

Class Actions

Consulting editors

Roger A Cooper, Lina Bensman

Cleary Gottlieb Steen & Hamilton LLP

Quick reference guide enabling side-by-side comparison of local insights, including an overview of the court system, frequency of class actions, legal basis, types of claim and relief; class formation; procedure; defence; settlement; judgment and appeal; regulatory action; alternative dispute resolution; fees, costs and funding, including potential selling of claims; and recent trends

Generated 14 November 2022

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2022 Law Business Research

Table of contents

OVERVIEW

Court system
Frequency of class actions
Legal basis
Types of claims
Relief
Initiating a class action and timing

CLASS FORMATION

Standing
Participation
Certification requirements
Consolidation

PROCEDURE

Discovery
Privilege and confidentiality
Testimony

DEFENCE

Defence strategy
Joint defence agreements

SETTLEMENT

Approval of settlements
Objections to settlement
Separate settlements

JUDGMENT AND APPEAL

Preclusive effect
Appeals

REGULATORY ACTION

Regulators
Private enforcement

ALTERNATIVE DISPUTE RESOLUTION

Arbitration and ADR

Court-ordered mediation

FEES, COSTS AND FUNDING

Contingency fees

Cost burden

Calculation

Third-party funding

Public funding

Insurance

Transfer of claims

Distributing compensation

UPDATE AND TRENDS

Legal and regulatory developments

Contributors

Japan



Oki Mori
oki_mori@noandt.com
Nagashima Ohno & Tsunematsu

NAGASHIMA OHNO & TSUNEMATSU



Mai Umezawa
Nagashima Ohno & Tsunematsu

OVERVIEW

Court system

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. 70 of 2013)). There are 23 certified QCOs as of June 2022.

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 property damage, etc, (property damage and damage due to mental suffering) has been incurred by a considerable number of consumers in relation to consumer contracts. There are four certified SQCOs as of June 2022.

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 (unless otherwise noted, article numbers refer to articles of the Special Act revised in May 2022)), 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) and settlement claims regarding disputes of target claims (settlement claims) (collectively referred to as target claims, etc), 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 four months of the judgment in a litigation regarding common obligations becoming final and binding, the SQCO must file a petition for the commencement of 'simple determination proceedings' (articles 15 and 16 of the Special Act). The period for filing simple determination proceedings may be extended by two months, and up to eight months, if the court deems it necessary, in response to a petition by a SQOC (article 16(2) of the Special Act). If a court issues an 'order of commencement of simple determination proceedings', the SQCO carries out the proceedings (articles 20 and 34 of the Special Act). (Hereinafter, consumers who hold target claims (target consumers) and consumers who hold settlement claims (settlement target consumers) (collectively referred to as target consumers, etc), and 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, etc; thus, these proceedings are primarily for the purpose of the SQCO filing proofs regarding the target claims, etc, brought by the target consumers, etc, and, in turn, to obligate business operators to address such claims (article 33 of the Special Act). If the SQCO and business operator do not dispute the substance of the target claims, etc, the target claims, etc, are deemed to be legitimate (articles 45(3) and 50(1) of the Special Act). If the SQCO and business operator dispute the existence or amount of target claims, etc, the court conducts a hearing with both parties and issues a 'simple determination order' (articles 47(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 48(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 49(1) and (2) of the Special Act), through which the target claims, etc, are determined. Under the revised Special Act, during proceedings of litigation after objection, the litigation may not be withdrawn without the consent of the opposite party (article 60 of the Special Act).

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 61(1) of the Special Act). The procedures for a provisional seizure are generally based on the Civil Provisional Remedies Act.

Law stated - 21 September 2021

Frequency of class actions

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 2022, QCO actions have been filed against only 81 business operators since the introduction of QCO actions in June 2007. In addition, as of June 2022, 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.

Even though five years or more have elapsed since the enforcement of the Special Act, the current SQCO action has not gained much traction and the number of SQCO action cases remains extremely small. Taking into account such circumstances, the Special Act was revised in May 2022 and the revised Special Act will be enforced on 1 June 2023.

Law stated - 21 September 2021

Legal basis

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.

Law stated - 21 September 2021

Types of claims

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 issuers of an annual securities report based on false information because there is generally no direct contract between the issuers 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;
- a claim for damages based on a tort under the Civil Code; (excluding the following category) and
- a claim for damages caused by employees with respect to the execution of the business (this category is newly introduced by the revised Special Act)

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, under the current Special Act, secondary losses, loss of profit, damages owing to harm done to the life or body of a person, and damage due to mental suffering (solatium) are excluded from the third to fifth 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.

As a result of the revision of the Special Act, damage due to mental suffering (solatium) that the current Special Act excludes from the scope of claims may fall within the scope of claims when major facts that serve as the basis for calculating damages are common to a considerable number of consumers, and in conjunction with the foregoing, when either (i) such claim for solatium is made together with a claim for property damage, or (ii) the relevant harm is caused intentionally (article 3(2)(vi) of the Special Act).

