

## The current situation of class action in Japan

Ikuo Sugawara  
Professor of Law  
Graduate School of Law  
Nagoya University, Japan

### 1 Summary of Japanese judicial system

The foundation of contemporary judicial system of Japan was laid in the second half of the 19<sup>th</sup> century. Both substantive and procedural laws belong to the Continental system; the Civil Law used the Civil Code of France and German as references, and the Civil Procedural was almost a verbatim translation of German law at that time. Thereafter, during American occupation after WWII, as well as major economic reform such as release of agricultural lands and the dismantling of Zaibatsu, laws such as Family Law and Inheritance Laws also received large-scale amendments. As to Civil Procedure Law, there was a shift from inquisitorial system to a strengthening of party-control system with adversarial system as a foundation. The basic structure, however, remains Continental. There is no jury system for civil cases, and as a result, there is no Evidentiary Laws independent from the Civil Procedure Law.

The Civil Procedure System takes the form of three-tiered trial structure. The first and second instances focus on both facts and questions of law, and the third instance examines only questions of law. For cases whose amounts of disputes are lower than 1.4 million yen, the first instance will take place in the Summary Courts, second in District, and third in the High Courts. The Summary Courts are courts with one judge, capable to resolve simple cases, and the procedures are simpler than the District Courts. Small claims procedures also exist for cases whose amounts in disputes are lower than 600,000 yen, where limitations are placed on the production of evidences and in principle the hearing will be limited to one day.

For cases with more than 1.4 million yen in disputes, the District Courts will be the courts of first instance, the second the High Courts, and the third the Supreme Courts. District Courts have judges sitting as a single judge court, or courts with three judges sitting in a collegial court. Normally, the court sits as a single judge court. However, in complex cases, by determination of the court, a collegial court may try the cases.

The litigation process is similar to that of the German system. It begins from the institution of the action. In principle, a judge will always be present in a proceeding. On the first day of the proceeding, the plaintiff will state his or her complaint, and the defendant will respond to that. If the defendant disagrees with the plaintiff's claim, several sessions will be organized in response to the needs of the parties, in order to allow them to exchange their claims, so the issues of disputes can be ascertained. A system exists for the disclosure of documents requested by the other party during this period. However, there is no equivalent to the American system of discovery such as contacting the other sides' witnesses in advance or interrogatories. However, in order to increase the efficiency of the processing of issues in disputes, rules such as private preparatory proceedings for oral arguments and long-distance telephone conference system between the parties in order to sort out the issues in disputes exist.

After the parties agree on the issues in disputes, in principle, evidence gathering (examination of witnesses and the parties) will be in one concentrated proceeding (if possible, on one fixed date). In the past, the issues in disputes were not clarified before evidence gathering, and witnesses were examined in sequence upon requests from the parties. Or, only one main witness would be examined on each designated date for evidence gathering, and cross examination would be held on the next hearing. As a result, the trails were prolonged. Together with the increase of the number of litigation, delay in litigation became a major issue. However, after major amendment of the Civil Procedure Law in 1998, regulations concerning the issues in disputes were enhanced substantially, and evidence gathering in principle became concentrated. Therefore, litigation time is continuously being reduced.

The adversarial system has been adopted for trial proceedings, and the submission of claims and supporting evidence are the responsibility of the parties. Apart from specific exceptions, judges have the obligations to make determinations based purely on the information submitted by the parties. On the other hand, the progress of the litigation procedure is part of the court's role, and the court has the authority to set relevant dates and to decide whether to accept the evidence provided. In addition, irrespective of the stage of the litigation proceeding, the court can advise the parties to settle the case. In practice, apart from cases where the defendants fail to appear from the beginning, more than half of the cases are resolved through settlement.

It is possible to appeal the decisions of the first instance. As it is seen as part of a

continuous proceeding, it is possible to review facts on appeal. However, recently, substantial parts of the facts are examined in the first instance, and to prevent incidents such as surprise attack on appeals, investigations of facts are reduced to the minimum. Only when there is a mistake on points of laws, or when there is an issue concerning the interpretation of the Constitution will an appeal be made to the Supreme Court. The third instance does not review questions of facts, only law. Before, no restrictions are placed on appeals as long as an argument concerning mistakes in the interpretation of the law is made. However, after 1998, the appeal system has been changed to one through the discretion of the court and leave from the Supreme Court is required for appeal.

Lastly, I want to give a brief explanation of the attorney system in Japan. In Japan, there is no compulsory requirement for lawyer representation for civil litigation. It is the parties' freedom to decide whether a lawyer should be present or not. As a result, for litigations represented by lawyers, even if one party wins, no costs will be awarded against the other party. However, tort related litigation is an exception. There are precedents where the court approves the winning party's inclusion of lawyer's fees in the calculation of damages and the court approves the amount it deems as fit as part of damages. In terms of remuneration for lawyers, traditionally, the Bar Association publishes pay scales for lawyers. However, recently, the Bar Association has received criticism from Commission of Fair Trade that publication of pay scale by the Bar will hinder the formation of a fair price. As a result, the Bar has abolished the standards. But, in practice, people still follow the custom that has been formed. Normally, retainer fee is about 5-10% of the amount in disputes, and when a party receives certain amount as a result of the court's decision or settlement, another 5-10% of the amount received will be paid to the lawyer.

In Japan, the number of judges and lawyers is very small compare to that of the United States and European countries. Further, it has been suggested that culturally, the Japanese people dislike litigation. In reality, the number of litigation is also smaller than that of other advanced countries. Nevertheless, the government is trying to shift the system from one of pre-dispute regulatory system, with administrative guidance at its center, to one based on deregulation and free competition and the provision of post ante relief. In conjunction, the government seeks to construct a user-friendly litigation system. In addition to the reform of the civil litigation system, large-scale reform of the civil justice, including rapid increase of the population of the legal profession, is also

underway.

## 2 Systems Relating to Group Proceedings in Japan

In Japan, no special system such as the Class Action System exists for group proceedings. As a result, group proceedings are required to be maintained on procedural methods that are accepted for normal litigation. Under this circumstance, the methods used are joinder of Claims and representative actions.

