 2020.

1 Okii Mori is a partner and Aki Watanabe and Natsumi Kobayashi are associates at Nagashima Ohno & Tsunematsu.

2 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. 70 of 2013).

Regarding jurisdiction, in addition to the locality that constitutes the general venue of the defendant, QCO actions may also be filed with a district court with jurisdiction over the locality in which the certain acts of business operators are conducted.³

ii Specified qualified consumer organisation actions

In October 2016, the act that permits SQCOs to carry out court proceedings came into effect. 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), SQCOs may file for ‘court proceedings for redress for damage’ (an SQCO action) in certain cases where similar monetary damage was incurred by a considerable number of consumers in relation to consumer contracts. There are three certified SQCOs as of December 2020.

An SQCO action involves the procedures outlined below.

The first stage

The first stage is ‘litigation seeking declaratory judgment on common obligations’ (litigation regarding common obligations).⁴ In this stage, the court is tasked with confirming whether a defendant business operator owes any monetary obligation to a considerable number of consumers based on existing facts and legal causes common to those consumers. The consumers are only specified by nature and range and are not specifically identified yet.

The second stage

Only when the judgment in the first stage is issued in favour of the plaintiff SQCO, the second stage begins. It is the procedures to determine the target claims pertaining to the confirmed obligations (target claims). In this stage, each consumer opts in by delegating to the plaintiff SQCO, and the court confirms whether or not any monetary obligations are owed by the defendant business operator and the amount of damages in relation to each consumer. 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. The judgments, including those in the first stage, bind only the consumers who opted in. If the court confirms that a consumer has the right to monetary relief from the defendant business operator, the plaintiff SQCO collects money from the defendant business operator and distributes it to each consumer. Regarding jurisdiction, in addition to the locality that constitutes the general venue of the defendant, SQCO actions may be filed with a district court according to Article 6 of the Special Act. It also permits an SQCO to file an action with a district court of a certain scale when the number of the target consumers is expected to be over 500 or 1,000.

II THE YEAR IN REVIEW

QCOs have been seeking injunctions against about 700 business operators since the introduction of QCO actions in June 2007. It can be said that it is well established in practice. Most cases were resolved outside the proceedings and QCO actions were filed only when resolutions could not be reached. According to the Consumer Affairs Agency, as of

3 Article 43 of the Consumer Contract Act.

4 Article 3 of the Special Act.

December 2020, QCO actions were filed against 73 business operators. On the other hand, as of December 2020, SQCO actions were filed against only five business operators (in four cases) since the Special Act took effect in October 2016. Refund requests by SQCOs outside the proceedings are also not as common as injunction requests by QCOs.

i Recent QCO actions

The Tokyo High Court issued a judgment granting an injunction on 5 November 2020. As this case attracted the attention of practitioners and the public, we introduce this case herein.

A QCO filed a petition against a business operator who operated a portal site and argued that the membership agreement of the site violates the Consumer Contract Act. The membership agreement stipulated that the business operator can revoke one's membership: (1) 'when the company reasonably determines that one has caused unreasonable inconvenience to other members', or (2) 'when the company reasonably determines that one is inappropriate as a member', and stipulated that (3) 'even if the member suffers damage due to the company's measures, the company will not compensate the member for the damage at all'. The Court judged that these clauses violated the Consumer Contract Act because clauses in (1) and (2) were both significantly lacking in clarity and thus clause (3) was an unreasonable clause that exempted all liability for damages based on any default or tort of the business operator. The Court granted the QCO's petition and ordered the suspension of the conclusion of the consumer contract.

This judgment seemed to affect businesses regarding how to evaluate the clarity of standard agreements prepared by business operators and how to remain exempt from the liability of business operators.

ii Recent SQCO actions

No SQCO action has been completed to the end so far. As the first SQCO action is the only case that entered into the second stage, we introduce this case herein.