Scope of business operators

Under the current Special Act, the defendant(s) must be a business operator (including sole proprietorships) and individuals other than sole proprietorships may not be the defendant (article 2(ii) of the current Special Act). However, as a result of the revision of the Special Act, in cases where (i) a business operator's employee inflicts damage on a third party with respect to the business, (ii) the business operator fails to exercise reasonable care in appointing the employee or supervising the business due to intentional or gross negligence, and (iii-a) the business supervisor (the person that supervises the business on behalf of the employer) fails to exercise reasonable care in appointing the employee or supervising the business due to intentional or gross negligence or (iii-b) the employee inflicts damage on the third party due to intentional or gross negligence, individuals who hold the position of business supervisor or employee may be considered as the defendant exceptionally (article 3(1)(v) and 3(3)(iii) of the Special Act).

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.

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).

Law stated - 21 September 2021

Relief

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, etc.

Law stated - 21 September 2021

Initiating a class action and timing

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 of the time that the obligee comes to know that the claim is exercisable or within 10 years of 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 fulfilment 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, etc, that substantially belong to target consumers, etc. Therefore, there are no means to toll the statute of limitations for all potential target consumers. On the other hand, under the current Special Act, when the filing of proofs of target claims, etc, have been made by SQCOs in simple determination proceedings, a litigation demand is deemed to have been made when the lawsuit pertaining to the litigation regarding common obligations has been filed, and the statute of limitation is tolled (article 38 of the current Special Act). In addition, the revised Special Act also permits the statute of limitation to be tolled in cases where the

litigation regarding common obligations is terminated by withdrawal or dismissal without prejudice of the litigation, or in cases where an SQCO does not file a simple determination proceeding, and in conjunction with foregoing, if the target consumers individually file a lawsuit within six months thereafter (article 68 of the Special Act).

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 2022, for civil lawsuits, the average period of time until a final decision (other than a default judgment) is rendered in the first instance is 14.6 months; however, 9.4 per cent of civil lawsuits take more than two years until their conclusion (including cases where a settlement is reached).

Additionally, according to the report published by the Supreme Court in 2021, it takes an additional 6.8 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 five months, if the Supreme Court finds it necessary to examine the case substantively, it would take much longer.

Law stated - 21 September 2021

CLASS FORMATION

Standing

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), 13 and 93(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 56(1) and 57 of the Special Act).

Law stated - 21 September 2021

Participation

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 34(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, etc, 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 23 of the Special Act).

Notice and announcement made by the specified qualified consumer organisation

Under the current Special Act, the SQCO must notify the known target consumers individually of the fundamental matters concerning simple determination proceedings, the contents of the case, the contents of the final and binding judgment in the litigation regarding common obligations, the extent of the target claims and target consumers, and other matters in writing or by electronic means (article 25(1) of the current 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 current Special Act). However, under the revised Special Act, in order to alleviate the burden on SQCOs with regard to giving such notice, an SQCO is not obliged to repeatedly notify target consumers, etc, to whom the business operator has already notified in response to the request by the SQCO (article 27(1) of the Special Act). Additionally, while an SQCO is continuously obliged to give public notice under the revised Special Act (article 26(1) of the Special Act), an SQCO is allowed to omit certain matters that the SQCO must ordinarily notify the known target consumers of in the notice if such SQCO gives public notice (article 27(2) 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, etc, 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 31(1) of the Special Act). Under the current Special Act, there are no measures to be taken if a business operator does not possess information on target consumers at the time the business operator is requested to disclose the information in the simple determination proceedings due to the fact that the business operator has destroyed such information. However, under the revised Special Act, in order to ensure the effectiveness of information disclosure, a system to preserve the information of target consumers possessed by business operators at the stage prior to the completion of the litigation regarding common obligations will be introduced. In the litigation regarding common obligations, the court may order business operators to disclose documents containing the names and addresses of target consumers, etc, at the request of SQCOs (article 9 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 32 (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.

Notice and publication by business operator

Under the current Special Act, 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 current Special Act). However, due to the revision of the Special Act, in addition to the publication that is required of business operators (article 29 of the Special Act), business operators are also obliged to notify the known target consumers, etc, of information such as the outline of the contents of the case and the SQCO's name when requested by the SQCO (article 28 of the Special Act). Additionally, when an SQCO makes inquiries to a business operator, the business operator is obliged to respond to the SQCO with regard to information such as the prospective number of target consumers, etc, (article 30 of the Special Act).

Law stated - 21 September 2021

Certification requirements

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(iv) 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.

In fact, the decision of the Tokyo District Court on 14 May 2021 dismissed an SQCO action for the reason given in the

third bullet point above. The filing was based on a claim for reimbursement brought against business operators who sold materials regarding cryptocurrency by presenting false or excessively misleading results; however, the court determined that each purchaser was negligent to some extent in respect of entering into the contract with the business operators and the degree of negligence differed from person to person.

Law stated - 21 September 2021

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 inquiry at any time at its discretion under the Code of Civil Procedure.

Law stated - 21 September 2021

Consolidation

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 24 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).

Law stated - 21 September 2021

PROCEDURE

Discovery

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 48(2) of the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers Act (the Special Act)).