### (1) Joinder of Claims

Joinder of Claims is a system that exists in many countries for the consolidation of litigations between several parties into one single action, where distinct proceedings exist, and are joined as a result of the intentions of the plaintiffs or the trial management of the court. According to the Code of Civil Procedure, when the rights or liabilities for an action are common to more than one persons or are based on the same ground of facts or laws, or when the rights or liabilities for the action are the same kind and based on the same kind of facts and laws, such persons may sue or be sued as co-litigants (Art. 38, Code of Civil Procedure). Normally, this is used for joining actions with relative small number of parties such as joining of debtor and guarantor, or contentions between inheritors and third parties regarding title to the inheritee's plot of land. However, litigations involving several hundred people under this kind of joinder is not unheard of. Where there is an action involving a group of plaintiffs, the list of plaintiffs attached to the petition will have multiple entries of several hundred names, but one major merit is that the processing fees for initiation of an action becomes cheaper for each person. For example, the processing fee for an action involving 1 million yen initiated by a single individual will be 8,600 yen. Where 100 people initiate actions all asking the same amount, the amounts in disputes will be 100,000,000 yen and the processing fee will be 410,760 yen. This means the fees will be reduced by more than half. In addition, evidence gathering concerning the common facts will be consolidated which makes it more economical. Furthermore, there are also merits to having one uniform judgment for similar kind of cases. This is especially so since the litigation proceedings are not separate litigation actions in practice, but are cases where a small number of lawyers are commissioned jointly, and are maintained on the basis of having the lawyers as representatives. As a result, not all of the hundred of parties will appear in court. This will enable the smooth process of the litigation where the interests of the parties strongly coincide with each others.

However, the group characteristic of this kind of procedures is only de facto and whether it should be maintained are in the discretion of the court. For example, where the evidence or the litigation strategies between the plaintiffs are different, the court can resolve them in separate litigation proceedings. Further, depending on the contents of the evidence and the progress of the trial, there is no guarantee that the contents of judgments will be the same for the parties and settlements or withdraw of claims may also happen. Separate appeals to the judgments may also occur. Further, where there are a lot of parties involved, demerits such as delay in the litigation procedures due to matters such as time needed for serving documents may also occur. When this method is adopted, even when only a small number of lawyers are hired as counsel for the litigation, in principle, authorization from each individual party is required. As a result, the number of participants for group proceedings under this format is limited to several hundreds. It is impossible for proceedings involving several thousands of parties. In addition, this kind of proceedings is based on the premise that each litigation is feasible economically and is thus difficult to be applied to cases involving multiple victims but the amounts of damages for each individual victim is small.

## (2) Representative Actions

This is a system where a small number of representatives are appointed to represent a large number of parties, and where the result will apply to all of the parties, to enable the smooth organization of the litigation proceeding where a large number of parties are involved. Under the Code of Civil Procedure, representative(s) can be chosen as plaintiff or respondent from the group of people having common interests in the proceeding (Art. 30(1)). In this case, a party choosing the representative (the “Represented Party”) will be withdrawn from the proceeding as a party (Art. 30(1) Code of Civil Procedure), but the judgment obtained by the representative will apply to the Represented Party. Therefore, even if there are several hundred, several thousands of persons involved, they can undergo litigation through one or several representative(s) and the result can apply to several hundred, several thousands of parties. The criterion for being a representative is ‘common interests’. Parties to the above-mentioned actions under Joinder of Claims (Art. 38, Code of Civil Procedure) may also select a representative and change the proceeding to representative action.

The major merit to this system is even if there is a huge number of parties, through the

election of representatives, the trial can be represented by one or several persons and lead to simplified procedures, and that the results can apply to all of the Represented Parties. Before the reform of the Code of Civil Procedure in 1996, selection of representatives cannot occur until a party becomes a party to a proceeding (that is, after a claim has been filed). After the reform, as long as a party with common interests has already initiated a proceeding, a party can select the party who has already initiated the proceeding to be his or her representative without filing a claim specifically for the purpose. Through this reform, it is easier to use the system of representative actions.

A party who has elected a representative can withdraw or change the representative at any time. Further, even if one of the representatives lost their capacity due to death or other reasons, other persons may automatically replace the role as representatives for the entire group (Art. 30 (5), Code of Civil Procedure).

This system of representative actions can be seen as an effective system for large-scale litigation. However, it also has its major limitations. Under this system, unlike the Class Action system where the representatives are deemed to be automatically authorized, representatives have to be explicitly designated by each individual party. As a result, the scale of the litigation is limited by the ability to identify the parties and to acquire their authorizations. In addition, in most instances, the appointed representative is also represented by lawyers. Therefore, under these situations, the parties choosing the representative have to choose the representative first, and the representative then goes on to appoint a lawyer. However, since the Represented Parties can also choose lawyers on behalf of all of the members of the group, or to maintain a close relationship with the lawyers, it can be stated that the merit of the representative actions system is in fact not that big. In fact, this system has not been utilized even after the reform of the Code of Civil Procedure in 1998.

### (3) Group Action Concerning Consumers

On top of the above mentioned procedures, recently, a new system for consumer related group action has been included in Consumer Contract Act. In consideration of the discrepancy in quality and quantity of information and the negotiation power between consumers and business operators, this is a law that seeks to provide relief to consumers who are misled by certain acts of the business operators (Art. 1, Consumer Contract Act). As a result of amendment to Consumer Contract Act, from June 2007,

consumer groups are given the standing to sue on behalf of consumers as parties to injunction actions, in order to protect the rights of consumers. Acts of the business operators that are subjects of the injunctions include inappropriate solicitations targeted at unidentified and large number of consumers, and contractual clauses that will unjustly harm the interests of consumers, and consumer groups may apply for injunctions against contracts that are entered into or may be entered into by consumers.

The consumer groups that can apply for injunctions are called qualified consumer groups and must be groups that are certified by the Prime Minister in advance. The conditions of certification include that the group must be specified not-for-benefit legal person or normal legal person, whose main purpose of activities is the protection of the interests of unspecified and the majority number of consumers; who actually performs those activities continuously over extensive period of time; who has set up board of directors as executing committee for affairs relating to injunction proceedings and whose decision making process is adequate. In addition, even if the above mentioned conditions are met, if gangsters are involved in the activities of the group, it will not be legible.

