Chapter 1

GROUP LITIGATION (CLASS ACTION) IN JAPAN

Toshitaka Kudo*
(Keio University)

1. Prologue: Defining "Group Litigation" and "Class Action"

In one sense, "class action" and "group litigation" indicate a lawsuit filed by a group or class of people as a multiparty action. The legal nature of this proceeding is just a bundle of ordinary individual lawsuits to which general rules of civil procedure apply. As a basic rule, a party seeking a substantive individual right has standing (due qualification) to file a lawsuit; a final judgment is binding only between parties.

In another sense, those terms indicate a lawsuit subject to special procedural rules, particularly concerning standing and *res judicata*. A plaintiff satisfying special standing requirements may file a lawsuit on behalf of a group or class of absent parties, who will be bound by a final judgment eventually. In this sense, a class action the U.S. federal law[1] is the most well-known system worldwide.

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[1] Fed. R. Civ. P, Rule 23.

Usages of "group litigation" and "class action" are not clearly distinguished. The lawsuit processed under a group litigation order (GLO)[2] in England and Wales is theoretically categorized as "group litigation" in the former sense, while some scholars refer it as an opt-out class action. On the other hand, "class action" is sometimes used in the former sense, especially when common law jurisdiction refers multiparty lawsuits in Continental law jurisdiction.

The bottom line is that no one made clear distinction between"group litigation" and "class action." Nevertheless, there seem to be subtle differences in usage of the two terms in Japan. In nuance, "group litigation" might be preferred in the former sense; "class action" in the latter. We use "group litigation" in the former sense and "class action" the latter, unless noted. Today, class action attracts more academic and practitioner attention globally, but in Japan group litigation often drives social and political movements beyond judicial dispute resolution. The following sections examine systems and actual cases in Japan.

2. Group Litigation in Japan

2.1 Overview

Since enactment of the current Constitution after WWII, Japan has seen a variety of group litigation cases. In many of those cases, a group of attorneys solicits possible claimants to file a lawsuit and represents them in court as grassroots social outreach, often pro-bono.

The most popular type of group litigation is personal injury despite immanent challenge to collective processing. Even if injuries are caused by the same or homogeneous factual ground, each victim's suffered damage differs significantly. Therefore, a practice called "categorized comprehensive damages" was generated to process group litigation efficiently. In this practice, plaintiffs voluntarily categorize themselves into several subgroups, depending on suffered damages.

[2] Civil Procedure Rules 2000, SI 221, Sch. 2, Rule 19.11.

Plaintiffs in the same subgroups seek the same amount of damages regardless of their specific injuries or diseases.[3] For example, in hepatitis C cases mentioned below, plaintiffs are categorized to three subgroups: successors of a victim dead from chronic hepatitis C, victims suffering chronic hepatitis, and asymptomatic carriers of the hepatitis C virus.

Another common practice in personal injury group litigation is to sue the state as a co-defendant allegedly owing secondary liability. This practice is believed to attract public attention and political involvement. Again, in hepatitis C cases, pharmaceutical companies that manufactured blood derivatives contaminated by hepatitis C virus were sued as defendants owing primary tort liability. In addition, the state was sued as a co-defendant owing supplemental liability based on negligent delay in revoking approval of contaminated derivatives.

Following sections describe several actual group litigation cases. They are a small portion of various actual cases.

2.2 Examples of concluded milestone cases

(1) Coal workers' pneumoconiosis case

In 1985, coal workers who suffered pneumoconiosis (black lung disease) triggered by ingestion of coal particulates and heirs of coal workers who died from the disease filed a lawsuit claiming damages against coal mine companies and the Japanese government. Because those 169 workers worked for coal mines in the Chikuho area of Kyushu, a major source of energy for Japan until the 1970s, this case is customary called the "Chikuho pneumoconiosis lawsuit."[4] Most defendant companies settled the case and paid damages to the plaintiffs, but one defendant company and the state fought all the way to the final appellate

[3] Sup. Ct. judgment on December. 16, 1981 (35–10 Minshu 1369) affirmed such practice in finding damages (This case is unusual, because the Court justified blanket finding of damages, responding the group litigation plaintiffs' criticism on it.).
[http://www.courts.go.jp/app/hanrei_en/detail?id=66]

[4] Fukuoka Bar Association Chikuho Division's website summarizes outline of the case at [http://www.chikuho.org/jirei/jinbai.html] (in Japanese).