Law stated - 21 September 2021

Privilege and confidentiality

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).

In relation to confidentiality, under the current Special Act, anyone can request to inspect records of simple determination proceedings, as is the case with ordinary civil litigation. However, due to the fear that information of target consumers, etc, can be accessed by others, the revised Special Act allows only parties and third parties who display a prima facie interest in the case to inspect records (article 54 of the Special Act).

Law stated - 21 September 2021

Testimony

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.

Law stated - 21 September 2021

DEFENCE

Defence strategy

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.

Law stated - 21 September 2021

Joint defence agreements

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.

Law stated - 21 September 2021

SETTLEMENT

Approval of settlements

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, under the current Special Act, a specified qualified consumer organisation (SQCO) and business operator may enter into a settlement only 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

The revised Special Act abolishes the provision that the scope of a settlement should be limited to the existence of a common obligation in the litigation regarding common obligations, and enables various settlements to be made (article 11 of the Special Act). For example, it has become possible to make a settlement in which the settlement is paid without determining the existence of a common obligation (the responsibility of a business operator) or a settlement in which relief may be sought in a manner other than the payment of money. In addition, since the revised Special Act does not oblige an SQCO to file a petition for the commencement of simple determination proceedings when litigation regarding common obligations is concluded in a settlement (article 15 of the Special Act), it has become possible to realise the contents of a settlement in the litigation regarding common obligations without proceeding to simple determination proceedings. The revised Special Act also stipulates that an SQCO may receive remuneration even if it has reached a settlement in the litigation regarding common obligations (article 82(2) of the Special Act). Moreover, if an SQCO agrees not to sue regarding the common obligation in a settlement within the litigation regarding common obligations, such agreement shall also be effective against other SQCOs (article 11(3) of the Special Act).

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 40, 71(1) and (2)(i) of the Special Act).

Law stated - 21 September 2021

Objections to settlement

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.

Law stated - 21 September 2021

Separate settlements

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.

Law stated - 21 September 2021

JUDGMENT AND APPEAL

Preclusive effect

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 (SQCO) and delegating consumers (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)). 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, etc, 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, etc, 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, etc, 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, etc, thereafter (articles 45(5), 49(6) and 50(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.

Law stated - 21 September 2021

Appeals

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 49(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).

Law stated - 21 September 2021

REGULATORY ACTION

Regulators

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 71, 91 and 92 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 promotion of the SQCO action system, under the current act, problems have been pointed out in regard to the difficulties that SQCOs face in obtaining necessary information or donations because of low public awareness of the SQCO action system and SQCOs, and the fact that physical and material support are not adequate. In order to improve these conditions and enhance the SQCO action system, the revised Special Act introduces a new system for certifying the third party who supports the SQCO action system (Juridical person who supports litigations by consumer organisations). The juridical person who supports litigations by consumer organisations shall provide support to SQCOs by means of providing information to consumers and managing money entrusted by SQCOs (article 98 to 113 of the Special Act).

Law stated - 21 September 2021

Private enforcement



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 88 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 95(1) and (3) and 97 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.

Law stated - 21 September 2021

ALTERNATIVE DISPUTE RESOLUTION

Arbitration and ADR

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.

Law stated - 21 September 2021

Court-ordered mediation

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.

Law stated - 21 September 2021

FEES, COSTS AND FUNDING

Contingency fees

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 72(2)(viii) and 97 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 71(4)(vi) and 92(1)(ii) of the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers). 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.

Law stated - 21 September 2021

Cost burden

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, etc, namely 'individual expenses' (article 51(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, etc, 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 52(1) and (3) of the Special Act).

Law stated - 21 September 2021

Calculation

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.

Law stated - 21 September 2021

Third-party funding

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)).

Law stated - 21 September 2021

Public funding

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.

Law stated - 21 September 2021

Insurance

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.

Law stated - 21 September 2021

Transfer of claims

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)).

Law stated - 21 September 2021

Distributing compensation

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.

Law stated - 21 September 2021

UPDATE AND TRENDS











Legal and regulatory developments

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

A specified qualified consumer organisation (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. In the second stage (ie, the procedures to determine the target claims), the SQCO and college reached an agreement on 27 July 2021 where the college was to pay about ¥67.5 million (approximately US\$500,000/£415,000) to the SQCO, which was equivalent to the amount of compensation for 558 applicants.

Law stated - 21 September 2021

Jurisdictions

| | | |
|---|--------------------|--------------------------------------|
|  | Australia | Clayton Utz |
|  | Belgium | White & Case |
|  | Canada | Lavery Lawyers |
|  | India | Krishnamurthy & Co |
|  | Japan | Nagashima Ohno & Tsunematsu |
|  | Mexico | SEPLAW Sepúlveda y Díaz Noriega SC |
|  | Netherlands | Freshfields Bruckhaus Deringer |
|  | South Korea | Hannuri Law Firm |
|  | Switzerland | CMS Switzerland |
|  | Taiwan | Lee and Li Attorneys at Law |
|  | USA | Cleary Gottlieb Steen & Hamilton LLP |