The qualified consumer group shall not apply for injunctions for its own benefits or for the benefits of specific third party, and must exercise it appropriately for unspecified and majority number of consumers. In addition, where multiple numbers of qualified consumer groups are involved in the injunction actions, in response to the nature of the case, they must jointly enforce the right to injunction action and must cooperate with and support each other. Further, where an injunction application for the same or the same kind of acts is pending before more than one court, a court should take into account the location of the parties or the witnesses, and if it deems it appropriate, it may transfer the case to another court. In addition, where there are cases with the same contents and where the same business operator is involved, the court must consolidate the cases. Furthermore, where an injunction application filed by another qualified consumer group is on a matter where a judgment already exists, or where the judgment may apply with the same force, in principle, where the contents of the claim and the business operation is involved are the same, repetitive injunction applications are excluded.

This consumer group action, where the consumer group protect the rights of the consumers on behalf of the consumers can be seen as a type of representative action.

However, the scope of its application is limited to that under the Consumer Protection Law, and the action that can be taken is limited to the application for injunctions. Consumer groups are not given the right to claim damages. This makes it a very restricted representative action. In addition, the consumer group does not require authorization from the consumers. Rather, eligibility to the standing to sue is certified by the Prime Minister. Therefore, to state it correctly, it does not subrogate the consumers. As a result, res judicata of the consumer group action does not apply to individual consumers, and each injured consumer still has the right to claim damages. Conversely, in terms of the claim for damages, no system of class action exists. Rather, only joinder of claims or representative actions exists.

### 3. Detail Procedure for Group Actions

As stated above, group actions in Japan are initiated through joinder of parties and representative actions. In addition, application for injunction under Consumer Contract Law also exists by the way of group action. The procedures for these actions are as follow:

#### (1) Joinder of Claims

Firstly, the Civil Procedure Code contains provisions on joint actions. According to the provisions (1) when the purposes or obligations or liabilities of an action are common to more than one persons or; (2) are based on the same grounds of facts or law; or (3) are based on the same kind of facts or law, the persons may sue or be sued as co-litigants (Article 38, Code of Civil Procedure. Through the utilization of this rule, depend on the situation, there are cases where the scale of the litigation can reach several hundred people. From precedent, it can be seen that a more relaxed approach is taken with regards to the conditions set out in (3). However, for this type of joint action, even though several litigants, for convenient purposes, are joined in one litigation procedure, each co-litigant's actions are seen as independent and do not affect the other co-litigants. As a result, in principle, delivery of documents to the court and the opponent, and other declarations of intentions all have to be performed individually by each co-litigant. Nevertheless, quite often, as the parties are in practice represented by common lawyers, it is good to limit the number of lawyers rather than just allow each individual party to behave in their own ways. In addition, it is the role of the lawyers to give notice to each individual party. As each co-litigant is in principle deemed as independent entities, as a result, it cannot be guaranteed that the results of the litigation will turn out to be the same for all co-litigants. Consequently, there are cases where a party proceeds to

separate himself/herself from the other co-litigants due to special reasons (bankruptcy declaration) and hence there are cases where the contents of the determinations are different from the others. Further, in principle, each individual party is free to settle, and there are no particular restrictions to withdraw one's claim (but, if the counter-party has already been involved, his or her consent is necessary). In addition, the court has the discretion to decide on the continuation/separation of a joint action, and even if the above conditions are met, the court can dissolve the joint action.

In the situation of joint actions, all parties to a dispute will enter their names in the petition as parties to the litigation. As a result, the amount of litigation is also calculated by adding up all of the amounts in disputes. Where there are several hundred parties who enter their names, the total amounts in disputes will also be big, and the stamp duty that needs to be paid to the court will also be high, but as described above, after dispersing the amounts amongst the participants, it becomes comparatively economical. In this type of situation, there is no authorization relationship between the parties. However, in practice, the claimants or the respondents (mostly claimants) form one group and commission common lawyer(s). Therefore, the litigation is represented by one or more lawyers. As a result, from the outset, it may be seem as group action represented by lawyers. However, as documents relating to the commissioning of lawyers have to be executed individually (Civil Procedure Rules Article 23(1)), it is impossible for latent parties to a dispute to be represented.

Since authorization from each individual is necessary, it is based on the premise of mutual trust between the lawyers and the clients, and the scale of a joint action is therefore limited to situations where there is a mutual trust relationship. As a result, even when a litigation is relating to country-wide damages, it is difficult to have one single litigation within the country, and most of the time, litigation groups are formed locally. This kind of group action based on joint action is not one formed as a result of the litigation, but rather one where the group is formed beforehand and proceeds to have a joint litigation. Res judicata in this case only applies to those participants whose names are listed.

## (2) Representative system

Representative action is regulated by the Code of Civil Procedure. Based on the Code of Civil Procedure, a number of persons having mutual interests may choose from amongst

themselves one or several persons to be a plaintiff or defendant for all those persons (Article 30(1) Code of Civil Procedure). From precedents, the mutual interests here means the above-mentioned interests (1) where the purposes or obligations or liabilities of an action are common to more than one persons or; (2) are based on the same grounds of facts or law. Further, whether (3) the disputes are based on the same kind of facts or law is also included has attracted some scholarly debates, but there seems to be stronger support for the affirmative.

This type of litigation is one where the co-litigants described above chose a specific representative amongst themselves, and that person will carry out the litigation on their behalf. As stated above, today, it is designated as one method for group action. However, originally, it is a system to allow a group of people that does not have corporate personality and that cannot form an association to proceed with litigation. The person elected is called the representative party, and the parties that choose the representative party are called the represented party. After making the election, the represented party will withdraw from the litigation (Article 30(2), Code of Civil Procedure). Consequently, the litigation will proceed with only a few representative parties. This election has to be done through written documents (Civil Procedure Regulations Article 15) and therefore parties to a dispute who has not made the election cannot be represented. In addition, the representative parties have to be chosen from amongst the parties and third parties outside of the litigation, such as lawyers, cannot be chosen as the representative party. The representative party, after being chosen, can of course hire a lawyer. Before, in order to be the represented party, a person has to become a party to the litigation, and withdraw after the election is made. However, now, a person can appoint a represented party without actually initiating a complaint (Article 30(3), Code of Civil Procedure). This system of election made by parties outside of the litigation was introduced during the reform in 1996. It is a system based on the class action system in the United States at that time, and aims to enable the parties to a dispute, where the amount of each loss is small but the number of victims is big, or when the benefits are hugely dispersed amongst the parties, to observe the trends of litigation, and to participate in litigation after that. However, at that point in time, the introduction of public notices or advertisements for pending litigations that are based on the same purposes was not accepted, and there are perceptions that the representative has not sufficiently been utilized. The represented person can change or cancel the election freely. However, after changes have been made, if the person wishes to cancel that change, it has to be done through written document and to be notified to

the other party in order to be effective.

