



ICLG

The International Comparative Legal Guide to:

Class & Group Actions 2013

5th Edition

A practical cross-border insight into class and group actions work

Published by Global Legal Group, in association with CDR, with contributions from:

Anderson Mōri & Tomotsune

Arnold & Porter (UK) LLP

Ashurst LLP

August & Debouzy

Bulló - Tassi - Estebenet - Lipera - Torassa - Abogados

Clayton Utz

Campos Ferreira, Sá Carneiro & Associados

De Brauw Blackstone Westbroek N.V.

Eversheds Ltd.

Fiebinger Polak Leon & Partner Rechtsanwälte GmbH

Georgiev, Todorov & Co.

Gianni, Origoni, Grippo, Cappelli & Partners

LAWIN

Lee and Li, Attorneys-at-Law

Linklaters LLP

Michael Best & Friedrich LLP

NERA Economic Consulting

Norton Rose Australia

Norton Rose Canada LLP

Pachiu & Associates

Quinn Emanuel Urquhart & Sullivan

Ríos-Ferrer, Guillén-Llarena, Treviño y Rivera S.C.

Stikeman Elliott LLP

TozziniFreire Advogados

Vinge

Wierzbowski Eversheds Sp.k.

Yigal Arnon & Co.



GLG

Global Legal Group

Contributing Editors

Ian Dodds-Smith & Alison Brown, Arnold & Porter (UK) LLP

Account Managers

Brigitte Descacq, Joe Houguez-Simmons, Dror Levy, Maria Lopez, Florjan Osmani, Samuel Romp, Oliver Smith, Rory Smith, Toni Wyatt

Sub Editors

Beatriz Arroyo
Fiona Canning

Editor

Suzie Kidd

Senior Editor

Penny Smale

Group Consulting Editor

Alan Falach

Group Publisher

Richard Firth

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Ashford Colour Press Ltd
October 2012

Copyright © 2012

Global Legal Group Ltd.

All rights reserved

No photocopying

ISBN 978-1-908070-38-8

ISSN 1757-2797

Strategic Partners



General Chapters:

1	EU Developments in Relation to Cross-border Actions for Collective Redress – Alison Brown, Arnold & Porter (UK) LLP	1
2	International Class Action Settlements in the Netherlands since <i>Converium</i> – Ruud Hermans & Jan de Bie Leuveling Tjeenk, De Brauw Blackstone Westbroek N.V.	6
3	Emerging Issues in the International Growth and the Internationalisation of Class Actions and Other Forms of Collective Redress: Lessons from the Domestic Front? – Michael Kotrly, Sylvie Rodrigue, Norton Rose Canada LLP & Tricia Hobson, Norton Rose Australia	12
4	Competition Law Private Actions in England & Wales: Access to Collective Redress & Plans to Reform – Mark Clarke & Lorraine McLinn, Ashurst LLP	20
5	Recent Trends in US Securities Class Actions against Non-US Companies – Robert Patton, NERA Economic Consulting	28

Country Chapters:

