

# Class Actions

*Contributing editors*

Joel S Feldman and Joshua E Anderson



2016

GETTING THE  
DEAL THROUGH 

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*Contributing editors*

Joel S Feldman and Joshua E Anderson

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Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

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No photocopying without a CLA licence.  
First published 2016  
ISSN 2059-5468

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



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# Preface

## Class Actions 2016

First edition

**Getting the Deal Through** is delighted to publish the first edition of *Class Actions*, which is available in print, as an e-book and online.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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

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

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Joel S Feldman and Joshua E Anderson of Sidley Austin LLP, for their assistance in devising and editing this volume

GETTING THE  
DEAL THROUGH 

London  
November 2015

# Japan

Tomoo Nishikawa, Takahiro Nonaka and Jun Kashio

Sidley Austin Nishikawa Foreign Law Joint Enterprise

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

### Summary of collective actions in Japan

A summary of the collective actions or similar systems in Japan is given here. If many people are to be plaintiffs, they usually form a group and file a lawsuit listing all of their names as the plaintiffs. In addition, in a similar system to the class action, qualified consumer organisations (QCOs) can file a lawsuit that demands an injunction against particular categories of acts of a business operator for the general interest of consumers (article 14 of Consumer Contract Act, article 10 of the Act against Unjustifiable Premiums and Misleading Representations, article 58-18 to 58-24 of the Act on Specified Commercial Transactions and article 11 of the Food Labelling Act). Furthermore, the new Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (the new Act) will become effective on or before 11 December 2016. Under the new Act, the specified qualified consumer organisation (SQCO) can:

- file a lawsuit ('litigation seeking declaratory judgment on common obligations', article 3 of the new Act) that demands a declaration of payment obligations commonly owed by a business operator to consumers (target consumers) in particular categories of cases. If the defendant acknowledges a claim, or the SQCO prevails or settles confirming the common obligation in whole or in part; then
- the SQCO files a petition for a special proceeding ('simple determination proceedings') to obtain an order from the court regarding the substance and amount of each claim of the target consumers (article 12 of the new Act). If any target consumer is dissatisfied with the order from the court; then
- the target consumer files an objection to the court by himself or herself or through the SQCO, and makes the procedure transfer to a lawsuit ('litigation after objection', articles 46 and 52 of the new Act). The defendant can also make the transfer if he or she is dissatisfied with the order from the court (article 46 of the new Act).

Considering the above, this chapter explains a lawsuit by a QCO (QCO Action) and the 'litigation seeking declaratory judgment on common obligations', 'simple determination proceedings' and 'litigation after objection' (collectively referred as an 'SQCO Action').

### The court where collective actions should be filed and the court system relating to collective actions

A QCO Action must be filed to the district court (article 8.2 of the Code of Civil Procedure, articles 24.1 and 33.1(1) of the Court Act). If any party is dissatisfied with a decision from the district court, the party usually appeals to the high court, with some exceptions. Further, if any party is unsatisfied with a decision from the high court, the party may appeal or make a petition for acceptance of appeal, depending on the substance of the case, to the Supreme Court.

In an SQCO Action, the SQCO must file the 'litigation seeking declaratory judgment on common obligations' to the district court (article 6 of the new Act), and the parties should appeal in the same manner as in a QCO Action (Q41 of the Q&A of the Special Act on Consumer Trial Procedure (Q&A)). In 'simple determination proceedings', the SQCO must file the case to the district court (article 12 of the new Act), and if any party objects to the order from the court, the proceeding transfers to a 'litigation after

objection' in the district court (article 52 of the new Act). Furthermore, if any party is dissatisfied with the judgment from the district court in a 'litigation after objection', the party should appeal in the same manner as in a QCO Action.