In representative action, the actions of the representative party and litigation actions taken on behalf of the represented parties are harmonized. The effects of the judgment obtained by the representative party will also apply to the represented parties who have withdrawn from the proceeding (Article 115 (1) (2), the Code of Civil Procedure). Although the representative party exists as a representative of the other members, he or she is not just an agent, but one of litigation representative as a party (任意的訴訟担当の一種). As a result, it is different from the situations where lawyers become representative of the litigation, and is not restrained by the authorization clauses. As a result, can withdraw from a litigation or enter into settlement based on his or her own discretion, and that result will be shared by the represented party, and therefore maintain the uniformity of results outside of judgments.

### (3) Consumer Group Action System

Group action under Consumer Contract Law is called consumer group action system and is limited to actions under consumer contract related disputes. Consumer contracts are contracts that are formed between consumers and enterprises, and are based on the premise that there are disparities between the quantities and qualities the parties have and the imbalances of negotiation powers. The same law allows the termination of contracts that are entered into due to misunderstanding or confusion of the consumers as a result of the disparity; releases consumers from the obligations for damages suffered by enterprises and invalidates clauses that will unfairly harm the interests of consumers; and contains provisions on injunctive actions to be taken by qualified consumer protection groups in order to prevent the occurrence or expansion of damages to the interests of consumers. Consumer group action is the system for this last method of providing relief to consumers.

The consumer group action system is a system of litigation for injunction applications to prevent the expansion or the occurrence of damages to the interests of consumers due to inappropriate solicitation or contract clauses in breach of consumer contract law. This right to apply for injunction is not given to each individual consumer, but is only given to consumer protection groups certified by the Prime Minister. In that sense, it is not a representative action in representation of the rights of consumers, but a non-representative group action system based on pre-authorized standing to sue.

The reason for approving the use of injunction which is not normally approved under contract law in this type of disputes is that there is a tendency in consumer contract disputes recently where there are large numbers of injuries but the amounts in disputes are small. Therefore, if only individual rights to claim damages are recognized, then due to the small value of damages there are few motivations for the victims to initiate proceedings. As a result, even if it is possible to claim damages, it will be difficult to prevent the expansion of the same kind of injuries. In addition, the reason for limiting the rights to apply for injunctions to approved consumer protection groups is that as it is quite effective in preventing the occurrence or expansion of the above-mentioned damages, its execution has huge impacts on the society and the economy, and therefore there is a need to establish clear and appropriate conditions of eligibility. Incidentally, this system was introduced in 2006 at the time of the amendment of consumer contract law. At that time, the introduction of group action system for claiming damages was passed up. As stated above, there were difficulties in resolving the problems of the calculation and distribution of damages.

As stated above, only groups certified by the Prime Minister can enforce this right to apply for injunctions under consumer group actions. The conditions for certification are: (1) the main object of the group is to carry out activities in support of the interests of an unidentified and huge number of consumers; (2) it has a proven track record for carrying out such activities continuously and over an extensive period of time; (3) it is a non-profit organization; (4) it has maintained adequate rules concerning the structure and business conducts of the organization; (5) it has maintained a roster of professionals in the areas of consumer protection or law; and (6) it has maintained an adequate basis of management and auditing. On top of this, to prevent abuse of the system, for consumer groups that fulfill these conditions, if gangsters are controlling the activities of a group, and are actually involved in or are assisting the execution of the activities of the group, then they will be deemed as unqualified. This system came into force in June 2007 and in practice, only two groups, “Consumers Organization of Japan (located in Tokyo) and “Kansai Consumer’s Support Organization”, are certified.

The subjects of injunctive reliefs are contracts that are entered into due to inappropriate solicitation by businesses or contracts that contain inappropriate clauses. Procedurally, the qualified consumer group has to deliver documents that contain the decree sought in the petition (the conclusion sought) for injunction and the points in

disputes to the business in question one week before the initiation of the injunctive application. The reason for requiring this notification is to facilitate the negotiation between the qualified consumer protection group and the business, and is based on the expectation that this might inhibit inappropriate behaviors. If the problem is not resolved through the notification, the qualified consumer group may move forward to start the action, but the jurisdiction is with the court at the place of resident of the defendant, or where the inappropriate action occurred (Article 43 (2), Consumer Contract Law). Although the Civil Procedure Code has provisions on special forums that are more advantageous to the defendant (Article 5, Civil Procedure Code), litigations under the consumer contract law are excluded from its application (Article 43(1), Consumer Contract Law). In addition, where several courts share jurisdiction to the same or the same type of injunctive application, the court can transfer the case to another court after considering the location of the parties and the witnesses and the commonness of the issues (Article 44, Consumer Contract Law).

In addition, where applications with the same contents and the same business as the opposing party are initiated in the same court, these applications must be joined (Article 45). As the application is not one based on property rights, it is sufficient to pay 13000 yen for the application fee (stamp duty).

