

A New Class Action System in Japan

I. Introduction

In recent years, the Japanese government has been developing a series of legislation with the aim of facilitating the protection of consumers. In 2001, the Consumer Contract Act (Act No. 61 of 2000) came into effect. This Act introduced substantive laws for consumer protection, such as invalidating provisions in a consumer contract, being an agreement which is concluded between a consumer and a business operator (“**Consumer Contract**”), which are significantly detrimental to consumers (Article 8-10 of the Consumer Contract Act). In 2007, an amendment to the Consumer Contract Act came into effect which introduced “Consumer Organisation Proceedings”. These proceedings allowed “Qualified Consumer Organisations” (“**QCOs**”) to seek injunctions, for the benefit of relevant consumers, against business operators to prevent them performing unfair acts, such as soliciting the execution of a Consumer Contract which includes an unfair provision (Article 12 of the Consumer Contract Act). However, under current Japanese laws, there is no special procedure under which a group of consumers can recover damages. Consumers who seek to recover damages caused by the actions of a business operator need to, in principle, individually file a lawsuit on their own behalf.

Currently, the Japanese government is working on legislation to introduce a new Japanese Class Action System (“**New System**”). The New System aims for consumers to be able to recover damages in a simpler and more prompt manner than under the previous system. The Japanese Government is currently working on a draft bill regarding the New System with the aim of filing the bill in the current session of the Diet which will end on 21 June 2012.

The New System is being developed solely for the purpose of protecting consumers in relation to Consumer Contracts. At the same time, to avoid putting an excessive burden on business operators, the New System limits the entities which may bring claims and the claims which can be brought. Due to these limitations, the New System is expected to be considerably different to the US class action system.

This newsletter summarises the New System based on information which has been disclosed to date. The New System as described in the bill or finally implemented may be different to that described in this newsletter.