On 17 December 2018, an SQCO filed a petition against a private medical college that set unjust standards for screening prospective students (e.g., 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 (i.e., the 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 constituted a tort and that, therefore, the applicants were entitled to seek compensation in respect of examination fees. The second stage (i.e., the procedures to determine the target claims) is currently ongoing. The SQCO delegated by the target consumers filed proof in respect of the target claims, but the defendant college disputed part of the target claims themselves and the amounts thereof. In the next proceeding, the court will conduct a hearing and issue a simple determination order.

iii New legislation or announced future changes to the class actions sector

Regarding SQCO actions, 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, is to take the required measures based on the results of the review.⁵ Three

⁵ Article 5, Paragraph (2) of the Supplementary Provisions of the Special Act.

years have passed since the enforcement of the Special Act as of October 2019, and, therefore, the review of the Special Act is anticipated to commence. We believe that, during this review, the government is likely to address the issue of the number of SQCO actions, which has been low.

III PROCEDURE

i Types of action available

Claim limitations of QCO actions

QCOs may file a petition only for 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.

Claim limitations of SQCO actions

The claims that may be brought in an SQCO action are limited to those concerning consumer contracts.⁶ 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.⁷ 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:

- a performance of a contractual obligation;
- b pertaining to unjust enrichment;
- c damages based on the non-performance of a contractual obligation; and
- d damages based on a tort under the Civil Code.⁸

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, SQCOs may not bring a claim for consolation money based on the leaking of personal information.

Scope of business operators

With regard to QCO actions, in principle, a business operator, a trustee of the business operator or an agent of the business operator or the trustee who commits unjust acts listed under the relevant acts is the defendant in a QCO action.⁹

6 Article 2, Item (iii) and Article 3, Paragraph (1) of the Special Act.

7 Article 3, Paragraph (1) of the Special Act.

8 Article 3, Paragraph (1) of the Special Act.

9 Article 12, Paragraph (1) of the Consumer Contract Act.

With regard to SQCO actions, in principle, regarding a consumer contract, the business operator that is party thereto is the defendant in an SQCO action.¹⁰ 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.

Statute of limitations and transitional limitations

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

With regard to SQCO actions, there is no specific statute of limitations other than the general rules of the Japanese Civil Code. The statute of limitations specified by the Japanese Civil Code shall be suspended without filing a lawsuit for a certain period of time upon the demand by an obligee for the fulfilment of an obligation or acknowledgment of obligation by the obligor, upon reaching an agreement to negotiate a claim, and in other specific circumstances.¹¹ However, SQCOs are not entitled to suspend the statute of limitations as target claims substantially belong to the respective consumers with the target claims (target consumers). Therefore, there are no means to suspend the statute of limitations for all potential target consumers.

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

ii Commencing proceedings

Commencing proceedings and participation of consumers in a QCO action

Only a QCO may file a QCO action. In addition, 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.¹² The value of the subject matter of a QCO action, which is the basis for calculating the amount to be paid as a fee when filing the action, is deemed to be ¥1.6 million.¹³ Therefore, a QCO may file a QCO action with a small fee (i.e., ¥13,000).¹⁴

With regard to participation consumers, since QCOs may only seek an injunction, and, in the case of prevailing and obtaining an injunction, consumers receive the benefits thereof even if they did not participate therein. Therefore, consumers are not required to opt in or opt out of a QCO action.

10 Article 3, Paragraph (3) of the Special Act.

11 Articles 147–152 of the Civil Code.

12 Article 41, Paragraph (1) of the Consumer Contract Act.

13 Article 42 of the Consumer Contract Act, and Article 4, Paragraph (2) of Act on Cost of Civil Procedure (Act No. 40 of 1971).