6	Argentina	Bulló – Tassi – Estebenet – Lipera – Torassa – Abogados: Gustavo J. Torassa & Mariano E. de Estrada	35
7	Australia	Clayton Utz: Colin Loveday & Andrew Morrison	41
8	Austria	Fiebinger Polak Leon & Partner Rechtsanwälte GmbH: DDr. Karina Hellbert	49
9	Belgium	Linklaters LLP: Joost Verlinden & Stijn Sabbe	55
10	Brazil	TozziniFreire Advogados: Patricia Helena Marta Martins	60
11	Bulgaria	Georgiev, Todorov & Co.: Alexander Katzarsky & Georgi Georgiev	64
12	Canada	Stikeman Elliott LLP: David R. Byers & Adrian C. Lang	71
13	England & Wales	Arnold & Porter (UK) LLP: Alison Brown & Ian Dodds-Smith	79
14	France	August & Debouzy: Dominique de Combles de Nayves & Benoît Javaux	89
15	Israel	Yigal Arnon & Co.: Barak Tal & Ruth Loven	99
16	Italy	Gianni, Origoni, Grippo, Cappelli & Partners: Daniele Vecchi & Federica Cinquetti	106
17	Japan	Anderson Mōri & Tomotsune: Nobuhito Sawasaki & Toshishige Fujiwara	112
18	Lithuania	LAWIN: Rytis Paukštė & Rimantė Tamulytė	120
19	Mexico	Ríos-Ferrer, Guillén-Llarena, Treviño y Rivera S.C.: Ricardo Ríos-Ferrer & Juan Pablo Patiño	126
20	Poland	Wierzbowski Eversheds Sp.k.: Iwo Gabrysiak	132
21	Portugal	Campos Ferreira, Sá Carneiro & Associados: João Pimentel & José Maria Júdice	137
22	Romania	Pachiu & Associates: Corina Radu & Adelina Somoiağ	143
23	Russia	Quinn Emanuel Urquhart & Sullivan: Ivan Marisin & Vasily Kuznetsov	153
24	Sweden	Vinge: Krister Azelius & Maria Maaniidi	159
25	Switzerland	Eversheds Ltd.: Peter Haas & Grégoire Mangeat	166
26	Taiwan	Lee and Li, Attorneys-at-Law: Alan T. L. Lin & Michael T. H. Yang	172
27	USA	Michael Best & Friedrich LLP: Paul E. Benson & Joseph Louis Olson	180

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Japan



Nobuhito Sawasaki



Toshishige Fujiwara

Anderson Mōri & Tomotsune

1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

If there is a group of persons with the same claim, they will usually file a “Joint Suit” (“Joint Proceeding”). The Code of Civil Procedure of Japan (“CCP”) also allows a number of persons who share a common interest to appoint a representative (“Appointed Party”) who will then act on their behalf in conducting the court proceeding (“Appointed Party Proceeding”). Further, in certain areas of law, a “Qualified Consumer Organisation” (“QCO”) can file a lawsuit against a business operator for the benefit of consumers (“Consumer Organisation Proceeding”). Under Japanese law, court decisions, in principle, are only binding on the litigant parties. A decision is binding on third parties only in exceptional cases. The same applies to Joint Proceedings, Appointed Party Proceedings and Consumer Organisation Proceedings.

Joint Proceedings

The CCP allows more than one plaintiff to participate in a court proceeding, and allows a court to hear more than one claim. In a joint suit, a party can apply for any remedy under the CCP, including, but not limited to, monetary compensation, injunctive relief or declaratory relief. A decision of the court is only, in principle, binding on the parties to the litigation. For several parties to file a joint suit, the parties’ claims must satisfy the general requirements to consolidate a number of claims into one court proceeding (CCP, Article 135). Further, a joint suit must satisfy one of the following requirements: (i) the rights and obligations which the claimants seek to enforce are common; (ii) the claims are based on the same factual or legal cause; or (iii) the rights and obligations which the claimants seek to enforce are of the same kind and are based on the same kind of factual or legal cause (CCP, Article 38). In Japan, group proceedings are usually brought by way of joint suit. Joint parties generally have the same attorneys.

Appointed Party Proceedings

The CCP allows a number of persons who share a common interest to nominate and make an Appointed Party file a lawsuit on their behalf (CCP, Article 30). All remedies under the CCP, such as monetary compensation, injunctive relief and declaratory relief, are available in proceedings conducted by the Appointed Party.

A decision of the court, in principle, is only binding on the Appointed Party, the defendant and the appointers who authorised the Appointed Party. A decision will not bind persons who share a common interest

but did not authorise the Appointed Party to act on their behalf.

To file an Appointed Party Proceeding, the following requirements must be met:

- (i) the group of persons who share the same interest must exist (specifically, those persons must satisfy the requirements for a Joint Suit and their main allegations must have commonality);
- (ii) the Appointed Party must be selected from the said group; and
- (iii) if the said group is well organised such that it is qualified to file a lawsuit under the name of the group itself (CCP, Article 29), the litigation cannot be conducted by the Appointed Party (CCP, Article 30).