In terms of the effect of the judgment in consumer group actions, there are no special provisions, so the principle of civil procedure applies, that is, it only applies to the qualified consumer protection group that becomes the plaintiff and the business concerned. Under this situation, in theory if a party (especially the plaintiff) changes it becomes a different litigation, and it is possible to have parallel litigations by different plaintiff groups against the same business, or it is also possible to institute proceedings at different times. However, in practice, where the same defendant is sued in proceedings with similar contents, issues such as similarity to double proceedings and res judicata arises. In terms of these issues, the Consumer Contract maintains each and individual principle of civil procedure, and tries to prevent inconvenience by establishing special provisions. Firstly, in terms of double litigation, as described before, it is possible to transfer cases between courts based on the discretion of judges, and when cases are trialed in the same court, through the provisions on joinder of cases when necessary, attempts are made to prevent parallel proceedings based on similar grounds. Next in terms of issues concerning violation of res judicata, when injunctive applications are allowed and the inappropriate actions are prohibited, its practical

effects will reach the society and in general, no particular problem will arise. The problem is when the plaintiff lost. In this situation, even when one qualified consumer protection group lost, res judicata will not apply to other qualified consumer protection groups. However, to both the court and the defendant, meaningless similar proceedings shall be prevented. As a result, certain information provision obligations by the qualified consumer group, and the obligations to cooperate are imposed on consumer protection groups. In particular, the qualified consumer protection group has the obligation to notify the Prime Minister and all qualified consumer protection groups of notice to initiate injunctive relief, use of ADR, initiation of the proceeding, the delivery of judgment on the request for injunction, appeals, confirmation of judgments, and settlement (Article 23(4)). In addition, the Prime Minister, who has received the report, also has to notify all qualified consumer protection groups of the date and summary of the report (Article 23 (5)). Through sharing these information to all qualified consumer groups without delay, it is hoped that unnecessary litigations can be controlled. In addition, through notifying each qualified consumer protection group, apart from provisions requiring the groups 'to exercise injunctive actions for the benefits of unspecified and large number of consumers' (Article 23(1)), and 'not to abuse injunctive actions' (Article 23(2)), they also have to 'exercise the rights to request injunctions together with other qualified consumer protection groups when the cases require it, and to cooperate with each other while attempting to solidify their activities relating to the injunction application'. Through following these provisions, it can be seen as measures to prevent the occurrence of double or obnoxious actions.

There are no specific restrictions preventing the qualified consumer groups from entering settlement. On the contrary, there are provisions that are premised on settlement (article 23(4) above.) As such, there are some misgivings whether qualified consumer groups may enter inappropriate settlement for their own benefits. However, in relation to that point, what shall be focused on is that apart from specific situations where it is deemed appropriate, a qualified consumer protection group and its officers and staffs shall not receive monetary or other benefits from the opponent in an action for injunction, irrespective of whether they are in the name of donation or grant, and shall not give a third party such kind of benefits (Article 28). The Prime Minister, in exercising its supervising power, can cancel certification when the qualified consumer protection group 'collude with the business operator and has waived the claim or entered into settlements that are detrimental to the interests of many and huge number of consumers, or otherwise when it is found that the organization has sought court

proceedings that significantly violate the interests of the unspecified and huge number of consumers'. Measures against inappropriate settlement are taken through these provisions.

#### 4. Discussions concerning Class Action and Group Action

In addition to the current framework described above, discussions relating to class actions or group actions can be stated as follow.

The recognition that there is insufficient support in Japan to large-scale damages with small amounts in disputes started in the 1970s and started the call for the introduction of the class action framework. In the midst, more specific discussions occurred during discussions leading up to amendments to the Code of Civil Procedure in 1998. At that point, there was also support for positive introduction of the system. However, due to concerns about insufficient procedural protections to parties who have received the judgments, and the fact that under the current system for damage suits, where individual damages have to be substantiated and the amounts of damages will then be determined separately, clashes with the way of thinking behind class action where damages are recognized in one bundle. As a result, the class action system was not introduced. Attempts were made to resolve the issue through expanding the system of representative system, where there are few clashes with the current procedural protections and the theories behind restitutions. Therefore, discussions concerning the civil litigation system took a break from the movements for the introduction of class action system.

Another area where active discussions occurred recently centered on the issue of whether group actions can be introduced in certain areas. More specifically, in the year 2000, at the time of the introduction of injunction claims as a part of reform of anti-monopoly law, there were heated debates concerning the introduction of the group actions systems used in United States and European countries. At the end, the conclusion that there is no obligation to permit claims for injunctions to groups that has not suffered damages. If group action is accepted, there is no certainty as to how far the effects of the judgment may go. Further, there is also a need to provide adequate procedural protection to victims who are not part of the group gained stronger position, and at the end, the attempt to introduce the system was forgone.

Discussions concerning the introduction of a group action system were raised again at the time of the amendment of the above mentioned Consumer Contract Law. The Consumer Contract Law is a law that came into force in the year 2000 and at the time of it coming into force, the Diet passed a supplementary solution to consider matters relating to the right to have group action for injunctive relief. Further, in the midst of changing social conditions where there are numerous reports concerning offences against consumers, there are many consumer contract related incidents where the same kind of injuries was suffered. There were criticisms that while consumers who suffered loss may have individual and ex post relief, it is difficult to prevent the spread of the same kind of injuries, and to prevent the occurrence/expansion of the same kind of injuries, there is a need for policies that aim to inhibit improper conducts. As a result, injunctive relief under the above-mentioned consumer group actions was introduced by referring to the systems of the EU countries. However, at this stage, the main focus for the introduction of the system is to prevent further injury to consumers and the expansion of damages, and the system for providing remedies to damages already suffered remained unchanged.

Furthermore, the most recent discussions on this topic occurred at the time of the amendment of the Anti-Monopoly law in 2008. As stated above, the legislators decided to give group action at the time of amendment of the anti-monopoly law in 2000. However, as group action was introduced for injunctive applications by the Consumer Contract Law in 2007, there were strong requests for the introduction of class action and group action systems by groups such as the Japanese Federation of Bar Associations. Some of the discussions raised there were quite different from the applications for injunctive relieves and damages and there is a need to talk about these issues one by one.

Firstly, in relation to injunction related litigation, there were discussions under the Anti-monopoly Law concerning whether other than consumer groups, business associations can also have the right to seek injunctive relieves. The reason for this is that in conjunction with consumers, individual businesses may also be affected by the actions in breach of Anti-Monopoly Law. Those in support of the introduction of group action claims that just as in the case of consumers, where even if the right to apply for injunctions is given to each individual consumer, in reality, the consumer will not be able to initiate an action due to the differences in resources and information, there are also many cases where it may be difficult for businesses to sue due to business interests.

In practice, even after the introduction of the right of the consumers to apply for injunctions after the year 2000 reform, this right was very rarely exercised. Those who oppose the introduction pointed out the facts that unlike consumers under consumer contract, damages to businesses are normally indirect, and even if businesses suffer damages, there are often no business groups in that industry. Further, in the area of Anti-monopoly Law, as it is recognized that Fair Trade Commission can also seek injunction, there are also calls for a clarification of the differences between application for injunction by public institutions and those by private groups. For example, there are suggestions that the suffering of damages is necessary for the later while for the former it is not necessary.