14 Appended Table 1 of Act on Cost of Civil Procedure.

Commencing proceedings and participation of consumers in an SQCO action

In SQCOs actions, only SQCOs may carry out the litigation regarding common obligations, and the simple determination proceedings.¹⁵ There are no special requirements (e.g., sending a written demand) to be fulfilled prior to the filing with regard to SQCO actions. The value of the subject matter of an SQCO action is deemed to be ¥1.6 million.¹⁶ Therefore, an SQCO may file an SQCO action with a small fee (i.e., ¥13,000).¹⁷

In addition, 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.¹⁸ In a case where there are likely to be several victims (i.e., 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.¹⁹ It is considered that if an essential part of the facts and fundamental legal causes are common, then 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.²⁰ The following cases are not considered to satisfy this requirement:

- a* 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;
- b* when an insurance company refuses to pay insurance money regarding non-life insurance and it is difficult to determine whether the insured event occurred; and
- c* where comparative negligence is at issue and it is difficult to determine the degree of negligence of each consumer.

With regard to participation consumers, the system for SQCO actions adopts an opt-in process. That is, 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.²¹

15 Article 3, Paragraph (1), Article 12 and Article 87, Paragraphs (1) and (2) of the Special Act.

16 Article 4 of the Special Act, and Article 4, Paragraph (2) of Act on Cost of Civil Procedure,

17 Appended Table 1 of Act on Cost of Civil Procedure.

18 Article 2, Item (iv) of the Special Act.

19 Article 2, Item (iv) of the Special Act.

20 Article 3, Paragraph (4) of the Special Act.

21 Article 31, Paragraph (1) of the Special Act.

iii Procedural rules

Procedural rules of QCO actions

Proceedings of litigation regarding common obligations are, in principle, handled under the Code of Civil Procedure. However, that the Consumer Contract Act prescribes, that, when there exist multiple actions brought by QCOs, the subject matter and defendants of which are the same, and are pending simultaneously in the same court, the parties are required to report this fact to the court, and the oral arguments and judicial decisions in these actions must be consolidated unless consolidating oral arguments and judicial decisions is found to be extremely unreasonable in light of the progress of the proceedings or other circumstances.²²

Litigation regarding common obligations (the first stage of SQCO actions)

In the case of litigation regarding common obligations,²³ the court is tasked with confirming whether the defendant business operator owes any monetary obligation to a considerable number of consumers based on the existing facts and legal causes common to those consumers.

Proceedings of litigation regarding common obligations are, in principle, handled under the Code of Civil Procedure; provided, however, that the Special Act prescribes the special rule about mandatory consolidation and limitation of supporting intervention.

When multiple litigations regarding common obligations, the subject matter and defendants of which are the same, are pending simultaneously, the parties are required to report such fact to the court, and the oral arguments and judicial decisions in such actions must be consolidated.²⁴ In addition, consumers are not allowed to intervene in the action in order to assist the SQCO.²⁵

Simple determination proceedings (the second stage of SQCO actions)

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.

Within one month of the judgment in a litigation regarding common obligations becoming 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'.²⁶ If a court issues an 'order of commencement of simple determination proceedings', the SQCO carries out the proceedings²⁷ (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 filing evidence regarding the target claims brought by the target consumers, and, in turn, to obligate business operators to address such claims.²⁸ If the SQCO and business operator do not dispute the substance of the target claims, the target claims are deemed to be legitimate.²⁹ If the SQCO and business

22 Article 45 of the Consumer Contract Act.

23 Article 3 of the Special Act.

24 Article 7, Paragraph (1) of the Special Act.

25 Article 8 of the Special Act.

26 Articles 14 and 15 of the Special Act.

27 Articles 19 and 31 of the Special Act.

28 Article 30 of the Special Act.

29 Article 42, Paragraph (3) and Article 47, Paragraph (1) of the Special Act.

operator dispute the existence or amount of target claims, the court conducts a hearing with both parties and issues a ‘simple determination order’.³⁰ In the simple determination proceedings, evidence is limited to documentary evidence. Other measures, such as the examination of witnesses, are not allowed.³¹

Notice and announcement regarding simple determination proceedings in SQCO actions

When simple determination proceedings in an SQCO action commence, the following information is announced or notified to target consumers in order 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*).³²

Notice and announcement made by the SQCO

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.³³ In addition, the SQCO must give public notice of the matters above by a reasonable method such as posting an announcement on its website.³⁴

