

Client Alert

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The New Class Action Legislation Promulgated in Japan

by Kengo Nishigaki and Takeshi Yoshida

Introduction

The “Bill on the Special Act on Civil Litigation Procedure for Collective Recovery of Property Damages by Consumers” – a bill which contains the new Japanese class action system, was promulgated on December 11, 2013. It will enter into force within 3 years from the date of its promulgation and Japan will, for the first time, have a class action system with two tiers and an opt-in procedure. Currently, under the existing collective consumer litigation system only an injunctive relief can be claimed against illegal acts by a business operator. The new Japanese class action system, however, will allow monetary damages suffered by consumers to be claimed, and can therefore be expected to have a significant impact on international corporations doing business with consumers in Japan. We suspect that international corporations which may become involved in Japanese class action suits will likely need special and advance litigation strategy and/or preparation because of this change.

Problems with the existing collective litigation legislation in Japan

A collective consumer litigation procedure already exists under the Consumer Contract Act but, under the current system, recovery is limited to injunctive relief for violation of the Consumer Contract Act by a business operator. In order to recover collective monetary damages, consumers have no other option than to utilize the Appointed Party System (“*Senteitoujisha-seido*” in Japanese) – a system in which multiple parties who share common interests appoint a representative party to file the lawsuit, or a Consolidation of Claims (“*Seikyu no heigou*”), wherein each party files a separate lawsuit and the claims are subsequently consolidated into a sole procedure at the initiative of the court. These systems have rarely been employed in collective consumer litigation for damages because many consumers are reluctant to file a lawsuit considering the probability of losing a case and the high legal costs that may be involved.

History of the new class action legislation

The project to pass a bill codifying a new Japanese class action system began in the wake of the OECD's "Recommendation of the Council on Consumer Dispute Resolution and Redress" in July 2007. This statement recommended that OECD members establish dispute resolution and redress systems to handle claims for economic damages by consumers in connection with their transactions with business operators. The Consumer Affairs Agency was then established in 2009 and it proceeded with the legislation project. This April, the bill was passed as a resolution by the cabinet and it was brought before an extraordinary session of the Diet in the fall of 2013. However, multiple economic organizations, such as the Japan Federation of Economic Organizations, and the American Chamber of Commerce in Japan, etc. have requested that the government withdraw the bill, warning of adverse effects on the Japanese economy due to abuse of the Japanese class action system.

Outline of the new JP Class Action

Standing to sue

Under the new class action rules, only a "Certified Qualified Consumer Organization" (*Tokuteiteki kakushou hisha dantai*) (hereinafter, "CQCO") approved by the government may file a class action claim for monetary damages on behalf of consumers. At the moment, 11 "Qualified Consumer Organizations" (*Tekikakushou hishadantai*) (hereinafter "QCO") have been approved by the government under the existing collective consumer litigation system, most of which are also expected to be certified as CQCOs. Under the existing system, a QCO cannot charge fees for its litigation activities, but under the new system, the CQCO may collect fees and costs from the consumer class members at the "second-tier" stage of the litigation. In this respect, the new CQCOs will have a strong incentive to be more active in filing class actions than the previous trend.

Claims subject to class actions

The claims subject to the new system are defined as "Common Obligations" (*Kyotsuu gimu*), which means obligations to make monetary payments which business operators owe to consumers under the Consumer Contract Act. More specifically, the claims subject to the new system are as follows: a) claims for performance based on contractual obligations, b) claims for unjust enrichment, c) claims for damages caused by defaults on contractual obligations, d) claims for damages due to product defect liability, and e) claims for damages caused by unlawful acts (*Fuhoukoui*). Only claims for damages caused by unlawful acts can be brought against not only business operators who are parties to consumer contracts but also business operators for the performance or solicitation of consumer contracts.

If claims are subject to Common Obligation but they are difficult to determine in the Simplified Determination Procedure (*Kanikakuteitetsuzuki*), (the "second-tier" procedure of the new class action system), the court may dismiss the lawsuit at the first-tier procedure level. Furthermore, only limited damages can be claimed through the system. For example, the following types of damages will be beyond the scope of the new system: a) so-called "consequential damages" (*Kakudai songai*), which means loss or damage to property other than the subject of the consumer contract, b) lost profits, which identifies the projected profit if the consumer contract

had been properly executed, c) physical injuries (*Jinshinsongai*), which means damage to the life or health of a person, and d) pain and suffering (*Isharyou*), which means psychological damage resulting in mental pain or suffering.