Consumer Organisation Proceedings

In certain circumstances, a QCO certified by the Prime Minister may file a lawsuit against a business operator for the benefit of consumers. Specifically, in cases where a business operator has committed or is likely to commit certain acts (please see the answer to question 1.2) against many, unspecified persons, the QCO may file a lawsuit applying for injunctive relief (Consumer Contract Act (“CCA”), Article 12; the Act against Unjustifiable Premiums and Misleading Representations (“AUPMR”), Article 10; and the Specified Commercial Transactions Act (“SCTA”), Articles 58-4 through 58-9).

A QCO is not considered to be exercising the claims of consumers but rather exercising its own claim given by law. The QCO can only apply for injunctive relief and not monetary compensation. A court decision will only, in principle, be binding on the QCO that brought the claim and the defendant. Nevertheless, when a court renders an injunction, all consumers will benefit because it is likely to suspend unlawful conduct.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

Joint Proceedings and Appointed Party Proceedings apply to all areas of civil law. A party can apply for any remedy under the CCP, including but not limited to monetary compensation, injunctive relief and declaratory relief.

Consumer Organisation Proceedings are only applicable to the following areas which relate to consumer disputes and only injunctive relief is available: (i) false representations, provision of conclusive evaluations on uncertain matters or wilful omissions of disadvantageous facts; (ii) solicitation using unlawful measures

(e.g. not allowing a consumer to leave a location where they have been solicited); (iii) agreements containing provisions which are not permitted by the CCA (for (i)-(iii), please refer to the CCA, Article 12); (iv) advertisements and other representations which may cause a misunderstanding regarding the quality or trade terms of goods or services (AUPMR, Article 10); and (v) acts specified in articles 58-4 through 58-9 of the SCTA. The SCTA only applies to the following types of transactions: door-to-door sales; mail-order sales; telemarketing sales; multilevel marketing transactions; specified continuous service offers; and business opportunity-related sales transactions. The conduct subject to Consumer Organisation Proceedings varies depending on transaction types, but in general, the SCTA allows injunctions for: (i) false representations, provision of conclusive evaluations on uncertain matters or wilful omission of important facts; (ii) solicitation or interference of withdrawal or rescission using unlawful measures (e.g. intimidation and disturbance); (iii) agreements containing provisions that are not permitted by the SCTA; and (iv) false or misleading advertising.

1.3 Does the procedure provide for the management of claims by means of class action (whether determination of one claim leads to the determination of the class) or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group?

For Joint Proceedings and Consumer Organisation Proceedings, a court decision is only, in principle, binding on the litigants, while in the Appointed Party Proceedings a court decision is only binding, in principle, on the Appointed Party, the defendant and the appointers. As such, decisions made in one case do not bind potential claimants.

However, there are some cases where a decision made in one case can affect potential claimants. For Consumer Organisation Proceedings, if a QCO receives a final judgment or enters into a settlement, other QCOs, in principle, cannot file a lawsuit against the same defendant to seek an injunction for the same acts that were disputed in the previous lawsuit (CCA, Article 12-2).

1.4 Is the procedure 'opt-in' or 'opt-out'?

In Joint Proceedings and Appointed Party Proceedings, potential claimants will, in principle, be bound by court decisions only when they file a lawsuit as a plaintiff or when they authorise an Appointed Party to act on their behalf. In this sense, these procedures have an "opt-in" nature.

