



# THE CLASS ACTIONS LAW REVIEW

SEVENTH EDITION

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# 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, and this is reflected in this seventh 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 (as well as greater recognition and experience of the limitations of) technology is giving rise to ever more stringent standards, with 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 creative and active in promoting and pursuing class actions, and local laws are being updated to facilitate such actions before the courts.

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

**Camilla Sanger and Peter Wickham**

Slaughter and May

London

March 2023

# JAPAN

*Oki Mori, Natsumi Kobayashi and Hitomi Okada<sup>1</sup>*

## 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, lawyers have generally organised a team to search for all potential plaintiffs and filed a lawsuit that is handled under the Code of Civil Procedure.<sup>2</sup> Therefore, the number of collective actions in Japan is small compared with the number of 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).<sup>3</sup> Consumers can receive the benefits thereof even if they did not participate therein. There were 23 certified QCOs as at December 2022.

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.<sup>4</sup>

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1 Oki Mori is a partner and Natsumi Kobayashi and Hitomi Okada are associates at Nagashima Ohno & Tsunematsu.

2 Act No. 109 of 1996.

3 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).

4 Article 43 of the Consumer Contract Act.



## **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, etc. Incurred by Consumers (the Special Act),<sup>5</sup> 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. As at December 2022, there were four certified SQCOs.

An SQCO action involves the procedures outlined below.

### ***The first stage***

The first stage is ‘litigation seeking declaratory judgment on common obligations’ (the litigation regarding common obligations).<sup>6</sup> In this stage, the court is tasked with confirming whether a defendant 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***

The second stage (which does not commence until the judgment in the first stage is issued in favour of the plaintiff SQCO) is the procedure to determine the target claims pertaining to the confirmed obligations. In this stage, each consumer opts in by delegating authority to the plaintiff SQCO and the court confirms whether or not any monetary obligations are owed by the defendant 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 defendant 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, the plaintiff SQCO collects money from the defendant 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 target consumers is expected to be over 500 or 1,000.

## **II THE YEAR IN REVIEW**

As at the end of April 2022, QCOs had sought injunctions against about 880 business operators since the introduction of QCO actions in June 2007 and they are now 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 at December 2022, QCO actions had been filed against 83 business operators. On the

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5 Act No. 96 of 2013. The amended Special Act will come into force on 1 October 2023. Unless otherwise noted, article numbers refer to articles of the Special Act revised in June 2022, and this review is based on the version of the Act applicable after 1 October 2023.

6 Article 3 of the Special Act.

other hand, as at December 2022, SQCO actions had been 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 because of 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**

As at January 2023, judgments have been issued to approve SQCO claims in the three sets of proceedings regarding common obligations (i.e., the first stage), and the procedures to determine the target claims (i.e., the second stage) have commenced. In one of these actions, the plaintiff SQCO finished distributing the money awarded as damages to each consumer and obtained collective redress for damage to the properties preserved by the provisional seizure. In another case, a settlement entailing an agreement to pay the target consumers was reached during the procedure to determine the target claims and the proceedings were closed. Notably, this latter SQCO action is the first case to have been concluded.

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 the applicants were, therefore, entitled to seek compensation in respect of examination fees. The second stage (i.e., the procedures to determine the target claims) was concluded on 27 July 2021 by way of settlement. The settlement condition was that the college pay the SQCO compensation, including the examination fees and expenses that the target consumers owed to the SQCO with respect to 558 target consumers, and the total amount was about ¥68 million.

### iii Revision of the Special Act

Regarding SQCO actions, the government had intended to review the status of the enforcement of the Special Act three years after its enforcement began. If it found it necessary, it was to take the required measures based on the results of the review.<sup>7</sup> Accordingly, the Consumer Affairs Agency engaged in discussions with experts and solicited public opinions; thereafter, considering that SQCO actions did not gain much momentum and needed to be more effective, the Special Act was revised in June 2022. The amended Special Act will come into force on 1 October 2023.

## 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;<sup>8</sup> for example, 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.<sup>9</sup> 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* damage based on the non-performance of a contractual obligation;
- d* damage based on a tort under the Civil Code; and
- e* damage caused by employees with respect to the execution of business.<sup>10</sup>

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. At present, damages for mental suffering (consolation money) are currently excluded from the scope of the claims that can be made under the Special Act; however, as a result of the amendment of the Special Act, such damages are to become permissible when major facts that serve as the basis for calculating damages are

<sup>7</sup> Article 5, Paragraph (2) of the Supplementary Provisions of the Special Act.