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

In Japan, QCO Actions or huge collective actions are currently not as common as class actions in United States. For example, the QCO Action was introduced in June 2007, but as of 5 July 2014 there have only been 30 QCO Actions – less than five per year ('Cases of injunctive claims under the QCO Action system', page 3, published by the department of Consumer System of Consumer Affairs Agency). In such circumstances, the new Act was adapted to remove difficulties for consumers in the recovery of damages by an SQCO Action ('History' in the memorandum regarding the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers, published by the Consumer Affairs Agency). It is therefore fair to say the majority of lawmakers are positive about facilitating a lawsuit that demands recovery of consumers' damages. Also, the judiciary is positive regarding giving relief to consumer damages, considering that the number of dismissals of QCO Actions are few.

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

QCO and SQCO Actions are derived from statute including, but not limited to, the Consumer Act or the new Act. Japan is a civil law country, so it does not have case law, though precedents are important in practice.

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

### SQCO Action

Below is a summary of article 3 of the new Act.

In an SQCO Action, the following may be filed for money payments relating to claims that business operators owe to target consumers connected to the consumer contract:

- a claim for performance of an obligation under a contract;
- a claim regarding an unjust enrichment;
- a claim for damages caused by a failure to perform an obligation under a contract;
- a claim for damages based on defect liability; and
- a claim for damages based on tort regarding the Civil Code (a business operator who fulfils obligation or solicits, makes someone solicit, or facilitates solicitation may also be a defendant).

However, claims for following damages will be excluded:

- extended damages (damages caused by loss or damage of assets other than an object of the consumer contract);
- lost profit (damages caused by a loss of profit that would be enjoyed if an object of the consumer contract was offered);
- damages caused to the body or life of a human being; and
- consolation money (damages caused by mental suffering).

### QCO Action

This is a summary of article 14 of the Consumer Contract Act, article 10 of the Act against Unjustifiable Premiums and Misleading Representations, articles 58-18 to 58-24 of the Act on Specified Commercial Transactions, and article 11 of the Food Labelling Act.

The following claims may be filed in a QCO Action:

- (i) a claim for injunction against an unjust solicitation in the consumer contract that falls in a particular category;
- (ii) a claim for injunction against the use of an unjust contract term in a consumer contract that falls into a particular category;
- (iii) any other necessary measure to stop or prevent a business operator's act in (i) or (ii);
- (iv) a claim for injunction against a representation by which the quality, standard or any other particular relating to the content of goods or services could be misperceived as being much better than it actually is, or much better than those of other business operators who supply the same kind of or similar goods or services as those supplied by the relevant business operator;
- (v) a claim for injunction against a representation by which the price or any other trade term of goods or services might be misunderstood to be much more favourable to the general consumers than it actually is, or than those of other business operators who supply the same kind of or similar goods or services as those supplied by the relevant business operator;
- (vi) a claim for injunction against an unjust solicitation, false or misleading advertisement or execution of particular categories of contract on damages in particular categories of commercial contracts; and
- (vii) a claim for injunction against particular categories of misleading display of foods or any other measures necessary to stop or prevent such misleading display.

### Details and examples of claims in an SQCO Action

Examples of claims that could be filed in an SQCO Action are as follows:

- A cell phone company collects unreasonably high penalty charges from many consumers who terminated phone contracts in the middle of the contract terms. The consumers demand reimbursement of the penalty charges based on the fact that the penalty clause is void.
- A software company sells commonly defective software to many consumers. The consumers demand recovery of the purchase price based on the company's breach.