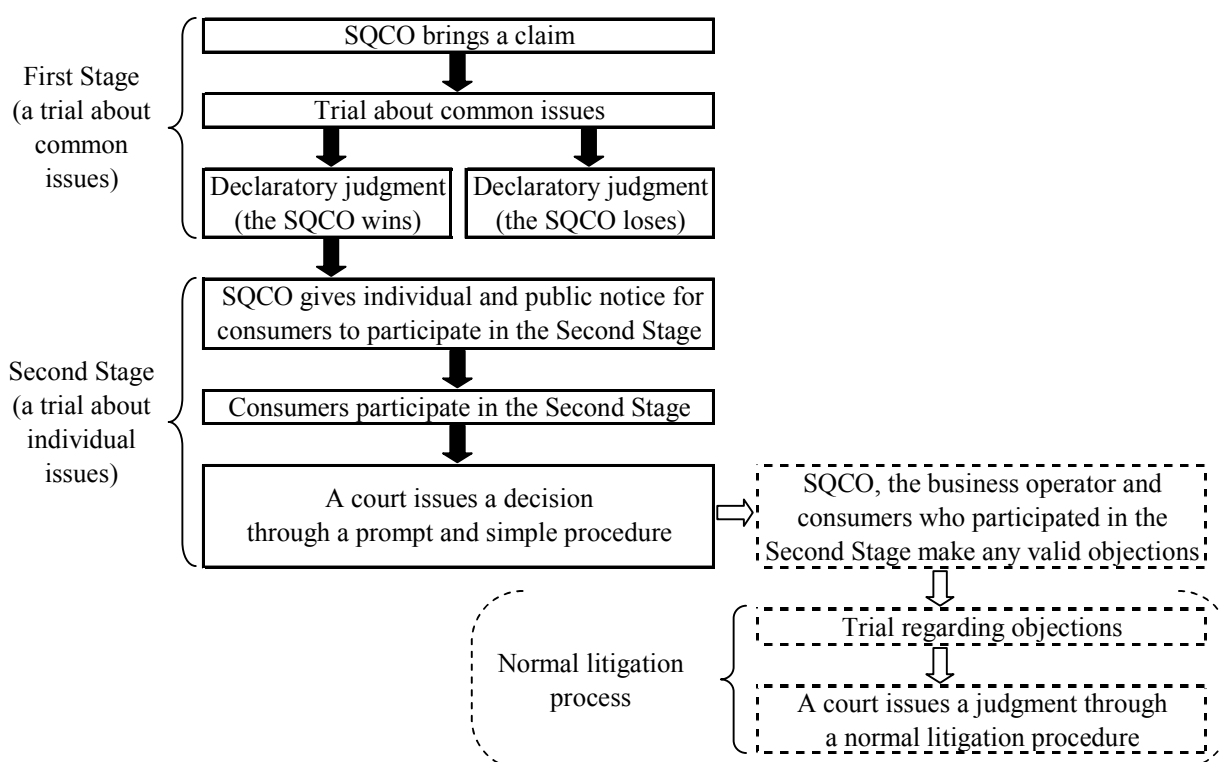
II. Outline of the New System

1. The overall structure of the New System

The New System consists of two-stages. The first stage is a procedure which determines the common issues of law and fact (“**Common Issues**”) between a business operator and a considerable number of aggrieved consumers (“**First Stage**”). Common Issues include matters such as whether a “school expense no return” provision contained in students’ contracts with schools is invalid. This First Stage procedure can only be filed by a “Specified Qualified Consumer Organisation” (“**SQCO**”) and only against business operators as defendants. Therefore, consumers do not actually participate in the First Stage.

If the SQCO, acting for the benefit of a considerable number of aggrieved consumers, succeeds at the First Stage, the amount to be paid to each aggrieved consumer will be determined at a second stage (“**Second Stage**”). If the business operator succeeds at the First Stage, the Second Stage will not commence but the decision of the First Stage will not be binding on consumers. This allows consumers to individually bring a claim against a business operator even if an SQCO fails at the First Stage.

The Second Stage is commenced by a petition filed by the SQCO. Once the Second Stage has been commenced, the SQCO will give individual and public notice to aggrieved consumers to participate in the Second Stage. At the Second Stage, the amount that each aggrieved consumer is entitled to recover will be determined.



2. SQCOs

Under the New System, a claim can only be brought by an SQCO. Currently, there are ten QCOs certified by the Prime Minister under the Consumer Contract Act. Among these QCOs (and other entities which will become QCOs), only those certified by the Prime Minister as fulfilling the requirements of the New System will become SQCOs. Under the New System, an SQCO will be entitled to receive certain compensation and expenses from the consumers under certain conditions as required by law.

3. Claims which can be brought under the New System

Claims brought under the New System need to be one of the following:

- i. a claim for the return of unjust enrichment resulting from cancellation, non-existence or invalidity of a Consumer Contract (e.g., a claim for the return of a payment made under a Consumer Contract which is related to a fraudulent business and is invalid due to a violation of the public policy of Japan);
- ii. a claim for performance of a Consumer Contract (e.g., a claim for payment of sales proceeds based on a sales agreement where the consumer is the seller and the business operator refuses the payment based on an unfair provision);
- iii. a claim for compensation of damage resulting from a tort committed in conjunction with the conclusion or performance of a Consumer Contract (e.g., a claim for compensation of damage incurred due to unlawfully soliciting a considerable number of consumers by using a uniform brochure). It should be noted that the scope of tort claims which can be brought under the New System is limited to tort claims under the Civil Code and not tort claims under special laws; or
- iv. a claim for compensation based on default of a Consumer Contract or defect liability under a Consumer Contract (e.g., a claim against a seller for compensation of damage arising from defective products).

In addition, the claims which can be brought under the New System are limited to monetary claims against a business operator. Furthermore, with respect to (iii) and (iv), damage relating to the subject matter of a Consumer Contract will be compensated but not secondary loss. Also, damage for personal injury and death will be excluded.

4. The First Stage: A lawsuit for a declaration on Common Issues

To commence the First Stage, the claim which is brought must be related to a Consumer Contract as described in section 3. Furthermore, all of the following three requirements must be met.

- i. Numerosity: A considerable number of consumers were affected by the conduct of the business operator.
- ii. Commonality: The damage suffered by the consumers must arise from the same

- or a similar factual or legal basis.
- iii. The Common Issues must be dominant in determining whether the consumers have claims. This means that once the Common Issues are determined at the First Stage, the decision on the individual claims at the Second Stage will not require significant examination by the court.

A lawsuit which does not fulfill (i) to (iii) will be dismissed for procedural reasons.

