

## Client Alert

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### Class Actions Now Available In Japan: Steps Global Companies Should Take To Address Them

On 1 October, a new law came into force introducing class actions in Japan, the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (hereafter, the "Consumer Special Measures Act").

Japanese-style class actions involve risks which businesses cannot ignore, and these extend beyond the class action itself. The foreseeable risks include satellite litigation and reputational risks. For global companies, how to manage these risks under the local regime in Japan will be a key business challenge.

#### What is a Japanese-style class action?

The Japanese-style class action differs from the archetypal US class action. The Japanese system provides for a two-stage, opt-in procedure. In outline, at the first stage, a Specific Qualified Consumer Organization commences litigation against a company seeking a declaration as to the liability of the company under the consumer contract (defined as "Common Obligations" under the Consumer Special Measures Act) as representatives of other potential consumer claimants. At the second stage, if the court finds that the company is liable (in respect of those common obligations), other consumers may then join the litigation as creditors in their own right without there being any uncertainty as to whether the company in question is liable, enabling them to claim damages for their individual economic loss cheaply and easily. For more detail on the procedure under the Consumer Special Measures Act, you may wish to consult "[The New Class Action Promulgated in Japan](#)".

As further explained below, from the point of view of risk management, there are dangers associated with Japanese-style class actions which global companies need to grasp.

#### What are the risks associated with a Japanese-style class action?

##### 1. Reputational risks

First and foremost among the risks associated with a Japanese-style class action is the risk of adverse publicity where dozens of individuals bring claims, even though these may be for comparatively small sums individually. Once such a class action receives media attention, the reputation of the company may be severely damaged.

In order for a claim to be brought under the Consumer Special Measures Act, the sole requirement which must be satisfied in terms of extent of loss is that a "considerable number" of consumers have sustained damage, and in practical terms, it is thought that tens of individuals will suffice for this purpose. Accordingly, it is possible that, if a few dozen consumers suffer loss, a

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company may face a consumer class action, exposing it to unwanted media attention which will have a serious adverse effect on its public image.

## 2. The risk of damages for consequential and other losses

In the end result, the potential scope of liability arising out of a Japanese-style class action extends to consequential loss, loss of profits, personal injury and damages for pain, suffering and distress.

It is true that the Consumer Special Measures Act excludes from the scope of recoverable loss in a class action: (i) so-called 'consequential' loss (loss resulting from the destruction or damage to property other than the subject-matter of the consumer contract); (ii) loss of profits (loss resulting from the failure to secure an advantage that likely would have been obtained had the consumer contract been fulfilled); (iii) personal injury (loss consisting of harm to life or limb); and (iv) damages for pain, suffering and distress (i.e., loss constituted by the infliction of psychological suffering).

Nonetheless, the risk that consumers will bring claims for these heads of loss in satellite actions that follow on from Japanese-style class actions is substantial. What this means in specific terms is that once consumers get a favorable judgment under the Consumer Special Measures Act, they are very likely to commence separate proceedings and plead the fact of the previous judgment in order to claim losses that could not be recovered in those earlier proceedings.

Such risks are potentially wide-ranging for any business that provides services or goods that make their way into the hands of consumers, and are likely to be a significant concern for many global companies which have a presence in Japan.

### What measures should global companies take to avoid such risks?

In the first instance, internal by-laws governing claims handling should be put in place, information relating to quality issues that have arisen in the market should be collated at an early stage, and a framework should be put in place which ensures improvement measures are implemented as soon as possible at the production line level and elsewhere. As part of this process, provisions must be adopted that specify which departments and which personnel will be responsible for handling claims, lay down duties to report promptly information regarding claims and relevant procedures, impose a duty of cooperation in relation to fault investigations and quality improvement on all departments involved, and stipulate penalties for the breach of such duties.

Moreover, there needs to be an organization in place that can rapidly introduce proactive damage limitation measures such as product recalls, exchanges, repairs and returns. The official view of the Consumer Affairs Agency is that if, as a result of a product recall, there ceases to be a "considerable number" of consumer complainants, the condition precedent to commencing a claim for a declaration under the Consumer Special Measures Act will not be satisfied and any claim likely will be struck out. When conducting product recalls, it must be borne in mind that there is a duty, in any event, to notify the supervisory authorities of any steps taken as part of the recall exercise in the event that the relevant laws are applicable.