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 proof of claims, the business operator may not refuse to disclose the documents unless an unreasonable amount of expense or time would be required for the business operator to specify the scope of the documents to be disclosed.³⁵ 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.³⁶ 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, Item (iv) 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 recognised by the public.³⁷

30 Article 44, Paragraphs (1) and (2) of the Special Act.

31 Article 45, Paragraph (1) of the Special Act.

32 Article 22 of the Special Act.

33 Article 25, Paragraph (1) of the Special Act.

34 Article 26, Paragraph (1) of the Special Act.

35 Article 28, Paragraph (1) of the Special Act.

36 Article 29, Paragraph (1) and (3) of the Special Act.

37 Article 27 of the Special Act.

Provisional seizure procedures in SQCO actions

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.³⁸ The procedures for a provisional seizure are generally based on the Civil Provisional Remedies Act (Act No.91 of 1989).

Appeals

With respect to a QCO 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).

With respect to an SQCO action, there is no special rule regarding appeal against the decision made regarding the litigation regarding common obligations in an SQCO action. On the other hand, with respect to the simple determination proceedings in an SQCO action, a SQCO, the business operator or a delegating consumer may file an objection against a simple determination proceedings and request the commencement of ordinary litigation.³⁹

Timing of the final decision

The length of time until a final decision is entered varies greatly from case to case.

In general, first instance courts shall aim (but are not bound) to render a decision in less than two years from the filing of the lawsuit.⁴⁰ Additionally, it takes another six months on average for appeals. Moreover, if a party appeals to the Supreme Court, additional time will be necessary. The average time for the Supreme Court to render a decision is around two and half months.

With regard to QCO actions, it tends to take a relatively long time to reach decisions. Based on the judgments rendered in the past year, it takes from about one and a half years to two and a half years to reach the initial decision, and it takes another half year to one year to reach the decision of the High Court.

With regard to SQCO actions, as mentioned above, no SQCO action has been completed to the end so far, and the first SQCO action is the only case that entered into the second stage. It took one year and three months to reach a decision in the litigation regarding common obligations of the first SQCO action.

iv Damages and costs

Calculation of damages

In SQCO actions, the permitted claims for damages exclude 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).⁴¹ Consequently, if an SQCO brings a claim for damages arising out of defects, the claim is limited to an amount equivalent to the purchase price of the product and default interest.

38 Article 56, Paragraph (1) of the Special Act.

39 Article 46, Paragraphs (1) and (2) of the Special Act.

40 Article 2, Paragraph (1) of the Act on the Expediting of Trials (Act No. 107 of 2003).

41 Article 3, Paragraph (2) of the Special Act.

In addition, the civil judicial system of Japan does not provide for punitive damages. Therefore, in SQCO actions, the judge awards only actual damages. Incidentally, there is no jury system for civil actions.

As mentioned above, SQCO actions have been filed against only five business operators (four cases), and the first SQCO action is the only case that entered into the second stage. In the proceedings of the second stage of the SQCO action, the defendant college disputed part of the target claims themselves and the amounts thereof, and the simple determination order has not been made. Therefore, there has been no judicial precedent that determines the total amount of damages.

Cost burden

With respect to attorneys' fees, there is no special rule regarding QCO and SQCO actions. In Japanese litigation, generally the litigation costs consist only of procedural expenses, such as the fees for the filing, and attorneys' fees are not included in the litigation costs. The parties should pay their respective attorneys' fees.

With respect to the litigation costs, in principle, the losing party bears these, pursuant to the Code of Civil Procedure.⁴²

However, the Special Act prescribes that the parties bear their own expenses in respect of the simple determination proceedings in an SQCO action other than the fees for the filing of proofs of claims and the fees for filing a petition pertaining to a filed claim in simple determination, namely 'individual expenses'.⁴³ As to these individual expenses, the court determines the burden of expenses according to the principle under the Code of Civil Procedure.⁴⁴

v Settlement

Settlement between a QCO and a business operator

There are no special requirements or restrictions on settlement in QCO actions. However, QCOs may not receive any economic benefit for exercising their right to demand an injunction, in the form of a contribution or donation or under any other name, in principle,⁴⁵ and a QCO may not enter into a settlement agreement by which the business operator pays money to the QCO.