In contrast, some common claims in a class action in other countries are excluded from the SQCO Action. First of all, the Consumer Affairs Agency states that a claim for product liability should be excluded because a claim for damages based on tort should be limited to the claim under the Civil Code as seen in the fifth bullet point in SQCO Action above. (This can be found in the 'Summary of main opinions and the point of view against the opinions in the public comment of proposal for action system regarding collective recovery of consumer damages' (hereinafter 'Point of View'), published by the Consumer Affairs Agency). The Agency also states that a claim for damages based on a personal data breach incident should be excluded as it is for consolation money, which is excluded by SQCO Action (iv), above (see also Point of View). In addition, the Agency explains a claim for damages based on a fraudulent statement in an annual securities report is excluded, because there is no Consumer Contract (see also Point of View). Furthermore, although the Agency does not state this clearly, a claim for damages arising from a nuisance will be excluded because there is no consumer contract. The Consumer Affairs Agency explains the reasons why these claims are excluded as follows:

- further analysis is needed on what effect will be introduced when a plaintiff files a claim whose burden of proof is changed from a tort claim under the Civil Code as an SQCO Action (Q21 of Q&A);
- vexatious suits must be prevented (Point of View); and
- a defendant should be able to roughly understand the stake at dispute at the early stage of an SQCO Action (Point of View).

However, manufacturers are not exempt from an SQCO Action when it is alleged that an accident occurred because of a product. According to the Agency (Point of View), a manufacturer may make a supporting intervention and make its own argument about a product's defect in the 'litigation seeking declaratory judgment on common obligations' regarding tort liability under the Civil Code; this would be filed against the seller. According to the Agency's interpretation, a defendant seller seems to be able to make

a third party notice to a manufacturer to prepare for its reimbursement claim against the manufacturer in the future (article 53.1 of the Code of Civil Procedure). Therefore, there may be a case where a manufacturer gets involved in an SQCO Action.

Also, a manufacturer should be alerted when a claim has emerged. The new Act denies retroactive effect, so if a consumer contract was executed or tort occurred before the effective date of the new Act, claims are excluded (article 2 of the Supplementary Provisions of the new Act). In addition, as in the fifth bullet point in SQCO Action above, a business operator who conducts, for example, solicitation, may be a defendant in a claim for damages based on tort regarding the Civil Code. Although the Agency provides an interpretation of these terms, the scope of these terms is not necessarily clear.

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

The SQCO may ultimately demand a money payment as relief. However, the SQCO must first seek a declaration of a common obligation owed by a business operator to target consumers in the 'litigation seeking declaratory judgment on common obligations' (articles 2(4) and 3 of the new Act). Second, in the 'simple determination proceedings' and 'litigation after objection', the SQCO or target consumers may seek money payments by the business operator as relief (articles 2(7), 2(8), 12, 46 and 52 of the new Act).

On the other hand, the QCO may demand an injunctive relief in the QCO Action (article 14 of the Consumer Contract Act, article 10 of the Act against Unjustifiable Premiums and Misleading Representations, articles 58-18 to 58-24 of the Act on Specified Commercial Transactions and article 11 of the Food Labelling Act).

### 6 Is there a process for consolidating multiple class action filings?

There is a process for consolidating multiple 'litigations seeking declaratory judgment on common obligations'. If the SQCO files the case (the 'later case') containing the same claim against the same business operator as another pending case (the 'earlier case') filed by another SQCO, the court where the earlier case is pending has a preclusive jurisdiction over such claim (article 6.5 of the new Act). Therefore, the latter case will be transferred to the court where the earlier case is pending, and these two cases will be consolidated (article 7.1 of the new Act).

Each party in a case has an obligation to notify the court of the existence of the other case (article 7.2 of the new Act). This is because the defendant, a business operator, should know of the existence of the other case. Under the new Act, the plaintiff (the SQCO) should know of the existence of the other case through a notice obligation that exists among all SQCOs upon the filing of a SQCO Action.

A QCO Action has a similar procedure as above, but the court does not necessarily transfer or consolidate cases (articles 44 and 45 of the Consumer Contract Act).

### 7 How is a class action initiated?

The QCO cannot file a QCO Action until one week after such written demand was received, unless the would-be defendant refuses to accept the injunction demand (article 41.1 of the Consumer Contract Act).

An SQCO Action is initiated by simply filing a complaint. There is no requirement for a notice with opportunity to cure prior to filing the complaint. The Consumer Affairs Agency explains this point by necessity of immediate filing in cases where a defendant business operator may dispose or hide its assets.