Next, in terms of claims for damages, there are more subjects that need to be discussed than the application for injunctive relieves. In the situation where business associations seek damages, issues may arise as to the relationship between the charges imposed by administrative agencies and the business association's claim under deprivation of profits. There is a need to clarify the scope for each side in order to prevent excessive claims for damages. Further, even if damages suffered by business associations can be recognized, questions still arise as to whom and to what extent should the profits divested by the violating enterprise be allocated. The problem becomes even bigger when consumer groups seek damages. Even if an enterprise infringes the Anti-monopoly Law, and was unjustly enriched, it is extremely difficult to prove how the consumers actually suffer damages from this. In a lot of the cases, there are often middle-men such as wholesalers between the infringing enterprise and the consumers, damages may be transferred to all sides and dispersed. As a result, it is not easy to prove the causal relationships and the amounts in disputes. Further, it can be imagined how difficult it will be to distribute the compensation appropriately. In reality, passive attitudes toward recognizing the rights to claim damages seem to be predominant.

Nevertheless, in order to provide relieves to victims of anti-monopoly actions, and to maximize preventive effects, the Japanese Federation of Bar Associations advocated for the introduction of the class action system through the opt-out method. However, it did not provide concrete proposals concerning questions that were raised from before such as procedural protections for victims, how to define class, the conditions for being a representative, and the effects and scopes of judgments.

## 5. The Future of Class Action / Group action in Japan

As stated in the outset, class action does not exist in Japan, and group action also does not exist except certain areas. I will try to provide the reasons for this and explore the future prospect.

There are various possible reasons for the reluctance to introduce group action system such as class action. I will try to analyze this from the perspectives of purpose, theory and the surrounding environment.

I will start firstly by considering the purposes for systems such as class action. I will not get into detailed discussions here, but if we look at the discussions raised so far in America and Japan, we will see there are four main purposes. The first one is restitution of the damages suffered by the victim (damages). The second is the prevention/inhibition of damages. The third is to punish the perpetrator and the fourth is the function relating to the maintenance of social order or the formation of policies. If we use America as an example, we can see from some of the judgments that order huge amounts of damages rather than just strict recognition of damages, the intention to require the offender to disgorge some of the profits or punitive factor play is even stronger. In practice, by including punitive damages, the amount of damages is quite often higher than the loss suffered, and sufficient distribution can be made to the victims. As a result, it can be seen as a realization of all four purposes stated above. However, as some points relating to the distribution of damages may not be completely flawless, the main purposes may therefore be seen as those from the second onward.

In comparison to that, the Japanese legal system, especially the Civil Code centered civil law system, is one based on the first purpose, which is the provision of damages. The purposes from second onward, especially the third and the fourth purposes are clearly outside of the scope. To be more specific, the third purpose, being one based on punishment, is one classified as a penal issue, and the fourth purpose of maintenance of order and formulation of policies is deemed as belonging to the role of administrative institutions. In addition, the second purpose of prevention/inhibition of damages has also been generally deemed as an administrative issue. As a result, there is no general rule with regard to injunction applications in the Civil Code, civil relief is one based on the legal theory of restitution. However, as to this last point, amongst the repeated occurrence of consumer troubles where the amount in dispute is small but the number

of occurrence is big, it can be seen that providing restitution based on damages is not enough as a response and therefore has led to the recent specification of areas of exception, with the partial introduction of the right to seek injunction for the purposes of prevention /inhibition of damages. Even under this circumstance, and as a reflection of the above-mentioned legal system, although the right to request for injunction is separated from damages, a very restricted position has been taken, and the 3<sup>rd</sup> and 4<sup>th</sup> purposes will not be achieved. From this standpoint, it can be seen that the point that the harmonization of the above four purposes, or rather, the organic combination of all purposes will in effect create a class action system that's even more effective is still not very well received in Japan.

This kind of differences as to purposes of the civil law system also impacts on the body of theory at the time of the creation of the system. Under Japanese civil law system, the main mission is the restitution of damages for each person or legal person, as distinct entities, and other purposes (charges, fines) are the responsibilities of other legal areas. As a result, both substantive theory and procedural theory are systemized based on the perception of how strictly each individual loss can be identified. As a result, even in situations where the loss is suffered by a group, the recognition is based on the accumulation of the losses suffered by each individual that constitutes the group. In reality, it is difficult to create the concept of damages suffered by the entire victim group as a whole that takes into account the losses of potential parties who does not have specific claim or proof. The same perception is also reflected in procedural theory. More specifically, issues such as standing as a party or res judicata are also based on the purpose of restoration of rights for individual entities, and are constituted by individual entities. In principle, a person cannot ask for more than one's own rights (one's own share of rights to claim damages), and in order to do that, it is necessary to obtain authorization individually. Res judicata is also strictly limited to contend for one's own rights and in principle is considered as not able to be expanded to matters outside of this. Under this way of thinking, it becomes difficult to go beyond the realization of one's own rights to find qualified person based on the purposes of the prevention/inhibition of damage, punishment of perpetrator and formulation of policies, and to make it easy to authorize that person, and to expand res judicata behind the real parties in response to the purposes.

Lastly, I want to talk about litigation environment. When you bear in mind the class action system, what has important implications to the environment is the lawyer

system, especially their place within the system and the remuneration system. Although Japan does not have a compulsory system for lawyer representation, in reality, it is difficult to litigate without the support of a lawyer. In that sense, it can be stated that lawyers are the biggest supporters for the realization of one's rights. However, even here the role of the lawyers is also based on individual entities and the rights of those entities. As a result, the lawyers' right to act as counsels is also always based on the premise of authorization by individual and specific parties. No matter how big the number of the parties expands, it is still accumulated by individual authorization behaviors and a lawyer is not expected to represent for more than that. There are specific, individual rights that must be protected to the last, and the lawyers are only expected to conduct litigation activities within that scope. Abstractly defined group or social interests are seen as insufficient as the foundation of lawyers' activities. This is also reflected in remunerations for lawyers. Even if a lawyer organize a group action, if it is based on the premise of individual authorization, the total number of parties involved has its limitations, and the total amount in dispute also has limitations. Further, even if the case is won, the lawyer is just a supporter for the recovery of the client's rights, and can only receive remuneration from part of the returned rights. As a result, the remuneration is also not as big as would be in the states. Even if the lawyer take the initiative to represent the possessor of the rights, organize the plaintiff group and won the case, the lawyer has to draft enormous amounts of documents, and may be burdened by office communications, and seem to have spend enormous amounts of manpower, and it does not seem to be a job with good returns. This substantially lowers the motivation for lawyers to create a class. In practice, even if large-scale group action is initiated in Japan, there are few cases where the lawyer takes the initiative to organize the plaintiff group. Usually, there are more cases where a victims' group has already been organized and they just commission a lawyer for the initiation of litigation.