instance. The final judgment by the Supreme Court in 2004 held the remaining defendants liable.[5] In particular, the judgment of state liability is regarded as a landmark because it found the state liable under doctrine of "negligent omission of administrative control" for the first time.[6]

(2) Hepatitis C cases

The lawsuits were filed by people who were administered blood-clotting agents during operations or childbirth between 1971 and 1990, and allegedly were infected with human hepatitis C virus (HCV) contamination in the administered products. Since 2002, the plaintiffs sought damages against pharmaceutical companies and the government in five district courts (Tokyo, Osaka, Fukuoka, Sendai, Nagoya). The first-instance judgments were rendered between 2006 and 2007, but each district gave different rulings on the period for which defendants were liable and types of products. Although all of these judgments were appealed, the Osaka high court proposed settlement negotiation in September 2007. After difficult negotiation at the working level and fierce political debate in the Diet, the prime minister accepted state liability for all plaintiffs regardless of timing and types of agents administered to them. In January 2008, the Diet immediately passed a special law that established a system to pay compensation to victims of the HCV contaminated products.[7] As a consequence, all pending lawsuits were settled. Under the new system, a victim who seeks compensation must file a lawsuit and obtain necessary fact-finding by the court. Upon the court's positive finding, the plaintiff can file a claim to the special fund, which

[5] Sup. Ct. judgment on Apr. 27, 2004 (58–4 Minshu 1032) [http://www.courts.go.jp/app/hanrei_en/detail?id=696]

[6] Supreme Court judgment in Chloroquine drug-harm case (Sup. Ct. judgment on Jun. 23, 1995 (49–6 Minshu 1600)) recognized the theory, but the court did not find liability of the State in the case. [http://www.courts.go.jp/app/hanrei_en/detail?id=221]

[7] Act on Special Measures concerning the Payment of Benefits to Relieve the Victims of Hepatitis C Virus Infections Caused by Specific Fibrinogen Products and Specific Coagulation Factor IX Blood Products" (Law No.2, 2009).

was raised by the state and the pharmaceutical companies.

2.3 Examples of pending high-profile cases

(1) Isahaya bay tide gate cases

(a) Background: Isahaya Bay reclamation project

Isahaya Bay is part of the Ariake Sea in northwestern Kyushu. The Ariake Sea is characterized by a large tidal range and wide tidelands. The state implemented the Isahaya Bay reclamation project with the objectives of improving disaster-prevention and creating superior agricultural land. The "Tide Levee" was established as part of that project. It is a levee approximately 7km in length established to divide Isahaya Bay and create reclaimed land and a retention basin on its interior. Sluice gates installed on this levee allow control of the water level of the interior freshwater retention basin.

(b) Fishermen's suit demanding opening of the gates

In December 2010, the Fukuoka High Court ruled in favor of a suit brought by a group of fishermen from Isahaya Bay who claimed the fishing industry had suffered as a result of the Tide Levee and who sought the opening of the sluice gates by the state (the 2010 Fukuoka High Court Decision).

The fishermen applied for indirect compulsory execution of the 2010 Fukuoka High Court Decision, and the court issued an order for indirect compulsory execution. The state appealed, but the Supreme Court rejected this appeal in January 2015.[8] Accordingly, the state was obliged to pay JPY450,000 per day in indirect compulsory performance until it opened the sluice gates (later this indirect compulsory performance payment increased to JPY900,000 per day when an application from the fisherman to increase this amount was granted).

The state filed an action to oppose execution with regard to the 2010 Fukuoka High Court Decision, seeking disapproval of compulsory execution. The judgment at the first instance denied the state's application, but it was overturned at the second instance (Fukuoka High Court judgment on July 30, 2018: hereinafter

[8] Sup. Ct. decision on Jan. 22, 2015 (249 Shumin 43).

the 2018 Fukuoka High Court Decision), which ordered a stay of the indirect compulsory execution. The group of fishermen has made a final appeal seeking to resume the execution; the case is still pending at the Supreme Court.

(c) Farmers' suit demanding an injunction against opening the gates

Meanwhile, a group of farmers who farm the reclaimed land to the interior of the Tide Levee had applied for a provisional disposition, seeking an injunction preventing the state from opening the sluice gates. In November 2011 the Nagasaki District Court gave a provisional disposition ordering an injunction against opening the gates; the state appealed, but the Supreme Court dismissed its appeal in January 2015.[9] Accordingly, the state was obliged to pay JPY490,000 per day in indirect compulsory performance, until it performed its obligation not to open the gates.