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

In an SQCO Action, only SQCOs have standing before the 'litigation after objection' (articles 3.1 and 12 of the new Act). The Consumer Affairs Agency explains that only SQCOs are given standing in order to prevent vexatious cases, as SQCOs are under governmental supervision (Atsushi Suzuki 'Summary of the bill of Special Act on Consumer Trial Procedure' NBL 2014,1,1 No. 1016, page 33).

On the other hand, in the 'litigation after objection', each target consumer has standing (articles 46.2, 52.1 and 53.1 of the new Act). Among other reasons, the Consumer Affairs Agency explains that this is because the determination of the claim is finalised in the 'litigation after objection'.

In a QCO Action, only QCOs have standing (article 14 of the Consumer Contract Act, article 10 of the Act against Unjustifiable Premiums and



Misleading Representations, articles 58-18 to 58-24 of the Act on Specified Commercial Transactions and article 11 of the Food Labelling Act).

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

In an SQCO Action, a target consumer must delegate authority to the SQCO to benefit the outcome of the 'litigation seeking declaratory judgment on common obligations' in the 'simple determination proceedings' (article 9 of the new Act), and this delegation could be seen as an opt-in (Q6 of Q&A). If 'simple determination proceedings' are commenced, the court must announce the basic facts of the 'simple determination proceedings' by an official gazette (article 22.1 of the new Act). Also, the SQCO must:

- individually notify known target consumers of the facts including but not limited to the outcome in the 'litigation seeking declaratory judgment on common obligations' by sending letters or emails (article 25 of the new Act); and
- disclose the facts above to the public in an appropriate manner including but not limited to a posting on the website of the SQCO (article 26 of the new Act).

In addition, the defendant business operator owes a obligation to:

- announce the information regarding the 'simple determination proceedings' by a posting on the website of the business operator or by any other similar manner (article 27 of the new Act); and
- disclose documents stating the names, addresses or other information of the target consumers to the SQCO, if the business operator has such documents (article 28 of the new Act). However, this shall not apply when an unreasonable amount of expense or time is required for the business operator to specify the scope of the documents to be disclosed (proviso of article 28.1 of the new Act).

In a QCO Action, there is no opt-in or opt-out. If the QCO is successful in an injunction, the business operator must stop solicitation or use of contract term against all consumers following such injunction, and consumers will enjoy a benefit in fact without any opt-in (Q2 of Q&A, page 26 of 'Material for explanatory meeting of consumer organisation action system'). In contrast, even if the QCO fails in the injunction, the judgment has no legal effect on consumers without opt-out. This means that the business operator is still exposed to the risk of injunction by consumers even after prevailing against the QCO.

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

There are requirements of multiplicity (article 2.4 of the new Act), commonality (article 2.4 of the new Act) and dominance (article 3.4 of the new Act) in the 'litigation seeking declaratory judgment on common obligations' (Q8 of Q&A, Suzuki, *supra* Question 8 at 34).

First, a business operator must owe payment obligations to a 'considerable amount of target consumers.' The amount that will satisfy this requirement is not clear because it is the court that makes the final judgment. The Consumer Affairs Agency states that several tens of target consumers will satisfy this requirement in a general case (Q12 of Q&A).

Second, an obligation owed by a business operator to target consumers must be based on the common factual and legal cause.

Third, the case is not one where there are individual facts depending on each target consumer, and therefore unsuitable for a determination through the 'simple determination proceedings'. There are no such three requirements for a QCO Action.

There is no pleading requirement that is unique to a QCO or SQCO Action, but the court will dismiss a case if it finds that the case lacks the requirements.