In the First Stage, the court will render a declaratory judgment on the Common Issues. The declaratory judgment will not only be binding on the parties to the First Stage (the SQCO and the business operator) but other SQCOs and the consumers who participate in the Second Stage. If the SQCO loses in the First Stage, the Second Stage will not be commenced and therefore the declaratory judgment will not be binding upon consumers, and they can individually bring a claim against a business operator.

5. The Second Stage: The procedure to determine the individual claims of each of the aggrieved consumers

At the Second Stage, a court issues a decision regarding the amount or existence of the claim from a considerable number of consumers through a prompt and simple procedure. The Second Stage will be commenced at the petition of the SQCO that was the winning plaintiff in the First Stage. After the Second Stage is commenced, the said SQCO will give individual notice to aggrieved consumers in which it will urge consumers to participate in the Second Stage. The SQCO will also give public notice via measures such as the internet. The SQCO can also request the business operator to give public notice; for example, via the website of the business operator. Furthermore, in the Second Stage, the court can order the business operator to provide the SQCO with documents which contain information necessary for individual notice to be given to individual consumers. A breach of this court order is subject to non-penal fines.

Once consumers request to participate in the Second Stage, the SQCO which was the plaintiff in the First Stage will notify the court of such consumers' claims. If the business operator admits those consumers' claims notified by the SQCO, then the amount of the consumers' claim will become final. If the defendant business operator disputes the amount or existence of a consumer's claim as contained in the SQCO's notice, the court will determine the amount or existence of the claim.

When a court issues a decision in the Second Stage, the SQCO, the business operator and consumers who participated in the Second Stage can object to the decision. If there is no objection, the decision of the court becomes final. If any of these parties/participants files a valid objection, the amount of the claim (or the claim itself) which is challenged by the objection will be determined by the normal litigation process. This normal litigation process may take longer than the processes used in the New System.

6. Advantages and disadvantages of the New System for relevant entities

Under the New System, each of the aggrieved consumers can decide whether to participate in the Second Stage after the SQCO wins the First Stage. Therefore, consumers can expect low-risk and prompt recovery. However, at the same time, the claims which can be brought under the New System are limited and therefore consumers may not be able to claim certain losses, such as losses arising from personal injury.

As to business operators, the New System might be beneficial for the prompt resolution of disputes with numerous consumers. Although a decision which is adverse to an SQCO will not bar other claims from consumers, it may discourage consumers from bringing claims and also be influential when courts are required to decide other claims made by consumers. The disadvantage for business operators is that the New System may increase the risk of claims from consumers.

Under the New System, an SQCO will be entitled to receive certain compensation and expenses from the consumers under certain conditions as required by law. This may motivate SQCOs to bring lawsuits more readily and may cause more QCOs and other entities to become SQCOs.

III. Expected impact on practice

Based on the information currently available regarding the New System, only SQCOs may bring claims. Furthermore, the claims which can be brought under the New System are claims related to Consumer Contracts and are subject to other requirements. Considering this, from a practical viewpoint, the scope of the New System is expected to be much more limited than the class action system in the US.

However, the New System will increase the risk of litigation for business operators from consumers. Also, after the New System is introduced, there is a possibility that a Japanese court or the legislators may extend the scope of the New System if it is clear that it is effective for protecting consumers. For a business operator which deals with consumers, it would be advisable to thoroughly examine the risks which may arise from the New System.

- End -

* * * * *

Contact Information:

Should you wish to receive further information or advice regarding the foregoing, please contact Kenichi Sadaka, Aoi Inoue, Toshishige Fujiwara or Takahiro Hasegawa.

Kenichi Sadaka
Partner
Email: kenichi.sadaka@amt-law.com
Telephone: +81-3-6888-1053

Aoi Inoue
Associate
Email: aoi.inoue@amt-law.com
Telephone: +81-3-6888-5802

Toshishige Fujiwara
Associate
Email: toshishige.fujiwara@amt-law.com
Telephone: +81-3-6888-5896

Takahiro Hasegawa
Associate
Email: takahiro.hasegawa@amt-law.com
Telephone: +81-3-6888-4763

*This law bulletin is published as a general service to clients and friends of Anderson Mori & Tomotsune and does not constitute legal advice.

Copyrights reserved by Anderson Mori & Tomotsune.