In April 2017, the Nagasaki District Court ruled in the first instance to allow the farmers' application for an injunction preventing the state from opening the gates. The state did not appeal, aiming to settle with the fishermen without opening the gates by establishing a fund for them. Although the fishermen's group, which had not been party to this case, applied for intervention as an independent party and appealed against the decision in the first instance, the court of second instance dismissed this application to intervene. The fishermen's group has made a final appeal against this judgment, and a ruling from the Supreme Court is pending.

(d) The state's dilemma, and three-party settlement negotiations

Because court proceedings relating to the fishermen and farmers proceeded separately and the Supreme Court rendered conflicting judgments in relation to those respective proceedings, the state has found itself facing a dilemma whereby it is required to make indirect compulsory execution payments whether it opens the gates or not. The Fukuoka High Court (which heard the action to oppose execution, described above (b)) and the Nagasaki District Court (which heard the suit for an injunction against opening the gates, described above in (c))

[9] Sup. Ct. decision on Jan. 22, 2015 (249 Shumin 67).

recommended a three-party settlement among the fishermen, farmers, and state; negotiations were being held, but they did not reach a settlement, and so the suits reached judgment. As a consequence of the 2018 Fukuoka High Court Decision, at present the state has no obligation to make indirect compulsory execution payments for not opening the gates, but the triparty dispute has yet to reach final solution.

(2) Fukushima nuclear accident evacuees' cases

(a) Background: compensation for nuclear damage

Many people residing in Japan were affected by the accident at the Fukushima Daiichi Nuclear Powerplant, triggered by the huge earthquake and tsunami on March 11, 2011. Individuals and corporations that suffered damages caused by the nuclear accident can seek compensation in three routes: filing a claim directly to the owner and operator of the plant, alternative dispute resolution, and litigation.

(i) Direct filing

Following provisional payments started after a month after the accident, the plant owner Tokyo Electric Power Company (TEPCO) launched the formal compensation scheme in September 2011. Filing can be made by completing a detailed form provided by TEPCO. A specialized unit within TEPCO processes the lodged claims, complying with general standards published by the Dispute Reconciliation Committee for Nuclear Damage Compensation, which is described below. If a claimant and TEPCO agree on compensation, it will be paid immediately upon signing agreement. As of November 22, 2018, TEPCO had received approximately 2.8 million filings, of which it had settled 2.6 million. A cumulative total of paid compensation is exceeding JPY 8 trillion.[10]

(ii) Alternative dispute resolution (ADR)

Claimants who cannot reach agreement with TEPCO or are disinclined to file a claim directly to TEPCO can refer the dispute to mediation provided by

[10] TEPCO website [http://www.tepco.co.jp/fukushima_hq/compensation/results/index-j.html] (in Japanese)

the Nuclear Damage Dispute Resolution Center (NDDRC).[11] The NDDRC was established in August 2011 as a subsidiary of the administrative committee in charge of mediation under the Nuclear Damage Compensation Act,[12] namely, the Dispute Reconciliation Committee for Nuclear Damage Compensation organized under the Ministry of Education, Cultural, Sports, Science and Technology.

The mediation scheme is operated by part-time mediators and full-time investigators. Mediators appointed to individual cases by the NDDRC process the mediation individually or as a panel, depending on complexity of a case. The investigators, all of whom are term-appointment attorneys, support the mediators by gathering facts, researching legal matters, and refining issues. Mediators can persuade parties to settle by themselves or issue recommended terms of settlement when no agreement is reached. Because evaluation of nuclear damage is highly technical and many people suffered homogeneous damages under similar circumstance, the NDDRC created a series of "general standards" for common categories of damages to ensure equal treatment. In recommending terms of settlement, the mediators must comply with the general standards, which legally are just unbinding internal guidelines. As of November 22, 2018, the NDDRC had received approximately 24,000 filings, of which it had settled 18, with 1,199 cases now pending. The rest of the flied cases had been mostly withdrawn or terminated without reaching agreement.[13]

(iii) litigation

Litigation is the last resort open to all: those who are disinclined to file either the direct claim or the ADR; those who are dissatisfied with amounts of compensation (actually or potentially) proposed at the direct claim or the ADR; those who want to use litigation to express their anger and denounce culpability of TEPCO and the state in public. If as claimant's motivation is either of former

[11] Theoretically, a claimant can choose other private ADR services, however such choice is not practical due to mediator's or arbitrator's lack of expertise for nuclear damage.