Consumer Organisation Proceedings do not require "opt-in" or "opt-out". QCOs are generally considered to be exercising their own claim and a court decision will, in principle, only bind the QCO which filed the lawsuit and the defendant.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

For Joint Proceedings and Appointed Party Proceedings, there is no minimum. For Consumer Organisation Proceedings, there is no requirement for a number of claimants, but a lawsuit shall not be filed unless there are many unspecified persons who are or are likely to be affected by the defendant's conduct. There is no clear-cut criterion for determining how many victims are required for a Consumer Organisation Proceeding.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

For Joint Proceedings and Appointed Party Proceedings, please refer to the answer to question 1.1. For Consumer Organisation Proceedings, there is no special requirement for similarity of claims because the QCO is not considered to be filing a collective lawsuit on behalf of consumers.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

In Joint Proceedings, individuals and entities that are aggrieved jointly file a lawsuit. In Appointed Party Proceedings, the Appointed Party will file a lawsuit on behalf of itself and the appointers. In Consumer Organisation Proceedings, a lawsuit can only be filed by a QCO certified by the Prime Minister. Currently, there are ten certified QCOs.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

In Joint Proceedings and Appointed Party Proceedings, there is no need to notify potential claimants. In Consumer Organisation Proceedings, a QCO must notify other QCOs and report to the Secretary General of the Consumer Affairs Agency when certain events occur, such as when the QCO files a suit, receives a judgment or enters into a settlement (CCA, Article 23, Paragraph 4). Further, a QCO must make efforts to provide consumers with necessary information (CCA, Article 27). As a matter of practice, a QCO will state on its website when they file a Consumer Organisation Proceeding lawsuit.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

For Joint Proceedings and Appointed Party Proceedings, there are no comprehensive statistics. However, according to the Supreme Court of Japan, of the civil cases of first instance which ended in 2010, there were 2,155 cases that had 10 or more plaintiffs. Six such cases involved environmental pollution, six cases involved defective construction, one case involved intellectual property and 44 cases involved labour disputes. It appears that there are few cases where Appointed Party Proceedings have been used.

For Consumer Organisation Proceedings, from June 2007 to December 2010, 15 Consumer Organisation Proceeding lawsuits were filed. Please note, however, that QCOs are required to send a written request to suspend unlawful conduct prior to filing a Consumer Organisation Proceeding (CCA, Article 41). As of 27 December 2010, written requests had been sent to a total of 140 business operators.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

In Joint Proceedings and Appointed Party Proceedings, all remedies under the CCP, such as monetary compensation, injunctive relief and declaratory relief are available. In Consumer Organisation Proceedings, only injunctive relief is available.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

There is no procedure under the current Japanese law which allows representative bodies to collectively exercise the claims of consumers. Consumer Organisation Proceedings may be similar to such actions in that a consumer organisation files a lawsuit for the benefit of consumers. For the details of Consumer Organisation Proceedings, please refer to the answers to questions 1.1 and 1.2.

A Consumer Organisation Proceeding action can only be made by a QCO certified by the Prime Minister. Once a QCO has this certification, no additional permission or certification is required for it to file a lawsuit.

2.2 Who is permitted to bring such claims e.g. public authorities, state appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Please refer to the answer to question 1.7.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Please refer to the answers to questions 1.1 and 1.2.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

Please refer to the answer to question 1.10.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Civil procedures are heard by judges.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

Joint Proceedings, Appointed Party Proceedings and Consumer Organisation Proceedings are all handled by a civil court. There are no special judges to manage these cases. However, for Consumer Organisation Proceedings, there are some special rules which apply; for example, when the same claims are brought to the same court against the same business operator by different QCOs, the

court has an obligation, in principle, to consolidate the proceedings (CCA, Article 45).

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

There is no special procedure to certify a class or group. However, if a Joint Proceeding is filed by plaintiffs who lack the requirements under Article 38 of the CCP and the defendant makes an objection without delay, the court will separate the proceeding to hear each claim. An Appointed Party Proceeding will be dismissed for procedural reasons if the requirements under Article 30 of the CCP are not met. For the details of the requirements under the CCP, please refer to the answer to question 1.1.

Potential claimants can participate in an existing lawsuit against a business operator; for example, by filing a lawsuit against the same business operator and requesting the court to consolidate the court proceedings. There is no provision in the CCP which states that the court can impose a cut-off date by which potential claimants must join the litigation. However, if the existing lawsuit has proceeded to a certain extent, then participation may be denied by the court.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

In theory, a court can separate one claim from others and render a judgment for only that claim (CCP, Article 243, Paragraphs 2 and 3) or request parties to concentrate their arguments on one claim before examining other claims. However, as a matter of practice, in many cases a court tends to concurrently handle all claims which are brought before it. Further, a court has an obligation to make a decision for each of the claims brought before it. Courts do not automatically apply a decision made for one claim to other claims without examining the evidence and circumstances of each claim.