<sup>8</sup> Article 2, Item (iii) and Article 3, Paragraph (1) of the Special Act.

<sup>9</sup> Article 3, Paragraph (1) of the Special Act.

<sup>10</sup> Article 3, Paragraph (1) of the Special Act.

common to a considerable number of consumers. Specifically, a claim for consolation money is permissible when: (1) the claim is made together with a claim for property damage; or (2) the relevant harm was caused intentionally.<sup>11</sup>

### ***Scope of business operators***

In principle, the defendant in a QCO action is 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.<sup>12</sup>

In principle, the business operator that is party to a consumer contract is the defendant in an SQCO action.<sup>13</sup> 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.

In addition, under the amended Special Act, where a business operator's employee causes damage to a third party in the course of the employee's duties, the following individuals may also be considered to be the defendant in exceptional cases:

- a* the employee who, through intentional or gross negligence, caused damage to the third party in the course of their duties; and
- b* the business supervisor (the person who supervises the business on behalf of the business operator) who, through intentional or gross negligence, failed to exercise reasonable care either in appointing the employee who caused the damage or in supervising the business.<sup>14</sup>

### ***Statute of limitations and transitional limitations***

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

There is no specific statute of limitations for SQCO actions other than the general rules of the Japanese Civil Code. The statute of limitations specified by the Civil Code shall be suspended, without a lawsuit having been filed, for a certain period upon demand by an obligee for the fulfilment of an obligation or acknowledgment of obligation by the obligor, or upon reaching an agreement to negotiate a claim, and in other specific circumstances.<sup>15</sup> However, SQCOs are not entitled to suspend the statute of limitations as target claims pertaining to the confirmed obligations substantially belong to the individual consumers who hold target claims pertaining to the confirmed obligations (target consumers). Therefore, there are no means to suspend the statute of limitations for all potential consumers who hold target claims pertaining to the confirmed obligations. However, under the amended Special Act, following the filing of proofs of target claims pertaining to the confirmed obligations and settlement claims regarding disputes of these claims (settlement claims) (hereinafter the target claims and the settlement claims are collectively referred to as the Target Claims unless stated otherwise) by SQCOs in simple determination proceedings, a request to initiate litigation is

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11 Article 3, Paragraph (2), Item (vi) of the Special Act.

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

13 Article 3, Paragraph (3), Items (i) and (ii) of the Special Act.

14 Article 3, Paragraph (3), Item (iii) of the Special Act.

15 Articles 147–152 of the Civil Code.

deemed to have been made upon the filing of the lawsuit regarding common obligations and, at this point, the statute of limitations is tolled.<sup>16</sup> The statute of limitations may also be tolled in cases where the litigation regarding common obligations is terminated by withdrawal or dismissal of the litigation without prejudice, or in cases where an SQCO does not file for simple determination proceedings and, in these cases, where the target consumers individually file lawsuits within six months of the termination.<sup>17</sup>

In addition, SQCOs may not make a claim concerning consumer contracts that were entered into before the Special Act took effect (i.e., 1 October 2016) nor a claim with respect to torts where the wrongful acts were committed before this date.

## **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 with a written demand for injunction and, in principle, may not bring a QCO action until one week after this written demand has been received.<sup>18</sup> 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.<sup>19</sup> Therefore, a QCO may file a QCO action with a small fee (i.e., ¥13,000).<sup>20</sup>

With regard to the participation of consumers, QCOs may only seek an injunction and, in the event that the QCO prevails and obtains an injunction, consumers receive the corresponding benefits even if they did not participate; therefore, consumers are not required to opt in or opt out of a QCO action.

### ***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.<sup>21</sup> 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.<sup>22</sup> Therefore, an SQCO may file an SQCO action with a small fee (i.e., ¥13,000).<sup>23</sup>

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

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16 Article 41 of the Special Act.