[12] Nuclear Damage Compensation Act, Art. 18.

[13] NDDRC website [http://www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/detail/1329118.htm]

two, s/he can just file an ordinary individual lawsuit. In fact, substantial numbers of group litigations have been filed.

(b) Group litigation cases

Most group litigation cases seeking compensation for the 3/11 nuclear accident have several common features. Plaintiffs are generally individuals who evacuated after the nuclear accident. Some lived in mandatory evacuation zones and others evacuated voluntarily. The majority of plaintiffs seek compensation exceeding standards established by the Reconciliation Committee based on various legal grounds such as general provision of tort in Article 709 of the Civil Code, the alleged individual rights guaranteed in Article 25 (wholesome and cultured living) and Article 13 (pursuing of happiness and developing personalities) of the Constitution, etc. As of November 2018, over 30 group litigation lawsuits comprising more than 10,000 plaintiffs are pending across the nation. Judgments of the first instance have been rendered in seven district courts. In four cases, both TEPCO and the state were held liable; in one case only TEPCO by negating state liability. In two other cases, the state was not designated as a defendant. Over 3,600 plaintiffs prevailed with JPY2.7 billion awarded. All these judgments have been appealed. In addition to the above-mentioned cases, one exceptional lawsuit claims liability of the reactor manufactures: GE, Hitachi, and Toshiba. As of November 2018, the case was pending at the Supreme Court after dismissal judgments at the first and appellate instances.

(3) HPV vaccine cases

(a) Background: controversies over HPV vaccination

The World Health Organization recommends human papillomavirus (HPV) vaccination to prevent HPV-related diseases such as cervical cancer. HPV vaccines are approved and available in over 100 countries. Over 50 countries, mainly European and North/South American, have adopted HPV vaccine in their national immunization program.

At present, Japan is among these countries. HPV vaccine Cervarix manufactured by GlaxoSmithKline obtained governmental approval in November 2009;

Gardasil by MSD (Merck) in July 2011. Since December 2011, the approved HPV vaccine has been provided at no cost to Japanese girls ages 12–16 by public funding. In April 2013, HPV was added to the list of recommended routine vaccinations specified in Immunization Act.

However, unconfirmed unusual post-vaccination neurological symptoms were reported. In worst cases, teenage girls suffered from numbness allegedly due to their HPV immunization. In March 2013, victims suffering serious symptoms established an organization to promote prohibition of the immunization and more public relief for the side-effect victims. Responding to media pressure and public attentions, MHLW suspended its proactive recommendations for the vaccine in June 2013, only two months after enactment.[14]

According to MHLW's evaluation of research conducted after the suspension, it is highly probable the reported post-vaccination symptoms were not causally associated with HPV vaccination but were psychosomatic responses. Nevertheless, the MHLW insisted on further studies before resuming the governmental recommendation.[15]

In any event, approval of the HPV vaccines itself has never been under review. In addition, the Immunization Act provides a compensation scheme for a routine vaccination recipient suffering health damage caused by the vaccination including one for HPV vaccination.

(b) Group litigation cases

Groups of HPV vaccination recipients suffering adverse neurological symptoms filed lawsuits against the two manufactures and the state. The first groups filed lawsuits at four district courts (Tokyo, Nagoya, Osaka and Fukuoka) in July 2016, followed by the second groups in December 2016. The 119 plaintiffs insist HPV vaccines have not proved useful in preventing cervical cancer but incur serious side effects more often than other routine vaccines. All cases are still pend-

[14] [https://www.mhlw.go.jp/bunya/kenkou/kekkaku-kansenshou28/pdf/kankoku_h25_6_01.pdf]

[15] [https://www.mhlw.go.jp/bunya/kenkou/kekkaku-kansenshou28/dl/tp160316_01.pdf]

ing at the first instances.

3. Special Procedural Measures for Consumer Protection

Japan had no class action system for a long time. However, in the area of consumer protection, new procedural measures were created during the past two decades. One is for injunctive action, the other for monetary compensation. These new statutes do grant standing not to individual consumers but to consumer organizations. Therefore, the systems are often called *Shohisya Dantai Soshou* ("consumer group litigation"), and the latter one *Shohisya Shugou Soshou* ("consumer collective action") or "Japanese class action," distinguishing from the former one.