A court can render an intermediate judgment for an issue of fact or law (CCP, Article 245); for example, in a case where liability and computation of damages are both disputed, the court can make a decision regarding liability and then consider damages later. Intermediate judgments are rendered by judges.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

There is no special case management procedure for Joint Proceedings, Appointed Party Proceedings and Consumer Protection Proceedings. However, for Joint Proceedings, the court often holds a scheduling conference where the court and the parties discuss issues concerning the process of the lawsuit.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The court can appoint an expert witness to provide expert evidence and/or a technical advisor to assist it with procedural matters such

as settlement negotiations. Further, the court can request a professional institution to provide information on technical issues. At the same time, the parties can present expert evidence; for example, by engaging a private expert witness or filing an opinion of an expert. Private expert witnesses are commonly used in litigations in Japan. In civil proceedings, in principle, there are no limitations on the nature or extent of expert evidence. A court has discretion on whether to allow expert evidence.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

The submission of written statements or expert opinions is not a legal requirement for witness examination. However, as a matter of practice, the judges usually request the parties to submit these documents before a witness examination.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

There is no obligation under the CCP to generally disclose documentary evidence. However, after court proceedings are commenced, the parties to the litigation can make an application to the court requesting the court to make an order for a party to submit a document. If the court accepts the application and issues an order, then the party that is subject to the order must file the document. The documents filed are limited to those specified by the court as there is no comprehensive obligation of disclosure. The party applying for the order needs to demonstrate that the document is necessary for the resolution of the case.

Certain documents are excluded from orders to produce, such as documents containing facts that have come to the attention of medical doctors or attorneys in the course of their duties or documents that were prepared solely for the use of the person who holds the document.

Even before the commencement of court proceedings, an application for the production of a document can be made if examination of the document may become difficult at a later stage (CCP, Article 234).

3.9 How long does it normally take to get to trial?

The length of a court proceeding depends on the particular circumstances of the case. In cases of first instance which ended in 2010, the average period of time between filing and the first oral hearing was 1.7 months. Please note that the CCP does not make a distinction between pre-trial proceedings and trial.

In civil proceedings, the parties generally make allegations on the merits of the case, allegations on procedural matters and submission of evidence concurrently in oral hearings and further preparatory proceedings. At the end of the proceeding, the court will hold witness examinations if it thinks it necessary, then render a judgment after that.

3.10 What appeal options are available?

An appeal to a court of second instance and a final appeal are both available.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

In the CCP there is no time limit to when a proceeding can be filed. However, the substantive law of Japan specifies that rights and obligations will lapse after a certain period of time.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have a discretion to disapply time limits?

The length of time varies depending on the type of claim, but in general, the following rules apply: (i) claims subject to the Civil Code will extinguish ten (10) years after the time that the claims became exercisable (the Civil Code, Article 166 and 167); (ii) claims subject to the Commercial Code will extinguish five (5) years after the time that the claims became exercisable (the Commercial Code, Article 522); and (iii) claims for compensation arising from tort will extinguish when three (3) years have passed from the time that the victim discovers the damage and the identity of the tortfeasor or when twenty (20) years have passed from the time of the tortious act (the Civil Code, Article 724).

The circumstances of the claimant will affect the time limit; for example, the rights of a minor without any statutory agent will not be extinguished until after the minor becomes an adult or obtains a statutory agent (the Civil Code, Article 158). Also, if the claimant is in circumstances under which he/she cannot be expected to exercise his/her rights in light of the nature of the rights, then the rights are deemed not to have been exercisable (the Supreme Court decision of 15 July 1970 (24-7 Minshu 771)).