17 Article 68 of the Special Act.

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

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

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

21 Article 3, Paragraph (1), Article 13 and Article 93, Paragraphs (1) and (2) of the Special Act.

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

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

### ***Multiplicity***

An SQCO action must be related to damage suffered by a considerable number of consumers.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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 the participation of consumers, the system for SQCO actions utilises an opt-in process; therefore, it is necessary for the consumers who hold Target Claims (Target Consumers) to delegate powers to an SQCO regarding the filing of proofs of claims and carrying out simple determination proceedings to receive monetary payment through the SQCO action.<sup>27</sup>

## **iii Procedural rules**

### ***Procedural rules of QCO actions***

Litigation proceedings regarding common obligations are, in principle, handled under the Code of Civil Procedure. However, the Consumer Contract Act states that when the subject matter and defendants of multiple actions brought by QCOs are the same, and are pending simultaneously in the same court, the parties are required to report this fact to the court,

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

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

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

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

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.<sup>28</sup>

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

In the litigation regarding common obligations,<sup>29</sup> the court is tasked with confirming whether the defendant owes any monetary obligation to a considerable number of consumers based on the existing facts and legal causes common to those consumers.

Litigation proceedings regarding common obligations are, in principle, handled under the Code of Civil Procedure; however, the special rule under the Special Act provides for mandatory consolidation and limitation of supporting intervention.

When multiple litigation proceedings regarding common obligations with the same subject matter and defendants are pending simultaneously, the parties are required to report this fact to the court, and the oral arguments and judicial decisions in these actions must be consolidated.<sup>30</sup> In addition, consumers are not allowed to intervene in the action to assist the SQCO.<sup>31</sup>

***Simple determination proceedings (the second stage of SQCO actions)***

In the procedures to determine the target claims pertaining to the confirmed obligations and settlement claims regarding disputes of these claims,<sup>32</sup> the court confirms whether or not any monetary obligations are owed by the defendant and the amount of damages in relation to each consumer.

Under the amended Special Act, within four months of the judgment in the litigation regarding common obligations becoming final and binding, or the termination of the litigation by way of settlement, the SQCO delegated by the Target Consumers must file a petition for the commencement of ‘simple determination proceedings’.<sup>33</sup> The period for filing simple determination proceedings may be extended by not more than two months in response to each petition by an SQCO, if the court deems it necessary; however, the period may not exceed eight months in total from the judgment or the termination by way of settlement.<sup>34</sup> If a court issues an ‘order of commencement of simple determination proceedings’, the SQCO carries out the proceedings<sup>35</sup> (target consumers who participate in the simple determination proceedings and consumers who hold settlement claims and participate in the simple determination proceedings are referred to as ‘delegating consumers’).

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28 Article 45 of the Consumer Contract Act.

29 Article 3 of the Special Act.

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

31 Article 8 of the Special Act.

32 At present, under the Special Act (until the amended Special Act enters into effect), settlement claims are not included in the scope of claims subject to simple determination proceedings.

33 Articles 15 and 16 of the Special Act.

34 Articles 16, Paragraph (2) of the Special Act. At present, under Article 15 of the Special Act (until the amended Special Act enters into effect), the time limit for filing a petition is within one month of the judgment, and there is no provision for extending the time limit unless the period for filing the claim cannot be observed by the SQCO for reasons not attributable to the SQCO (in which case, the SQCO must file a petition for the commencement of simple determination proceedings within two weeks of the grounds having ceased to exist).

35 Articles 20 and 34 of the Special Act.

The purpose of these proceedings is to determine speedily the substance of the Target Claims; thus, their primary objective is the filing of evidence by the SQCO regarding the Target Claims brought by the Target Consumers and, in turn, to oblige the defendant to address these claims.<sup>36</sup> If the SQCO and the defendant do not dispute the substance of the Target Claims, these are deemed to be legitimate.<sup>37</sup> If the SQCO and the defendant dispute the existence or amount of the Target Claims, the court conducts a hearing with both parties and issues a 'simple determination order'.<sup>38</sup> In the simple determination proceedings, evidence is limited to documentary evidence. Other measures, such as the examination of witnesses, are not allowed.<sup>39</sup>

Until the amended Special Act enters into effect, anyone can request to inspect records of simple determination proceedings, as is the case with ordinary civil litigation. However, because of the fear that the information of the Target Consumers may be accessed by others, the amended Special Act allows only parties and third parties that show a *prima facie* interest in the case to inspect records.<sup>40</sup>

### ***Notice and announcement on 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 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.<sup>41</sup>

### ***Notice and announcement made by the SQCO***

The SQCO must give public notice of the fundamental matters concerning simple determination proceedings, the outline of the SQCO action and other matters by a reasonable method such as posting an announcement on its website.<sup>42</sup> However, under the amended Special Act, an SQCO is not obliged to repeatedly notify, *inter alia*, Target Consumers that the business operator has already notified in response to the request by the SQCO.<sup>43</sup> Until the amended Special Act enters into effect, the SQCO has to notify all the known target consumers.<sup>44</sup>

When the SQCO requests a defendant 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 defendant may not refuse to disclose the documents unless an unreasonable amount of expense or time would be required for the defendant

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36 Article 33 of the Special Act.