3.1 Action for injunctive relief

(1) Background

Prior to the legislation in Japan, a tide came from Europe. In 1993, a Council Directive on unfair terms in consumer contracts (Unfair Terms Directive)[16] recommended measures to prevent unfair contractual clauses. In 1998, a Directive of the European Parliament and of the Council on injunctions for the protection of consumers' interests[17] mandated member states to establish injunctive actions by qualified consumer organizations. Following the directives, each member state designed systems for injunctive relief by their national law.

In Japan, responding the Opinion Paper of the Judicial Reform Council released in 2002, the Economy Welfare Bureau, an affiliate of the Cabinet, begun a study for a group action for consumers in 2004. Getting through discussion at the committee and the Diet, a special rule for injunctive action was added to the

[16] Council Directive 93/13/EEC, OJ L 95, 21.4.1993, p. 29–34.

[17] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51–55.

Consumer Contract Act (CCA) in 2006 and enacted in 2007. In drafting a bill, national laws in Europe, especially Germany, were referenced intensively.

(2) Standing

Only a qualified consumer organization (QCO) can file the injunctive action against an enterprise allegedly violating consumer protection law. Neither a governmental agency nor an individual consumer has standing. To qualify, a consumer organization needs to be certified by the government. Substantive requirements and procedural rules for certification are specified in CCA.[18] On the statutory text, the prime minister has authority to certify, but the Consumer Affairs Agency is in charge. As of July 2018, 19 organizations were certified.

(3) Subject matters

Either of the following unfair activity by the defendant enterprise constitutes a subject of injunction:[19]

(i) Inappropriate solicitation or contractual clauses prohibited under CCA

(ii) Violation of Act against Unjustifiable Premiums and Misleading Representations

(iii) Violation of Act on Specified Commercial Transactions (regulation on door-to-door sales etc.)

(iv) Violation of Food Labeling Act

(4) Pre-action requirement

Prior to filing the lawsuit, a QCO must send a written demand to stop violation to an alleged violator (enterprise). In addition, violation has been continuing over 1 week even after the demand; or the violator expressly refused the demand.[20]

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[18] CCA Art. 13–14.

[19] CCA Art. 12; Violation of Act against Unjustifiable Premiums and Misleading Representations Art. 30(1); Violation of Act on Specified Commercial Transactions (regulation on door-to-door sales etc.) Art. 58–18 to 58–24; Food Labeling Act Art. 11.

[20] CCA Art. 41(1).

(5) Judgment

Upon finding the violation, the court issues a judgment granting injunctive relief, while monetary relief is not allowed.

(6) Statistics

As of December 2017, 48 actions were filed.[21] Because most cases were settled in or out of court, judgment was rendered in just a few cases.[22]

3.2 Action for recovery of monetary damages

(1) Background

Class actions and collective redress for consumer cases had been a topic of academic interest in the early 21st century.[23] In 2013, the EU Commission issued a Recommendation for collective redress mechanisms in member states for injunctions against and claims for damages caused by violations of EU rights.[24] The Recommendation pointed out consumer protection as one area where collective redress is valuable.[25]

In Japan, following research and discussions by study groups organized by the Cabinet Office and Consumer Agency, the Expert Committee for Consumers' Collective Redress organized by the Consumer Committee issued a final report in 2011. A two-stage system (mentioned in detail below (5)) of the new procedure

[21] [http://www.meti.go.jp/shingikai/shokeishin/pdf/004_03_00.pdf](in Japanese)

[22] [http://www.caa.go.jp/policies/policy/consumer_system/collective_litigation_system/about_system/case_examples_of_injunction/pdf/06sashitomejirei.pdf]

[23] For example, Christopher Hodges, The Reforms of Class and Representative Actions in European Legal Systems, A New Framework for Collective Redress in Europe (Hart, 2008).

[24] C(2013)3539/3, Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.6.2013, p. 60–65.

[25] In April 2018, the European Commission issued a proposal that aims to launch representative actions on behalf of consumers and introduce stronger sanctioning powers for member states' consumer authorities as part of the "New Deal for Consumers." COM(2018) 184 final; 2018/0089 (COD).

was modeled mainly from French and Brazilian laws. After long discussions on drafting, a proposed bill passed the Diet in 2013. The new law was named "Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers" (ACCA) became effective in 2016.[26]

(2) Standing

Only a QCO with special certification (specially qualified consumer organization: hereinafter SQCO) can file the lawsuit for the first stage.[27] To obtain special certification, a QCO has to meet additional requirement such as financial soundness, etc.[28] As of November 2018, there are 3 SQCOs.