**11 How does a court determine whether the case qualifies for a collective or class action?**

There is no special motion, hearing or procedure to determine whether a case satisfies requirements for a QCO or SQCO Action. Therefore, the general rules in the Code of Civil Procedure are applicable. Namely, with respect to the matters to be examined upon court's own authority, the court voluntarily starts to examine such matters. However, as to affirmative defence matters, the court starts to examine the matters after a party's motion. The court will dismiss the case if it finds that it lacks the requirements for such an action, and parties cannot correct it as a result of the

examination (Q4, Q12, Q13 and Q32 of Q&A; article 3.4 of the new Act). With respect to the three requirements of multiplicity (article 2.4 of the new Act), commonality (article 2.4 of the new Act) and dominance (article 3.4 of the new Act) in a SQCO Action (see question 10), whether they are the matters to be examined upon court's own authority or affirmative defence matters is unclear, because the new Act does not have explicit provisions. However, the defendant benefits greatly if a case is dismissed because of the lack of these three requirements, since the defendant escapes the risk of a huge amount of payment obligation. Therefore, in practice, it is likely that a defendant will start an argument on these three requirements. The parties are likely to argue and prove whether the requirements are satisfied in the earlier stage of a lawsuit in most cases, unless they are obviously satisfied.

With respect to the burden of proof, this depends on whether a matter is subject to the argument principle or the principle of detection by the court's own authority. If the matter is strongly related to the public interest, it is subject to the principle of detection by the court's own authority. In that case, no party owes the burden of proof and the court voluntarily collects facts and evidence. On the other hand, if the matter is subject to the argument principle, it seems that multiplicity and commonality are on a plaintiff, and dominance is on a defendant from the manner of description in each clause in the new Act. The Consumer Affairs Agency states that a plaintiff owes the burden of multiplicity (Q4 in Q&A), but it does not give similar information regarding commonality and dominance. In any case, which party owes the burdens of proof is uncertain at this point because these are also not expressly provided for in statute. The standard for determination of the three requirements is likely to be the preponderance of evidence, following the general rule in the civil lawsuits.

**12 How does discovery work in class actions?**

In Japan, there is no discovery rule that is equivalent or similar to the US discovery rule. However, the court may order the submission of a document that falls in particular categories under general rule in the Code of Civil Procedure in the 'litigation seeking declaratory judgment on common obligations' and 'litigation after objection'. Furthermore, civil evidence preservation is sometimes used for the purpose of disclosure of the other party in practice. However, the power of these measures to coerce disclosure is much weaker than the discovery, so a plaintiff will have difficulty in proving in these lawsuits in many cases.

On the other hand, the court cannot order the submission of a document in the 'simple determination proceedings' (article 45.2 of the new Act). In addition, a business operator must disclose documents including the information regarding target consumers such as names if the conditions are satisfied (see question 9; article 28 of the new Act).

**13 Describe the process and requirements for approval of a class-action settlement.**

In an SQCO Action there are special requirements and processes for a settlement, because the settlement affects target consumers in certain cases. First of all, in a settlement inside the court in the 'litigation seeking declaratory judgment on common obligations', the SQCO and a business operator may decide whether all or part of a common obligation exists (article 10 of the new Act). However, such SQCO must notify the other SQCOs of its settlement plan before entering into it (article 78.1(7) of the new Act). In addition, the SQCO may not enter into a settlement that disposes target consumers' rights without settling whether all or part of the common obligation exists. Furthermore, the SQCO cannot enter into a settlement that disposes of the right of an individual target consumer (Q42 and Q45 in Q&A). In contrast, it is unclear whether the SQCO can make a settlement that contains a withdrawal of the case outside the court (Q43 in Q&A).

In the 'simple determination proceedings' and 'litigation after objection' the SQCO can enter into a settlement inside or outside the court without any special approval or procedure after being delegated authority by a target consumer (articles 65.1 and 65.2(1) of the new Act). In contrast, the SQCO cannot enter into a settlement before being delegated authority (Q43 of Q&A).

On the other hand, there is no requirement for approval for a settlement in a QCO Action, because the settlement does not affect consumers.