37 Article 45, Paragraph (3) and Article 50, Paragraph (1) of the Special Act.

38 Article 47, Paragraphs (1) and (2) of the Special Act.

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

40 Article 54 of the Special Act.

41 Article 23 of the Special Act.

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

43 Article 27, Paragraph (1) of the Special Act.

44 Article 25, Paragraph (1) of the Special Act (until the amended Special Act enters into force).



to specify the scope of the documents to be disclosed.<sup>45</sup> In addition, the SQCO may file with the court a petition for an ‘order to disclose information’ to have the business operator perform the obligation, unless the court finds that the case falls under the exception above.<sup>46</sup> 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

Moreover, under the amended Special Act, even during the litigation regarding common obligations, the court may order the defendant to disclose documents containing the name and addresses or contacts of Target Consumers at the request of SQCOs if the SQCO makes a *prima facie* request showing that (1) the defendant owes common obligations, and (2) there are circumstances where it would be difficult to disclose these documents unless requested in advance.<sup>47</sup>

### ***Notice and publication by business operators***

When requested by an SQCO, a defendant must publish the matters announced by the court in the Official Gazette in a manner readily recognised by the public.<sup>48</sup>

In addition, under the amended Special Act, a defendant is also obliged to notify the known Target Consumers of information such as an outline of the details of the case and the SQCO’s name when requested by the SQCO.<sup>49</sup> Moreover, when an SQCO makes inquiries to a defendant, the defendant is obliged to respond to the SQCO, giving information such as the prospective number of Target Consumers<sup>50</sup>

### ***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 pertaining to the confirmed obligations before filing for an SQCO action.<sup>51</sup> The procedures for a provisional seizure are generally based on the Civil Provisional Remedies Act.<sup>52</sup>

### ***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, an SQCO, the defendant or a delegating consumer may file an objection against

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

46 Article 32, Paragraph (1) and (3) of the Special Act.

47 Article 9 of the Special Act.

48 Article 29, Paragraph (2) of the Special Act.

49 Article 28 of the Special Act.

50 Article 30 of the Special Act.

51 Article 61, Paragraph (1) of the Special Act.

52 Act No. 91 of 1989.

a simple determination proceedings and request the commencement of ordinary litigation.<sup>53</sup> During proceedings after an objection has been filed, the litigation may not be withdrawn without the consent of the opposing party.<sup>54</sup>

### ***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.<sup>55</sup> 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-a-half months.

It tends to take a relatively long time for decisions to be reached in QCO actions. Based on the judgments rendered in the past three years, it takes from about one and a half to three years for the initial decision to be reached and another six months to one and a half years for the decision of the High Court to be reached.

With regard to SQCO actions, as mentioned above, three SQCO actions have entered into the second stage, and two of these were concluded by way of settlement or completion of monetary distribution. In addition, one action was rejected by the court of first instance and the High Court on the grounds that the requirement regarding predominance was not satisfied, following which the SQCO appealed to the Supreme Court. Based on these four SQCO actions, we deduce that in relation to the litigation regarding common obligations, it takes from about nine months to two years for the initial decision to be reached and another six months for the decision of the High Court to be reached.

## **iv Damages and costs**

### ***Calculation of damages***

In SQCO actions, the permitted claims for damages exclude secondary losses, loss of profit and damage owing to harm done to the life or body of a person.<sup>56</sup> 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. 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 proceedings of the first SQCO action were closed by way of settlement at the second stage. In another SQCO action, for which the distribution of compensation has already been completed, the amount of money preserved by the provisional seizure (i.e., about ¥2 million) was refunded in proportion to the amount of damage suffered by each consumer who had opted in. Therefore, there has been no judicial precedent determining the total amount of damages.

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53 Article 49, Paragraphs (1) and (2) of the Special Act.