(3) Subject matter

Individual consumers' claims must be related to a consumer contract and meet all requirements below ((a) to (d)).[29] The subject matter at the first stage is not individual claims themselves but conceptual common liability that a defendant enterprise owes to consumers. Therefore, SQCOs are granted special third-party standing.

(a) Seeking monetary relief

Defendant's monetary obligations to consumers shall arise from a consumer contract, such as: (i) Failure to perform the contract, (ii) Return of unjust enrichment or (iii) Damage caused by non-performance of the contract, fraud, etc.

(b) Numerosity

Damages shall be suffered by a substantial number of consumers. Because no specific number is written in the statute, the court decides the "substantial

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[26] Law No. 96 of 2013.

[27] ACCA Art. 3.

[28] ACCA Art. 65.

[29] (a) to (c) are developed from statutory construction of ACCA Art. 2(iv). (d) is implied from Art.3(4). One can detect flavors similar to class certification requirement of US federal law (F.R. Civ. Pro R.23(b)).

number" case-by-case.

(c) Commonality

The common liability shall be based on common factual and legal grounds. In most consumer cases, individual claims were arisen under not exactly the same, but substantially same (or homogeneous), grounds because each consumer individually signed a contract with the enterprise.

(d) Predominance

Questions of law or fact common to consumers shall predominate over questions affecting only individual consumers.

(4) Scope of damages

Even though the requirements above (3) are satisfied, damages specified below shall not be sought:[30] (i) consequential damages, (ii) lost profits, (iii) personal injury damages, (iv) solatium (moral damages). In other words, only direct monetary damage arisen from the consumer contract is allowed.

(5) Structure of two-stage proceedings

(a) Classification of class action system in general

In general, structures of class action systems can be classified into three models: (i) opt-in, (ii) opt-out, (iii) two-stage. (i) Opt-out means that a class action judgment is binding to a non-party class member, unless s/he affirmatively excludes her/himself from the class. (ii) Opt-in means the judgment is NOT binding to a non-party class member unless s/he affirmatively includes her/himself in the class. (iii) Two-stage consists of a first stage to determine common issues for a class and a second stage to determine individual recoveries. The first-stage proceeding does not provide opportunity to opt-in or opt-out. Only at the second stage can a class member utilize a first-stage judgment prevailing for the class.[31]

[30] ACCA Art. 3(2).

[31] In broad sense, the two-stage can be included in the opt-in because a class member is not automatically bound by the first-stage judgment.

A judgment for the opponent is not binding to a class member.

The new Japanese system falls under the two-stage class action. The first stage is called a "declaratory judgment action on common obligation," which determines issues common to all individual consumers such as enterprise practices violating consumer law, its illegality, an causation to damage.

The second stage is called a "simplified determination proceeding," which determines existence of each consumer's claim, with judicial binding power. The consumer side can proceed to the second stage only if a plaintiff SQCO obtained final judgment or in-court settlement finding for consumers at the first stage. If not, the case is terminated.

(b) First stage: declaratory judgment action on common obligations

A legal nature of the first-stage proceeding is a declaratory judgment action litigated between a SQCO and a business enterprise allegedly violating consumer law. A subject matter of the first stage is "common obligation," the defendant's obligation to pay money compensation to consumers based on common factual and legal grounds.

Under general rules of civil procedure, the final judgment of the first stage is binding between the plaintiff SQCO and the defendant enterprise. Furthermore, ACCA stipulates special rules on res judicata;[32] (i) The first-stage judgment is binding also on other non-party SQCOs. (ii) If the plaintiff SQCO prevails in the first-stage judgment, individual consumers can utilize the judgment in the second-stage proceeding.

(c) Second stage: simplified determination proceeding

(i) Commencement of the second stage

The court issues a commencement order upon filing by the SQCO within one month from its prevailing judgment or in-court settlement at the first stage.[33] Simultaneous with the commencement order, a period for filing individual con-

[32] ACCA Art. 9.