**14 May class members object to a settlement? How?**

Target consumers cannot object to a settlement entered into during the 'litigation seeking declaratory judgment on common obligations'. This is because, if a target consumer is dissatisfied with the settlement, he or she can refrain from opt-in in the 'simple determination proceedings', then the

settlement will not have any legal effect on the target consumer (Q43 of Q&A).

On the other hand, in a settlement entered into in the 'simple determination proceedings' or 'litigation after objection', whether target consumers can object to the settlement is not clear. At least a target consumer who opposes to the settlement can refrain from being affected by the settlement by withdrawing the opt-in. However, whether the SQCO is required to notify target consumers before entering into the settlement is unclear at this point, so whether target consumers have the opportunity to withdraw opt-in is unclear.

Consumers may not object to a settlement in a QCO Action, because the settlement does not affect consumers.

#### 15 What is the preclusive effect of a final judgment in a class action?

The final judgment in the 'litigation seeking declaratory judgment on common obligations' has a preclusive effect on the plaintiff SQCO, a defendant business operator, and the other SQCOs if the plaintiff has lost (Q40 of Q&A). If the plaintiff has prevailed in whole or in part, the preclusive effect also covers the target consumers who made a delegation to the SQCO (opt-in) in the 'simple determination proceedings' (article 9 of the new Act). Therefore, from the target consumers' perspective, they may opt in only when they are comfortable with the outcome of the 'litigation seeking declaratory judgment on common obligations'. In contrast, from the perspective of a business operator, it will owe payment obligations to most target consumers if it loses in the 'litigation seeking declaratory judgment on common obligations'. In addition, the business operator is no longer exposed to the risk of lawsuit from any SQCO if it prevails once in the 'litigation seeking declaratory judgment on common obligations', but it is still exposed to the risk of lawsuit by individual target consumers. However, it is anticipated that target consumers rarely file a lawsuit after the SQCO loses.

Judgments in the 'simple determination proceedings' and 'litigation after objection' have a preclusive effect on the target consumers who opted in, and a defendant business operator (article 9 of the new Act). In addition, there is likely to be a preclusive effect on the SQCO, but there is no express clause in the new Act.

The final judgment in a QCO Action has a preclusive effect on the plaintiff QCO and a defendant business operator, but the judgment does not have a preclusive effect on consumers.

#### 16 What type of appellate review is available with respect to class action decisions?

There is no special rule for standards or procedures for an appellate review in a QCO or SQCO Action. General rules in the Code of Civil Procedure, under which an appeal court examines the appropriateness of fact findings and law applications by the lower court, are applicable.

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

Regulators do not play any role in a QCO or SQCO Action. A settlement in a QCO or SQCO Action has no legal effect on a pending or future regulatory action. However, these settlements may have an effect on the administrative direction of regulators. In addition, the Prime Minister supervises the QCOs and SQCOs (articles 30–33 of the Consumer Contract Act, article 85 of the new Act), and if they have any problem in operating for consumers the Prime Minister will cancel their qualifications (article 34 of the Consumer Contract Act, article 86.2 of the new Act).

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

Whether the QCO or SQCO can be a party of an arbitration is not expressly provided in statute. The QCO is likely to be able to be a party of an arbitration, because the QCO has a claim for an injunction outside the court (article 12 of the Consumer Contract Act), and there is a clause that states that a QCO is obliged to notify the other QCOs and the Prime Minister of Japan when the QCO has entered into an arbitration agreement related to an injunction in the Consumer Contract Act (article 23.4(3) of the Consumer Contract Act). However, there is no disclosed precedent where a QCO has become a party in an arbitration.