When a QCO and business operator enter into a settlement agreement, they are not required to obtain court approval.

Settlement between an SQCO and a business operator

First, in litigation regarding common obligations, an SQCO and business operator may enter into a settlement with regard to the existence of a common obligation.⁴⁶ 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

42 Article 61 of the Code of Civil Procedure.

43 Article 48, Paragraph (1) of the Special Act.

44 Article 49, Paragraphs (1) and (3) of the Special Act.

45 Article 28, Paragraph (1) of the Consumer Contract Act.

46 Article 10 of the Special Act.

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 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.⁴⁷

As with the settlement agreement between a QCO and business operator, when an SQCO and business operator enter into a settlement agreement, they are not required to obtain court approval.

Range of binding power of settlement

In principle, a settlement between a business operator and a QCO or an SQCO, in a QCO action or an SQCO action, does not bind consumers since a settlement is not valid against third parties,⁴⁸ provided, however, that if a business operator and an SQCO enter into a settlement regarding the existence of obligations of the business operator in the litigation regarding common obligations in an SQCO action, and consumers opt in to the simple determination proceedings, the settlement binds these consumers.⁴⁹ Therefore, if consumers are dissatisfied with the settlement in the litigation regarding common obligations, they can seek redress of damages on their own by bringing an action individually unless they opt in to the simple determination proceedings.

Separate settlements

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.⁵⁰ However, in cases where multiple actions for injunctions filed by QCOs, or multiple actions regarding common obligations filed by SQCOs, must be consolidated, these actions cannot be separated.

Defence strategy

It is essential for business operators to consider reputational risk, because QCO and 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. 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, a judgment may trigger similar actions. Therefore, when being contacted by a QCO or an SQCO prior to filing, business operators would be wise to consider entering into a settlement before filing by the QCO or the SQCO.

47 Article 37; and Article 65, Paragraph (1), and Paragraph (2), Item (i) of the Special Act.

48 Article 115, Paragraph (1) and Article 267 of Code of Civil Procedure.

49 Article 9 of the Special Act and Article 267 of Code of Civil Procedure.

50 Article 152, Paragraph (1) of the Code of Civil Procedure.

IV CROSS-BORDER ISSUES

i Overseas claimants

We cannot say that Japan offers favourable options for overseas claimants. Only SQCOs may carry out the litigation regarding common obligations and the simple determination proceedings.⁵¹ Moreover, consumers may not intervene in the litigation regarding common obligations.⁵²

A consumer who falls within the ambit of the target consumers, and who also has a claim that falls within the ambit of the target claims that were recognised in the judgment rendered at the first stage, is able to delegate powers to the SQCO to carry out the second stage. However, the SQCOs may not carry out the filing of proofs of claims with regard to a target claim over which a Japanese court does not have international jurisdiction, pursuant to ©Section 1, Chapter 2, Part 1 of the Code of Civil Procedure.⁵³

Only consumers who delegate powers to the SQCO are bound by the judgment. If consumers overseas are dissatisfied with a judgment in the litigation regarding common obligations in an SQCO action, they are not bound by the judgment unless they opt in to the simple determination proceedings.

ii Overseas defendants

A business operator overseas may become a defendant in an SQCO action when Japanese courts have international jurisdiction pursuant to the Code of Civil Procedure. For example, Japanese courts have international jurisdiction over litigation when the place of performance of the obligation is within Japan; when the action is against a business operator who conducts business in Japan and the claim involves the business that the business operator conducts in Japan; and when the tort occurred in Japan.⁵⁴

V OUTLOOK AND CONCLUSIONS

Regarding QCO actions, most cases have been resolved outside the proceedings, but it can be said that QCO actions are well established in practice.

On the other hand, regarding SQCO actions, the number of SQCO actions has been low, and no SQCO action has been completed to the end although four years have passed from the enforcement of the Special Act. Four SQCO actions have been filed, and one of them has entered the second stage (i.e., simple determination proceedings). The other three cases are still pending at the first stage (i.e., litigation regarding common obligations). This number seems small compared to the number and scale of consumer troubles that are actually occurring.