[33] ACCA Art. 14–18.

sumers' claims and a period for approval or disapproval by court are specified.[34]

To guarantee individual consumers' opportunity to seek their claims, periods specified by court are posted in public notices in the Official Gazette.[35] In addition, the SQCO must inform known individual consumers in writing or digital media[36] and post a public notice by a reasonable method.[37]

(ii) Review of individual claims

To seek compensation by utilizing the outcome at the first stage, individual consumers must delegate the power regarding his/her claim to the SQCO.[38] Therefore, the only SQCO that filed the second stage can submit all delegated individual claims to the court within the designated period.[39]

Of course, the defendant in the first stage (business enterprise) has opportunity to argue individual claims submitted by the SQCO. Compared with ordinary civil litigation in court, the process to determine individuals' claims at the second stage is quite simplified due to judgment on common liability at the first stage and fair representation by the SQCO.

The enterprise which was defeated at the first stage must state its opinions of approval or disapproval regarding each submitted individual claim within the designated period.[40] Approved claims become enforceable with *res judicata*.[41] On the other hand, with respect to disapproved claims the SQCO has a choice of contesting or not. If the claim is contested, the court determines if it has merit, upon hearing and examining documentary evidence presented by parties (the SQCO and the enterprise).[42] The process of determination is called "simplified determination," much quicker and simpler than ordinary civil litigation.

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[34] ACCA Art. 24(1).

[35] ACCA Art. 24(3).

[36] ACCA Art. 25.

[37] ACCA Art. 26.

[38] ACCA Art. 31.

[39] ACCA Art. 30.

[40] ACCA Art. 42.

[41] ACCA Art. 42(3)(5).

[42] ACCA Art. 44.

Against the determination, the party may file an objection to seek further review in court.[43]

(iii) Enforcement of determined individual claims

What if the enterprise does not pay the determined individual claims? In that case, the SQCO of the first-stage plaintiff can enforce all such claims on behalf of the claimants[44] via proceedings prescribed in the Civil Execution Act. If enforcement is successful entirely or partly, the SQCO makes distributions to individual consumers.

(6) Statistics and evaluation

As of November 2018, no single case has been filed in two years since the enactment. This situation is ironic; ACCA enacted with expectations turned out to be toothless from the outset.

Among shortcomings would be limited subject matters and collectible damages. Generally speaking, amounts of individual claims are small in consumer cases, but the ACCA further discourages consumers or consumer organizations by limiting the scope of damages narrowly. In addition, because tort claims are entirely excluded, contemporary mass torts such as information leaking, environmental pollution etc. never fall under the new system's jurisdiction.

Another shortcoming might be limited standing to file the action. Consumer organizations in Japan are doing their best, but it is undeniable that their human and financial resources are not necessarily sufficient compared with ones in foreign countries. In some countries, governmental agencies are granted standing to file lawsuits for consumer protection. However, such models did not incur interest from lawmakers, presumably because of long-standing support for deregulation and "small government."

[43] ACCA Art. 46.

[44] ACCA Art. 47(2).

(7) The class action menace?

One would like to ask why such a weakened ACCA was created in Japan. In the course of drafting ACCA, business circles lobbied against the legislation based on bitter experiences in U.S. class actions. Voices from the consumer side vanished into the din, which deemed class action a menace to business operations.

However, does only a class action contribute to abusive class action lawsuits and bellicose litigants in the United States?

The answer would be "No." A famous scholar comparing class actions in the world stated, "Importing class action law does not necessarily mean importing American-style litigation. The transplant is 'surgically controlled.' There is no reason to believe that the whole 'Yankee Package' would invade a foreign system through the window opened by the class action device."[45]

"Yankee Package" refers to unique features of the American civil judiciary, such as discovery, contingent fees, an entrepreneurial bar, the jury system, and punitive damages. In my opinion, this insight should be shared among Japanese business circles to make discussions for reform[46] sensible and productive.

4. Epilogue

For two decades, collective redress for consumer protection has been a topic of interest, especially in Europe and North/South America. In emerging countries, areas such as consumer protection and environmental protection are often set aside because legal development tends to focus on business and industrial growth. Nevertheless, such tendencies would change as a country's economy grows. I hope the Japanese experience will encourage Mekong Delta countries to hold productive legislative discussion, free from class action phobia.

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[45] Antonio Gidi, Class Actions in Brazil. A Model for Civil Law Countries, 51 Am. J. of Comp. L. 311, 322–23 (2003).

[46] ACCA Supplementary Provisions Art. 5(2) mandates the government to review the new law after 3 years from the enactment.