As stated above, in Japan under such ideologies of the legal system, even when there are large-scale damages, only reforms that are within the same scope of this systematic ideology are underway. This attitude is shown in 2006 during the debates concerning the introduction of consumer group litigation. There even though injunctive litigations by consumer groups are recognized, damage claims through group actions are denied. In addition, the reason for denying that is that in today's Japan, as a result of improvement of representative action system, the increase of amounts in dispute small claims to 600,000 yen, and the summary court to 1.4 million yen, the replenishment/increase in efficiency of the civil litigation system, the large-scale

increase of the population of legal professions and the expansion of the scope of activities of related legal professions, expansion of access of judicial information, the replenish/activation of alternative dispute resolution mechanisms (ADR), all make it easier to realize each right holder's rights. Responses to large-scale loss should also be dealt with by using the results of such reforms.

Based on the premise of not damaging today's Japanese civil law system, from reality, it can be seen that maybe maximum efforts have already been put in.

Lastly I want to talk about future outlooks. Well then, is this kind of response in Japan sufficient to deal with today's social conditions? Perhaps not. The rapidly changing social conditions and multi-faceted economic growth caused a large amount of torts and damage to consumer. However, when such damages occur, there is a high probability that there are two points that today's Japanese system cannot deal with. The first is that deterrence power is not sufficient. In today's system, in terms of new type of tort or consumer contract related damages, the expansion of damages can be inhibited by injunction applications. However, this kind of measure is only taken when the damages have been actualized and in many cases, a great deal of losses has already occurred at this point in time. Particularly, due to the diffusion of technologies such as the internet, at the time losses are actualized, a lot of damages have occurred. As such, rather than taking measures when losses are likely to happen, it is important to deter the plotting of unjust schemes themselves. So to speak, rather than passive deterrence by preventing the spread of losses at the time it becomes actualized, by requiring the disgorgement of profits, or by taking punitive measure stricter than this, it inhibits the motivations of malicious enterprises to cheat consumers in order to increase their profits. As it were, isn't it time to start considering about ideas on proactive deterrence. The second problem is the inability to deal with latent expansion of losses. In today's society, products that seem harmless at the time of the occurrence of events, and the losses only become apparent after being distributed widely, are continuously being produced (e.g. Asbestos). The concept of inhibition through injunction does not work in this kind of losses. Even if we set aside punitive or policy formation purposes, at least it is necessary to construct a group action mechanism that can provide timely relief to the victims.

Today, a lot of the advocates who take passive attitudes toward the introduction of class action system are concerned with the negative effects huge amount of compensations may have on economic activities, inappropriate settlement, or the fact that relief may

not be provided to victims due to deficiencies in the distribution of damages. If we turn over to Japanese law, it is true that only damages that can be individually identified are able to be recognized and thus the amount of compensation can easily be fitted to a reasonable range. In addition, as damages are within recognized range, it also makes it easier to distribute. To begin with, if the scope of compensation is limited to indemnifications for the purposes of restitution, the goal is to return to the condition before the infringement, and the upper limits of the compensation can be objectively calculated. On the other hand, when nuances such as deterrence or punishment, or policy formation are included in the concept of damages, it is extremely difficult to set an objective standard. And it is difficult for judges to determine what amount will have the effect of deterrence or punishment. As such, the above criticisms concerning class action are not unreasonable. However, it is also true that group action mechanism is required due to the above-mentioned changes in the social environment. There is an urgency to subjugate the demerits of class action, and to build a new system that can harmonize with the Japanese system.

Appendix

Code of Civil Procedure

Article 30. (Appointed party)

1. Several parties having a common interest and not included under the provisions of the preceding article, may appoint from among themselves one or more persons who will act as plaintiff (s) or defendant(s) for the entire body.

2. In cases where a person (s) has (or have) been appointed to act as plaintiff (s) or defendant (s) in accordance with the provisions of the preceding paragraph subsequent to the pendency of the suit, the other parties shall withdraw from the suit by operation of law

3. Persons who possess an interest in common with the plaintiff(s) or defendant (s) in a pending suit, and who are not parties thereto, may appoint such plaintiff (s) or defendant (s) to act as the plaintiff (s) or defendant (s) also in their stead.

4. Persons (hereinafter referred to as "appointors") who have appointed another person (s) who will act as plaintiff (s) or defendant (s) in accordance with the provisions of paragraph 1 or the preceding paragraph, may cancel the appointment or change such parties (hereinafter referred to as the "appointed parties") appointed.

5. In cases where any of the appointed parties has lost the capacity as such due to death or any other reason, the remaining appointed parties may conduct acts of litigation for the entire body.

-----

Article 115. (Scope of persons bound by final and binding judgment, etc. )

1. A judgment which has become final and binding shall be effective against the following persons:

- i . the parties;
- ii. in cases where a party became a plaintiff or defendant on behalf of another person, such other person;
- iii. successors who succeeded any persons in the preceding two items following the conclusion of oral argument;
- iv. persons who, on behalf of any persons in the preceding three items, possess the subject matter of the claim.

2. The provisions of the preceding paragraph shall apply mutoatis mutandis to

declarations of provisional execution.

## Consumer Contract Act

### Article 23 (Exercise of Rights to Demand an Injunction)

(1) A qualified consumer organization shall exercise its right to demand an injunction

properly for the interests of many unspecified consumers.

(2) A qualified consumer organization shall not abuse its right to demand an injunction.

(3) A qualified consumer organization shall exercise its right to demand an injunction

jointly with other qualified consumer organizations depending on the nature of a case, and shall endeavor to cooperate and coordinate each other in conducting services involved in demand of an injunction.