On the other hand, it seems that the SQCO cannot be a party in an arbitration (though this is not expressly provided in statute) because the SQCO does not have a claim for payment outside the court. Also it is not expressly provided in statute whether a target consumer can delegate authority to the

#### Update and trends

The new Act that introduces a new type of collective action (the SQCO Action) will become effective in or before December 2016. Before the introduction of the new Act, the Consumer Affairs Agency is likely to issue guidelines that will give their detailed interpretation of the new Act. The guidelines will be helpful in understanding the details of procedures in an SQCO Action.

SQCO even if there is a waiver clause of delegation in a contract, so it is the subject of an interpretation by the court.

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

There may be two types of fees in a QCO or SQCO Action:

- the fees for attorneys from a QCO or SQCO; and
- the fees for a QCO or SQCO from consumers.

With respect to the fees for attorneys, there is no prohibition in statute, so a contingency fee is likely to be allowed. However, excessive fees may violate against legal ethics. Similarly, although contingency fees are not prohibited for an SQCO, the government will review the fee agreement (articles 65.4(6), 66.2(5) and 70 of the new Act), and if the fees are inappropriate the government will take appropriate measures including but not limited to cancelling the qualification of the SQCO (article 86.2 of the new Act).

On the other hand, the QCO is not supposed to receive any fees, though receiving fees is not prohibited in statute.

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

Basically, the general rule in the Code of Civil Procedure is applicable to a QCO or SQCO Action. Under the general rule, the losing party bears the litigation cost in principle (article 61 of the Code of Civil Procedure). However, in the 'simple determination proceedings' there is a special rule under which the bearer is different depending on the outcome of the proceeding and item of cost (articles 48.1, 49.3 of the new Act, article 61 of the Code on Civil Procedure). It should be noted that the costs of notification and announcement to target consumers, which may be huge amount, are excluded from litigation cost, because these costs are considered to be for preparation of litigation (Q56 and Q57 of Q&A). Therefore, the SQCO bears the costs of notification and announcements regardless of the outcome of the SQCO Action.

With respect to attorneys' fees, the court usually denies recovery but grants them as a part of damages only in a limited amount and limited cases such as a tort action. This practice is likely to apply to the SQCO Action, but is uncertain at this point.

#### 21 Is third-party funding of class actions permitted?

Third-party funding is not prohibited under Japanese law, but is uncommon in Japan. One possible reason for this is there is less merit for investors, because Japanese courts do not grant as much compensation as US courts do, even if a plaintiff prevails in tort actions. However, there will be more cases where the court orders compensation for many consumers, and the aggregated amount to all the consumers will be huge because of the introduction of the SQCO Action. Then, it seems there is more merit for investors, so third party funding may become common and regulations regarding funding may be needed in the future.

#### 22 Can plaintiffs sell their claim to another party?

With respect to the transfer of a claim for injunction by the QCO or claim for filing action by SQCO, there is no express prohibition in statutes. However, it seems that neither the QCO nor the SQCO can sell claims, because they receive qualifications through examination by the Prime Minister of Japan and are given claims based on such qualifications.

On the other and, there is no special rule for the transferability of a claim by a consumer. Therefore, under the general rule in the Civil Code, a consumer seems to be able to sell his or her claim, other than a tort liability claim. However, to buy and collect these claims and file a huge lawsuit may constitute a violation against the Attorney Act (articles 72 and 73 of the Attorney Act).



### 23 If distribution of compensation to class members is problematic, what happens to the award?

In an SQCO Action, the final relief is money payment (articles 2(7), 2(8), 12, 46 and 52 of the new Act), and the payment will be done through the SQCO (Q29 of Q&A). Therefore, technically there could be a distribution problem if any target consumer does not receive the money from the SQCO for a long time. The new Act does not have a specific rule for such money.

In a QCO Action, the relief is an injunction, so there is no distribution (article 14 of the Consumer Contract Act, article 10 of the Act against Unjustifiable Premiums and Misleading Representations, articles 58-18 to 58-24 of the Act on Specified Commercial Transactions and article 11 of the Food Labelling Act).

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Class Actions  
ISSN 2059-5468



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