If the passage of time is apparent from the briefs and evidence filed, and a party invokes the time limit, the court does not have any discretion but to apply the time limit.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Concealment or fraud may prevent the claimant from discovering damage and the identity of the tortfeasor, and may also hinder the claimant from exercising his/her rights. As such, these issues may affect the commencement of the time limit (please also see the answer to question 4.2).

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

In Joint Proceedings and Appointed Party Proceedings, all types of damage that may be compensated under the CCP, such as bodily injury, mental harm, damage to property and economic loss, are subject to compensation. For Consumer Organisation Proceedings, monetary compensation is not available.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Under Japanese law, the claimant, in principle, has the obligation to prove that it incurred damage and that the damage has a reasonable causal relationship to the tortious act. If the claimant seeks compensation of the cost of medical treatment, he/she must demonstrate these facts.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

In Japan, tort law does not allow the parties to recover punitive damages. A decision of a foreign court ordering punitive damages will not be enforceable in Japan so far as it relates to punitive damages (the Supreme Court decision of 11 July 1997 (51-6 Minshu 2573)).

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

For Joint Proceedings and Appointed Party Proceedings, there is no limit for recoverable damages. If the damages reasonably arise from a tort, they are recoverable. For Consumer Organisation Proceedings, monetary compensation is not available.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Under Japanese law, a claimant seeking compensation must prove the amount of damage he/she incurred. How damages are calculated depends on the method of proof used by the claimant. In cases where it is clear that damages were incurred but the demonstration of their amount is very difficult, the court can award the amount of damages which it considers appropriate (CCP, Article 248). Quantification of damages will be done separately for each victim. As a matter of law, the court will not calculate damages as a group then distribute compensation to the group's members.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

There are no special rules that apply to settlements for Joint Proceedings and Appointed Party Proceedings. In Consumer Organisation Proceedings, the approval of the court or the competent authorities is not required for a settlement. However, if a QCO reaches a settlement with one business operator, other QCOs will not, in principle, be able to make the same claim against the same business operator (CCA, Article 12-2).

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Litigation costs will be borne by the losing party in principle unless otherwise allocated by the court (CCP, Article 61). Please note that litigation costs under the CCP are limited to matters such as

payments to witnesses, fees arising from service of court documents and fees for filing a lawsuit. Other litigation relation expenses, such as attorneys' fees, will in principle be borne by both parties. However, in claims for damages arising from tort, the successful party may be able to request the payment of attorneys' fees to a reasonable level.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

In Joint Proceedings, joint parties, in principle, pay litigation costs in equal amounts but the court can set a different allocation or order the parties to pay the costs jointly and severally (CCP, Article 65). The distribution of other expenses such as attorneys' fees will be decided by an arrangement between the parties. In Appointed Party Proceedings, the distribution of litigation expenses will be decided by the arrangements between the appointing parties. In Consumer Organisation Proceedings, the QCO will pay the litigation expenses.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

If a party withdraws a lawsuit or abandons their claim, that party will, in principle, pay the litigation costs relating to their own claim. The distribution of other litigation expenses will be decided by the arrangements between the parties.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

There is no provision in the CCP that specifically requires the court to impose a cap on litigation costs. The court manages the amount of costs through its discretion on distribution; for example, if a party engages in unnecessary conduct or causes delay in the court proceedings, the court may allocate the costs arising from such conduct to that party (CCP, Articles 62, 63 and 65).

Assessment of litigation costs will be done as follows. First, the court determines the party who shall pay the litigation costs and its allotment. Secondly, the court clerk determines the specific amount after that.

7 Funding

7.1 Is public funding e.g. legal aid, available?

A person who lacks financial capacity may request the court to postpone the payment of litigation costs (CCP, Article 82). A person can also request the Japan Legal Support Centre to provide legal aid, such as an advance for the payment of attorneys' fees. Also, some local governments have implemented consumer protection ordinances which provide aid for consumer-related disputes.