(4) A qualified consumer organization shall notify other qualified consumer organizations without delay and pursuant to a Cabinet Office Ordinance if any of the following occurs, and shall report the details of the same and other matters provided by a Cabinet Office Ordinance to the Prime Minister. In this case, the qualified consumer organization shall be deemed to have notified and reported the same, when, in lieu of the notification and the report, it takes measures provided by a Cabinet Office Ordinance that allows all qualified consumer organizations and the Prime Minister to review the same information through electromagnetic means(which means the use of electronic information processing organizations and other

information communication technologies. The same shall apply hereinafter).

(i) When a demand for an injunction has been made as prescribed in para. (1) of Article 41 (including the case where it is applied to mutatis mutandis pursuant to para. (3) of the same article).

(ii) In addition to the cases prescribed in the preceding item, when a non-judicial demand for an injunction has been made against a business operator.

(iii) When an action concerning a demand for an injunction has been filed (including a petition for settlement or conciliation or an agreement for arbitration), or a petition for provisional disposition order has been filed.

- (iv) When a judgment pertaining to a demand for an injunction has been rendered (including settlement by conciliation, notification of a decision in lieu of conciliation or an arbitration award) or notification of ruling with respect to the petition of provisional disposition order pertaining to a demand for an injunction has been made.
- (v) When an appeal against the judgment in the preceding item has been filed (including the filing of an objection to the decision in lieu of conciliation or the filing of a rescission of the arbitration award) or an appeal has been filed against the ruling in the preceding item.
- (vi) When the judgment in item (iv) (including the decision in lieu of conciliation or an arbitration award) or the ruling prescribed in the same item has become final and binding.
- (vii) When a judicial settlement pertaining to a demand for an injunction has been reached.
- (viii) In addition to the cases listed in the preceding items (vi) and (vii), when a lawsuit pertaining to a demand for an injunction (including proceedings pertaining to a petition for settlement, conciliation proceedings or arbitration proceedings) or proceedings of provisional disposition pertaining to a demand for an injunction have been completed.
- (ix) When non-judicial settlement pertaining to a demand for an injunction has been reached, or any other agreements have has been reached or failed to be reached with a business operator pertaining to a demand for injunction.
- (x) When a qualified consumer organization is going to conduct any act pertaining to the waiver of claims, settlement, withdrawal of appeals and other proceedings set forth by a Cabinet Office Ordinance with respect to a demand for an injunction that will result in a final and binding judgment or those which will have the same effect.
- (xi) When a qualified consumer organization has conducted other acts pertaining to proceedings provided by a Cabinet Office Ordinance with respect to a demand for an injunction.
- (5) When the Prime Minister has received any report provided in the preceding paragraph, the Prime Minister shall notify other qualified consumer organizations of the date and time of the report, its outline and other matters set forth by a Cabinet Office Ordinance, by means that allows all qualified consumer organizations and the Prime Minister to review the same information electromagnetically or by other means provided by a Cabinet Office Ordinance.

(6) When a qualified consumer organization may compulsorily execute a final and binding judgment, etc. provided in the main clause of item (ii) of para. (5) of Article 12, it may not waive a demand for an injunction pertaining to the final and binding judgment, etc.

-----

#### Article 43 (Jurisdiction)

(1) The provision of Article 5 of the Code of Civil Procedure (excluding provisions pertaining item (v)) shall not apply to a lawsuit for demand of an injunction.

(2) A lawsuit for demand of an injunction may also be filed with a court with jurisdiction as to the place where the business operator committed such an act provided for in paragraphs (1) - (4) inclusive of Article 12.

#### Article 44 (Transfer)

When a lawsuit for demand of an injunction has been filed in one court and an identical or similar lawsuit for demand of an injunction is pending in other court, the court may transfer the lawsuit, in whole or in part, in consideration of the address or location of relevant parties, the address of witnesses who are to be examined,

similarity of issues or evidences or other circumstances, and if the court finds it reasonable, in response to an application or ex officio, to such other court or other competent court having jurisdiction.

#### Article 45 (Consolidation of Oral Arguments, etc.)

(1) Several lawsuits for demand of an injunction with the same contents and business

operator, etc. being an opposite party are pending concurrently in the same court of the first instance or the same court of second instance, the oral arguments and judgment procedures shall be conducted in consolidation, provided, however, that this shall not apply when it is found that consolidation of oral arguments and judgment procedures of other lawsuit for demand of an injunction is extremely unreasonable in consideration of progress of proceedings or other circumstances.

(2) In the case prescribed in the main clause of the preceding paragraph, parties shall notify the court of same.

#### Article 46 (Suspension of Court Proceedings)

(1) In the case where a final and binding judgment, etc., to which another qualified consumer organization is a party, has been already issued pursuant to the main

clause of item (ii) of para. (5) of Article 12, with respect to a pending lawsuit for demand of an injunction, and there is a reasonable ground to suspect that said another qualified consumer organization have any of the reasons provided for in item (iv) of the para. (1) of Article 34, with respect to court proceedings, etc. pertaining to said final and binding judgment, etc. (including the case where they may be deemed to have any of the reasons provided for in item (iv) of the para. (1) of Article 34 pursuant to the provision of para. (2) of Article 34), and it is found that considerable period of time may be required to determine the rescission of certification provided in the para. (1) of Article 13 pursuant to the provision of para. (1) of Article 34 or the certification pursuant to the provision of para. (3) of Article 34 (hereinafter referred to as "Rescission of Certification, etc." in the following article), the Prime Minister shall notify the court where the lawsuit for an injunction is pending (hereinafter referred to as "Court in Charge of the Case" in this article) of the same and the period of time expected to be required to determine, pursuant to a Cabinet Office Ordinance.

(2) When the Prime Minister notifies the court as provided in the preceding paragraph, the Prime Minister shall determine whether or not to rescind the certification within the period relating to the notice, and notify the court in charge of the case of the decision.

(3) In the case where a court in charge of the case has received the notice prescribed in the provision of para. (1), and it finds necessary, the court may suspend the court proceedings until the period relating to the notice has elapsed (when the notice prescribed in the preceding paragraph has been received before the period relating to the notice has elapsed, until the notice has been received).