Further, claims subject to the new system have to relate to damages owed to a “considerably large number of persons.” In public comments made during the process of drafting the bill, the government was asked to clarify the meaning of a “considerably large number of persons” and the response by the government was that “tens of people” (a very fuzzy number) would suffice.

Two-tier and opt-in procedure

The two-tier and opt-in procedure is the main feature of the newly emerging Japanese class action system. In a “first-tier” procedure, a CQCO will file a lawsuit requesting the court to confirm a Common Obligation in the claims if the CQCO finds that damages have been caused to a considerably large number of consumers. If the Common Obligation is not confirmed by the court, the procedure will end and a “second-tier” procedure will not commence. If the Common Obligation is confirmed by the court or by an agreement by the parties during the first-tier procedure, a “second-tier” procedure will be initiated to determine the claims of consumers.

In the second-tier procedure, a CQCO will notify consumers with potential claims found to be subject to the class action of the first-tier result or will provide public notice to them by way of internet, newspapers, TV commercials, etc. By the CQCO’s request, the business operator will also be required by the court to provide public notice by way of internet, newspapers, etc. and disclose information identifying consumers with potential claims subject to the class action to the CQCO.

Consumers with claims will then delegate the authority to recover their claims to the CQCO via the same procedure, and the CQCO will file said claims with the court. The court will forward the claims to the business operator who will then approve or reject them after reviewing the alleged facts and evidence in relation to each of them. If the business operator approves the claims, they will be confirmed without additional procedures. If the business operator rejects the claims, they will be determined by the court in a Simplified Determination Procedure, in which only documentary evidence will be examined. If the consumer objects to a determination reached in a Simplified Determination Procedure, the case will be changed to an ordinary litigation procedure. The drafters of this Bill expect the Simplified Determination Procedure to be used for settlements between business operators and consumers due to cost efficiency.

The court's judgment in the first-tier procedure will be binding against other CQCOs as well as the parties and the judgment in the second-tier procedure will be binding against all consumers who delegated the authority to seek recovery of their claims at the end of the second-tier procedure to the CQCO.

Provisional Attachment

Under the new class action system, even prior to filing the class action, a CQCO may seek provisional attachment if the CQCO makes a prima facie showing of the claims subject to the class action, the scope of the consumers, the amount of the claims and necessity of the provisional attachment.

Final Amendments

The original Bill was slightly amended by the House of Representatives immediately before passage. These amendments include obligations imposed on the government to take necessary measures to avoid abuse of power by the CQCO and unjust effects on business operators caused by the CQCO. An obligation to support the CQCO's performance by providing it with financial and information resources was also imposed on the government.

Implications for Companies

New Recall Policy

Currently, recalled defective products sold under consumer contracts can be the subjects of a new class action, but the Consumer Affairs Agency will likely issue guidelines to the contrary. Such guidelines have been requested by the Japan Federation of Economic Organizations. Thus, companies should re-examine their product recall policies in order to avoid unjust liability in future class action lawsuits.

Handling of Legal Action

The defendants in new class actions will usually be retailers who contract directly with consumers, rather than manufacturers. However, manufacturers can assist retailers through intervention ("*Hojyosanka*") in a particular case.

Company reputations can be easily damaged by class actions. Although protection from this risk will not be easy, companies can seek dismissal of claims brought against them based on the lack of a "Common Obligation" or difficulty in determining the claims in the "second-tier" procedure immediately after the initiation of the lawsuit – this will help to minimize reputation damage to some possible extent.

After a second-tier procedure starts, a number of unjust claims will most likely be filed with the court. Companies then risk inadvertently approving unjust claims, due to being overwhelmed by the need to process a large number of claims. Once unjust claims are mistakenly approved, they cannot later be excluded. In addition, as the court will apply the company's standards for claim approval when deciding whether to approve claims during the second-tier procedure, mistaken approval could expand the company's liability by causing the court to erroneously approve claims under the same standards. In order to avoid this legal risk, it is vital for companies to establish clear standards of approval of claims in the initial stages, ensure that information is shared by the team members processing the filed claims on a daily basis, and have other team members double check approval decisions before submission.

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