7.2 If so, are there any restrictions on the availability of public funding?

The criteria for receiving aid vary depending on the entity which provides it. However, in general, if the party has financial capacity

or there is no possibility of winning the case, the party cannot receive aid from any entity.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

The Japan Federation of Bar Associations stipulates that attorneys' fees shall always be appropriate. Conditional or contingency fees might become inappropriate if they will make the amount of the attorneys' fees extremely high.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

In general, provision of financial aid by a third party is not in itself prohibited. However, the act of continuously taking over claims from a third party for the purposes of enforcing claims may be contrary to the laws of Japan (the Lawyers Act, Article 73). Furthermore, attorneys are not allowed to lend money to their client except under certain special circumstances, such as an emergency which requires the advance payment of litigation costs.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

In general, consumer claims can be assigned to a third party. However, the act of continuously taking over claims from a third party for the purposes of enforcing claims may be contrary to the laws of Japan (the Lawyers Act, Article 73).

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

If a professional claimant or other person/entity takes over consumers' claims for the purposes of enforcing claims on a continuous basis, it may be contrary to the Lawyers Act of Japan.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Victims of criminal cases can use criminal procedures as a means of recovering damages. More specifically, the following procedures may be used:

- (i) Settlement using criminal procedures: Where a victim of crime reaches an out of court settlement with a criminal defendant, the victim may request the court to record this in the court record. If the criminal defendant fails to pay the settlement amount, the criminal victim can enforce the settlement without filing a civil lawsuit.
- (ii) Order for compensation: Victims of certain types of crime can file a petition to the court hearing a criminal case for an order seeking compensation of damage.
- (iii) Recovery payment: For certain types of crime, such as fraud, the assets acquired by a criminal defendant through their unlawful acts will be confiscated by the government and the government will make payments to the criminal defendant's victims from those assets.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Mediation and arbitration can be used as a means of dispute resolution.

8.5 Are statutory compensation schemes available e.g. for small claims?

There is no general statutory compensation scheme. However, there are compensation schemes for certain areas of law; for example, the scheme mentioned in part (iii) of the answer to question 8.3.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

A variety of remedies, including but not limited to monetary compensation, injunctive relief and declaratory relief, are available in arbitration, provided that they are derived from the applicable substantive law. A variety of remedies are also available in mediation but mediation requires the consent of both parties to be effective.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Joint Proceedings and Appointed Party Proceedings may be brought by residents from other jurisdictions. However, Japanese courts must have jurisdiction over the claims brought against them. Consumer Organisation Proceedings may only be brought by QCOs and cannot be brought directly by residents of other jurisdictions.

There is no provision in the CCP which specifically prohibits forum shopping. However, the court will deny jurisdiction if there are special circumstances where the handling of the proceedings in Japan is contrary to the ideas of fairness of the parties and ensuring just and speedy adjudication (the Supreme Court decision of 11 November 1997 (51-10 Minshu 4055) and Article 3-9 of the CCP).

9.2 Are there any changes in the law proposed to promote class/group actions in Japan?

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 current system.

The New System will consist of two-stages. The first stage is a procedure which will determine the obligations ("Common Obligations") deriving from factual or legal causes that are common between a considerable number of aggrieved consumers and a business operator ("First Stage"). This First Stage procedure can only be filed by a "Specified Qualified Consumer Organisation" ("SQCO") and only against business operators as defendants. Among QCOs (as defined in the answer to question 1.1) (and other entities which will become QCOs), only those certified by the Prime Minister as fulfilling the requirements of the New System will be entitled to attain SQCO status.

If the SQCO, acting for the benefit of the considerable number of aggrieved consumers, succeeds at the First Stage, the amount to be paid to each aggrieved consumer will be determined at the second stage (“Second Stage”). The Second Stage is commenced by a petition filed by the SQCO. Thereafter, the SQCO will give individual and public notice to aggrieved consumers to participate in the Second Stage. Consumers who join the Second Stage of the procedure may receive compensation, although consumers who do not join at such time will still have the option to file a lawsuit on their own behalf. The court decision at the First Stage will be binding on the parties of the First Stage and also consumers who joined during the Second Stage.