One of the reasons for this small number of cases seems to be that the current SQCO action system is not easy to use. Even if an SQCO receives information concerning customer trouble, it seems that many cases have not been filed owing to several difficulties, such as restrictions in respect of claimable damage and defendants in SQCO actions, the cost of

51 Article 3, Paragraph (1), Article 12 and Article 87, Paragraphs (1) and (2) of the Special Act.

52 Article 8 of the Special Act.

53 Article 30, Paragraph (3) of the Special Act.

54 Article 3-3, Items (i), (v) and (viii) of the Code of Civil Procedure.

announcements to target customers and difficulties in grasping whether or not a business operator has sufficient assets to compensate for damage to customers. In addition, SQCO certification standards are strict, and there are only three SQCOs.

Pursuant to Article 5, Paragraph (2) of the Supplementary Provisions of the Special Act, upon the elapse of three years from the enforcement of the Special Act, the government is to review the status of enforcement of the Special Act, and, if it finds it necessary, take the required measures based on the results of the review. Although over three years have passed since the enforcement of the Special Act, there so far seems to have been no specific movement towards amendment of the Special Act; however, it is anticipated that the review of the Special Act will commence.

It is expected that further discussions will be held and further improvements will be made.

ABOUT THE AUTHORS

OKI MORI

Nagashima Ohno & Tsunematsu

Oki Mori is a partner at Nagashima Ohno & Tsunematsu. He practises in a wide variety of civil litigation and other dispute resolution procedures including, but not limited to, consumer litigation, corporate litigation, commercial litigation, real estate litigation, finance litigation, labour litigation and tax litigation. Moreover, he specialises in consumer law, such as cases involving the Act against Unjustifiable Premiums and Misleading Representations, food labelling, product recalls or accident reports, the Product Liability Act, the Consumer Contract Act and the Act on the Protection of Personal Information. He has extensive experience in responding to emergency situations involving governmental authorities, such as the Consumer Affairs Agency, mainly in consumer law, and also has obtained many judgments and orders in his favour in administrative litigation and appeal procedures. Furthermore, he was awarded the honour of being named the Dispute Resolution Lawyer of the Year at the ALB Japan Law Awards 2019 hosted by Asian Legal Business.

AKI WATANABE

Nagashima Ohno & Tsunematsu

Aki Watanabe is an associate at Nagashima Ohno & Tsunematsu. Since joining the firm, she has engaged in a wide variety of civil litigation and other dispute resolution matters, including commercial litigation, matters regarding trading by consumers and businesses, labour disputes, intellectual property matters and toxic tort litigation. She graduated with an LLB from the faculty of law of the University of Tokyo in 2012 and a JD from the University of Tokyo School of Law in 2014, and was subsequently admitted to the Bar of Japan in 2015.

NATSUMI KOBAYASHI

Nagashima Ohno & Tsunematsu

Natsumi Kobayashi is an associate at Nagashima Ohno & Tsunematsu. Since joining the firm, she has engaged in a wide variety of civil litigation and other dispute resolution matters, including commercial litigation, matters regarding trading by consumers and businesses, intellectual property matters and labour disputes. She also has experience in matters involving governmental authorities and consumer organisations in Japan, such as the Consumer Affairs

Agency and the Consumers Organization of Japan. She graduated with an LLB from the faculty of law of the University of Tokyo in 2014, and was subsequently admitted to the Bar of Japan in 2016.

NAGASHIMA OHNO & TSUNEMATSU

JP Tower

2-7-2 Marunouchi, Chiyoda-ku

Tokyo 100-7036

Japan

Tel: +81 3 6889 7000

Fax: +81 3 6889 8000

oki_mori@noandt.com

aki_watanabe@noandt.com

natsumi_kobayashi@noandt.com

www.noandt.com/en/

an LBR business

ISBN 978-1-83862-764-5