54 Article 60 of the Special Act.

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

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

### ***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.<sup>57</sup>

However, the Special Act stipulates 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'.<sup>58</sup> As to these individual expenses, the court determines the burden of expenses according to the principle under the Code of Civil Procedure.<sup>59</sup>

### **v Settlement**

#### ***Settlement between a QCO and a defendant***

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,<sup>60</sup> and a QCO may not enter into a settlement agreement whereby the defendant pays money to the QCO. On the other hand, it is possible to prescribe a clause that stipulates, in the settlement, a penalty that will be imposed if an obligation owed by the defendant is not fulfilled.<sup>61</sup>

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

#### ***Settlement between an SQCO and a defendant***

First, at present, until the amended Special Act enters into effect, an SQCO and a defendant can enter into a settlement in the litigation regarding common obligations only with regard to the existence of a common obligation.<sup>62</sup> In addition, it is considered that an SQCO cannot enter into an out-of-court settlement with the defendant until it has been delegated by the consumers who hold target claims pertaining to the confirmed obligations in simple determination proceedings. In contrast, the question whether an SQCO settles with a defendant out of court as a normal consumer organisation is outside the scope of the Special Act. Therefore, unless the settlement disposes of the substantive rights of the consumers who hold target claims pertaining to the confirmed obligations, the SQCO can enter into an out-of-court settlement agreement that contains a clause concerning the withdrawal of the SQCO action.

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57 Article 61 of the Code of Civil Procedure.

58 Article 51, Paragraph (1) of the Special Act.

59 Article 52, Paragraphs (1) and (3) of the Special Act.

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

61 Article 28, Paragraph (1), Item (iv) of the Consumer Contract Act.

62 Article 10 of the Special Act (until the amended Special Act enters into force).

The amended Special Act abolishes the provision to limit the scope of a settlement in the litigation regarding common obligations and enables various settlements to be made.<sup>63</sup> For example, it has become possible to make: (1) a settlement in which the settlement is paid without determining the existence of a common obligation (the responsibility of a defendant); and (2) a settlement in which relief may be sought in a manner other than the payment of money, such as repair of defect or replacement of a product. Additionally, when litigation regarding common obligations is concluded in a settlement,<sup>64</sup> it has become possible to realise the contents of this settlement without proceeding to simple determination proceedings. The amended Special Act also stipulates that an SQCO may receive remuneration even if it has reached a settlement in the litigation regarding common obligations.<sup>65</sup> Moreover, if a settlement in the litigation regarding common obligations stipulates that an SQCO will not file an SQCO action regarding the common obligation, this agreement shall also be effective against other SQCOs.<sup>66</sup>

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.<sup>67</sup>

As with the settlement agreement between a QCO and a business operator, when an SQCO and a defendant 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.<sup>68</sup> However, where a defendant and an SQCO enter into a settlement regarding the existence of obligations of the defendant in the litigation regarding common obligations in an SQCO action, and consumers opt in to the simple determination proceedings, the settlement binds these consumers.<sup>69</sup> Therefore, if consumers are dissatisfied with the settlement in the litigation regarding common obligations, they themselves can seek redress in the form of damages by bringing actions 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.<sup>70</sup> 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.

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63 Article 11 of the Special Act.

64 Article 15 of the Special Act.

65 Article 82, Paragraph (2) of the Special Act.

66 Article 11, Paragraph (3) of the Special Act.

67 Article 40; and Article 71, Paragraph (1), and Paragraph (2), Item (i) of the Special Act.

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

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

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

### ***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 the litigation regarding common obligations, in practice, when a court renders a 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 at this stage.

## **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.<sup>71</sup> Moreover, consumers may not intervene in the litigation regarding common obligations.<sup>72</sup>

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.<sup>73</sup>

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.<sup>74</sup>

## **V OUTLOOK AND CONCLUSIONS**

Regarding QCO actions, although most cases have been resolved outside the proceedings, QCO actions are well established in practice.

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71 Article 3, Paragraph (1), Article 13 and Article 93, Paragraphs (1) and (2) of the Special Act.

72 Article 8 of the Special Act.

73 Article 33, Paragraph (3) of the Special Act.

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

On the other hand, the number of SQCO actions, has been low despite the Special Act coming into force six years ago. One of the reasons for this small number of cases seems to be that, at present, under the Special Act (until the amended Special Act enters into force), there are several difficulties in filing an SQCO action, such as restrictions in respect of claimable damage and defendants in SQCO actions, the cost of announcements to target customers and difficulties in grasping whether or not a business operator has sufficient assets to compensate for damage to customers.

However, as described above, some measures to (1) reduce the burden on SQCOs, and (2) make it easier to provide relief to consumers, such as the introduction of the defendant's obligation to notify consumers, are going to be taken by means of the amendment of the Special Act. Although this change may not significantly increase the number of SQCO actions, there may be a possibility that the amendment will affect SQCO actions in the future.

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