It is particularly worth noting that the claims brought under the New System can only be one of the following:

- (i) a claim for performance of a consumer contract, being an agreement which is concluded between a consumer and a business operator (“Consumer Contract”);
- (ii) a claim for the return of unjust enrichment in relation to a Consumer Contract;
- (iii) a claim for compensation based on default of a Consumer Contract or defect liability under a Consumer Contract; or
- (iv) a claim for compensation of damage resulting from a tort committed in conjunction with a Consumer Contract. It should be noted that the scope of tort claims which can be brought under the New System will be limited to tort claims under the Civil Code and not tort claims under special laws.

In addition, claims which can be brought under the New System will be limited only to monetary claims against a business operator. Furthermore, with respect to (iii) and (iv), although damages relating to the subject matter of the Consumer Contract will be compensated, secondary losses will not be eligible for compensation.

In this article, we have summarised the New System based on the information disclosed to date. As the discussions are still ongoing and the proposed legislation may further change, the New System, as described in the bill or finally implemented, may subsequently be different from that described in this Article.

**Nobuhito Sawasaki**

Anderson Mōri & Tomotsune
Izumi Garden Tower
6-1 Roppongi 1-chome, Minato-ku
Tokyo 106-6036
Japan

Tel: +81 3 6888 1102
Fax: +81 3 6888 3102
Email: nobuhito.sawasaki@amt-law.com
URL: www.amt-law.com/en

Nobuhito Sawasaki is a partner at Anderson Mōri & Tomotsune. Mr. Sawasaki has been engaged in a wide range of practice areas since he joined the firm in 2001. He has advised domestic and foreign clients on labour law, pension law, mergers and acquisitions, corporate law, the Private Information Protection Act and financial regulations.

Recently, Mr. Sawasaki has been advising domestic and foreign clients on compliance with labour and employment laws, the Private Information Protection Act and business licensing issues. He has also assisted domestic and foreign clients with numerous labour disputes and other labour-related matters such as the redundancy process, formulation of working rules and reformation of employee benefits schemes. Further, Mr. Sawasaki contributes practical advice to domestic and foreign clients which handle personal information and proprietary information in the course of their business.

**Toshishige Fujiwara**

Anderson Mōri & Tomotsune
Izumi Garden Tower
6-1 Roppongi 1-chome, Minato-ku
Tokyo 106-6036
Japan

Tel: +81 3 6888 5896
Fax: +81 3 6888 6896
Email: toshishige.fujiwara@amt-law.com
URL: www.amt-law.com/en

Toshishige Fujiwara is an associate at Anderson Mōri & Tomotsune.

Mr. Fujiwara has experience representing foreign and domestic clients in litigations and other dispute resolution procedures, in areas such as international disputes, consumer disputes (including group disputes), financial transactions, administrative disputes and liability claims. Mr. Fujiwara also has experience of advising foreign and domestic clients in a variety of areas including dispute resolution, consumer protection, labour, financial regulations, international law, trade control, pharmaceutical affairs, corporate pension and other general corporate matters.

ANDERSON MŌRI & TOMOTSUNE

Anderson Mōri & Tomotsune is one of Japan's premier law firms. As of September 1, 2012, the firm has 304 Japanese lawyers (bengoshi), 10 lawyers qualified in foreign jurisdictions, approximately 139 other professional staff including patent lawyers, immigration lawyers, foreign legal trainees, translators and paralegals, and approximately 183 other general staff members.

Anderson Mōri & Tomotsune has offices in Tokyo and Beijing and it provides a full range of specialised legal services for both international and domestic corporate clients. The firm is frequently involved in domestic and international legal matters of substantial import. In particular, the firm has extensive expertise in large M&A and finance transactions, global securities offerings and other cross-border investment transactions. The firm also represents clients in complex international and domestic legal disputes.

Other titles in the ICLG series include:

- Aviation Law
- Business Crime
- Cartels & Leniency
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Investment Funds
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Telecoms, Media & Internet
- Trade Marks



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk