

# **Is the Opt-in System Doomed to Fail? An Experience with the New Japanese Legislation on Collective Redress**

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## **Introduction**

In December 2018 a legal action under the Japanese law on collective redress, Law No 96 of 2013, known as the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (the ‘Collective Redress Act’ or the ‘Act’), was filed in relation to a widely reported scandal in which Tokyo Medical University (TMU) discriminated against female candidates in its entrance examinations to suppress the number of future women doctors. The matter garnered significant public attention and a non-profit organisation called the Consumer Organisation of Japan (COJ) brought the action against the TMU. The COJ alleged that the university treated certain candidates,

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especially women, unlawfully and claimed damages, including examination fees and travelling and lodging expenses, on behalf of affected candidates. The COJ argued that adjusting grades without explaining the procedure to the candidates in advance was tortious and, alternatively, that adjustment of the grades was tortious and breached a contract with the candidates.<sup>2</sup> This was the first case filed under the Collective Redress Act and is still pending, with an uncertain outcome, as of September 2019.

What is surprising is that this was the first collective action brought under the new redress system since the Act was implemented in October 2016. Many Japanese industries opposed the introduction of the system, claiming that its implementation would undermine the competitiveness of Japanese industry due to additional litigation costs.<sup>3</sup> Yet two years after implementation of the Act it had not been used. As of September 2019, only two – or three, if counted by the number of the defendants – cases have been filed under the Act.

In hindsight this result may not be surprising. Jurisdictions that have successful collective redress systems, viewed in terms of the number of cases, tend to adopt a so-called opt-out system.<sup>4</sup> It is difficult to create a successful collective redress system by adopting an opt-in mechanism such as the one the Act creates. In adopting a system with opt-in characteristics, the government may have expected that the Act would be used infrequently. Furthermore, the legislature<sup>5</sup> embedded many significant limitations into the Act. It even appears that the legislature may have intentionally designed the system to fail in terms of the number of cases brought. This article will discuss these features of the Japanese legal system of collective redress.

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2 Satoshi Sugiyama, 'In lawsuit, consumer group alleges discrimination by Tokyo Medical University', *Japan Times* (17 December 2018), [www.japantimes.co.jp/news/2018/12/17/national/crime-legal/tokyo-medical-university-sued-damages-first-legal-action-rigged-admissions-process/#.XLhi01KP5WI](http://www.japantimes.co.jp/news/2018/12/17/national/crime-legal/tokyo-medical-university-sued-damages-first-legal-action-rigged-admissions-process/#.XLhi01KP5WI), accessed 14 September 2019.

3 Koichi Miki, *Minji soshō niyuru shūgōteki kenri hogo no rippō to riron* [Legislations and Theories of Collective Rights Protection through Civil Justice] (Yūhikaku 2017), pp 105–106; Kazuhiko Yamamoto, *Kaisetsu shōhisha saiban tetsuzuki tokurei-hō* [Commentary on the Act on Special Measures Concerning Consumer Group Action] (2nd ed, Kōbundō 2016), pp 12–13.

4 According to Professor Hensler in 2011, a significant number of cases were recorded in Australia (245 since 1992), Canada (411 since 2007) and Israel (750 since 2007) where opt-out systems were available, compared with other countries. Deborah R Hensler, *Keynote: The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 *George Washington LR* 306 (2011), p 309.

5 The Act was enacted based on discussions among experts appointed from, among others, scholars, lawyers, judges, consumer groups, business and industry, and the Japanese Consumers Affairs Agency. In this article, the term 'legislature' includes such pre-legislative discussion bodies.

## Legislative background and history

A collective redress system, including a class action system, performs a useful legal function when individual claims are small and an individual claimant would have trouble obtaining a remedy, but collectively the claims are large. The national court system also benefits from such a system, which enables courts to efficiently and simultaneously dispose of massive numbers of similar claims caused by a common incident or practice. In the United States, the class action system has been criticised and called out for reform because a number of its characteristics have allowed abuse of the collective redress process.<sup>6</sup> However, many jurisdictions around the world have adopted collective redress systems in one form or another and with many variations.<sup>7</sup> Japan is now one of these jurisdictions.

Historically speaking, in Japan two legal systems for disposition of collective claims existed before the implementation of the collective redress system.<sup>8</sup> In 1926 the Code of Civil Procedure introduced a system that allowed plaintiffs or defendants in litigation proceedings who had a common interest to appoint one or more of themselves to stand as the plaintiff or defendant on behalf of the group (the so-called appointed party system (*sentei tōjisha*)).<sup>9</sup> During the reform of the civil procedure system in 1996, the Code of Civil Procedure, Law No 109 of 1996 (CCP), added a provision that enables a person who is not a party to pending litigation, but who shares a common interest with the plaintiff or defendant in the litigation, to appoint that plaintiff or defendant to also stand in on the interested party's behalf. The appointed party system was designed to simplify litigation proceedings with multiple parties by introducing a procedure for selecting representative parties, and does not offer any measures for disposing of collective claims on behalf of persons sharing

6 Deborah R Hensler, *The Globalization of Class Actions: An Overview*, 622 *Annals of the American Academy of Political and Social Science* 7 (2009), at 10; Richard L Marcus, *The American Class Action: Scourge or Savior?*, translated by Masahiko Omura, in Masahiko Omura and Koichi Miki (eds), *America minji soshō-hō no riron* [Theories of the Law of the Civil Procedure in the US] (Shōji hōmu 2006), pp 225–255.

7 See n 6 above, Hensler, p 10.

8 Strictly speaking, another new collective injunctive system was legislated in 2012 to enable neighbourhood residents to entrust the Certified Prefectural Centre for Removal of Organised Crime to request injunctive relief against specified organised crime groups, regarding usage of offices and other ancillary activities. Art 32-4, Act for Prevention of Wrongful Acts by Members of Organised Crime Groups, Law No 77 of 1991. Because of its narrow scope of application and different characteristics from the Collective Redress Act explained in this article, discussion and explanation of this system, and the Act enacting it, has been omitted.

9 For the appointed party system, see Yasuhei Taniguchi et al (eds), *Civil Procedure in Japan* (3rd ed, Juris Publishing 2018), pp 322–323 [Tatsuo Ikeda].

common interests. Therefore, the appointed party system does not work effectively as a procedural device to deal with a plethora of claims among the parties.<sup>10</sup> However, it was the basis for the two-stage proceedings adopted in the redress system discussed in this article.<sup>11</sup>

The legislature enacted another legal system to deal with collective claims in 2006, which entered into force in 2007, through an amendment to the Consumer Contract Act, Law No 61 of 2000.<sup>12</sup> This system, called a consumer organisation action, was designed to provide a qualified entity that represents unspecified affected consumers with opportunities to obtain injunctions against business operators that engage in conduct that is harming or may harm consumers' interests.<sup>13</sup> A consumer organisation action only focuses on preventing unspecified affected consumers against future damages, not on providing direct, effective monetary relief to consumers who have incurred actual losses.<sup>14</sup> Therefore, consumer organisation actions do not provide a means to recover monetary damages against business operators.<sup>15</sup>

### **New legislation for collective redress**

The Collective Redress Act, which introduced the Japanese legal system for collective redress of consumer contract disputes, was enacted in 2013 and came into force in 2016. The system was introduced to provide special treatment for consumer contracts; therefore, the Act was designed to address disputes relating to consumer contracts, rather than mass torts generally and other types of cases.

Japanese civil procedure legislation has been strongly influenced by the inquisitorial German model and also partially influenced by the adversarial US model after the Second World War, most notably in aspects such as the method of cross-examination of witnesses.<sup>16</sup> Interestingly, however,

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10 See n 3 above, Miki, pp 102–103.

11 *Ibid*, pp 225, 256–257.

12 Consumer Contract Act, Arts 12–47.

13 *Ibid*, Art 12.

14 See n 3 above, Miki, pp 100–101.

15 After this legislation, collective injunctive systems have been expanded to areas other than consumer contracts. The Act against Unjustifiable Premiums and Misleading Representations, Law No 134 of 1962, was revised in 2008 to include a collective injunctive system in Art 30, and the Act on Specified Commercial Transactions, Law No 57 of 1976, was also revised in 2008 to include a similar system in Art 58.18-25; these amendments entered into force in 2009. Furthermore, the Food Labelling Act, Law No 70 of 2013, which was enacted in 2013 and entered into force in 2015, included a collective injunctive system in Art 11.

16 See n 9 above, Taniguchi et al, pp 30–32 [Yasuhei Taniguchi].

the Japanese legislation on collective redress was inspired by the two-stage proceedings used in the Brazilian class action system.<sup>17</sup>

The primary characteristics of the Act are summarised as follows, using the key features of collective redress systems in various jurisdictions as established by Professor Hensler<sup>18</sup> (each characteristic is discussed in further detail later):

- *Procedure under the Act*: two-stage proceedings (the first-stage proceedings are commenced by a specified qualified consumer entity ('consumer entity'); if it prevails in the first-stage proceedings, wholly or partially, individual consumers may opt-in at the second stage) as opposed to opting in or opting out of single stage proceedings or opt-out-style two-stage proceedings.
- *Standing to bring claims under the Act*: consumer entities have exclusive standing as opposed to public officials or private actors (eg, consumers themselves).
- *Scope of eligible claims*: limited to claims related to consumer contracts as opposed to trans-substantive (ie, available for any kinds of claims).
- *Remedies available under the Act*: damages, as opposed to injunctive or declaratory relief.

#### *First-stage proceedings*

Under the Act, standing to file a lawsuit is granted only to consumer entities, which are certified by the Prime Minister.<sup>19</sup> Initially, a consumer entity is supposed to file a lawsuit requesting a declaration from the court regarding the common liability of the defendant business operator to consumers, based on underlying facts and legal causes common to the potential claims of unspecified consumers. This first proceeding is called an 'action for declaratory judgment on common obligations' and is a litigation proceeding which requests the court to issue a declaratory judgment. The consumer entity requires no individual mandate from consumers to file this proceeding. Moreover, consumers are not allowed to participate in this initial stage.<sup>20</sup> For these first-stage proceedings to be permitted, specified requirements regarding the 'numerosity' of the potential claimants, 'commonality' of the issues and 'predominance' of the common issues must be met.<sup>21</sup>

17 See n 3 above, Miki, p 265.

18 See n 4 above, Hensler, p 307.

19 Collective Redress Act, Arts 2(x), 3.

20 *Ibid*, Art 8.

21 *Ibid*, Arts 2(iv), 3(4); Makoto Ito, *Shôhisha higai kaifuku saiban tetsuzuki no hôkôzô - kyôtsûgimu kakunin soshô wo chûshin to shite* [Collective Recovery of Property Damage of Consumers], 66 *Hôsô jihô* 2035 (2014), pp 2061–2063; see n 3 above, Yamamoto, pp 152–164.

*Second-stage proceedings*

If the court finds common liability on the part of the business operator and the decision becomes final and binding, the consumer entity is supposed to commence the second stage of proceedings within one month of the date of the first stage judgment becoming final and binding.<sup>22</sup> In the second stage the court will determine the amount of damages to be awarded to each individual consumer. This second proceeding is called a ‘summary determination proceeding’ and, at this stage, individual consumers are allowed to participate in the proceedings by delegating their powers to the consumer entity.<sup>23</sup> The new legislation is called ‘two stage proceedings’, and it has adopted an opt-in system at the second stage.

The legislature expected this second stage to be a flexible process similar to alternative dispute resolution.<sup>24</sup> In the second stage both parties initially exchange admissions or denials of the claims.<sup>25</sup> During this process a settlement between the parties is both anticipated and encouraged by the legislature.<sup>26</sup> After this proceeding the court decides the disputed claims based only on documentary evidence and a hearing with the parties.<sup>27</sup> For this reason, it is called a *summary* determination. To protect the constitutional rights of the parties to have an open, regular trial, the parties and consumers who opted in may object to the summary determination within a month after receipt of service of process and may instead request resolution through a formal trial and judgment process.<sup>28</sup>

**Characteristics of the redress system**

The following aspects of the system are notable from the perspective of comparison with non-Japanese systems. Issues relating to the opt-in process are discussed later.

*Standing*

As previously explained, the standing to file a lawsuit under this system is granted only to a consumer entity certified by the Prime Minister. The Prime Minister certifies such an entity from among the qualified consumer entities that have continuously worked to obtain injunctive relief under the

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22 Collective Redress Act, Arts 14, 15(1).

23 *Ibid*, Art 31(1).

24 See n 3 above, Miki, p 286.

25 Collective Redress Act, Arts 42(1), 43(1).

26 See n 3 above, Miki, p 288.

27 Collective Redress Act, Arts 44(2), 45(1).

28 *Ibid*, Arts 46(1), (2), 52(1).

pre-existing consumer organisation action process. The requirements for certification include having a sufficient financial basis to properly perform services under this system.<sup>29</sup> As of September 2019, three consumer entities had been certified by the Prime Minister.

*Scope of eligible claims*

The Act limits eligible claims to those within a relatively small range. As mentioned above, the Act was enacted to provide special treatment for consumer contracts. The consumer generally must have privity of contract with the business operator for the claims to be eligible under the system.<sup>30</sup> This requirement was established so that a business operator could estimate its stake in the first-stage proceedings.<sup>31</sup> Thus, it is difficult to use this system for securities litigation, where no privity of contract between the issuer and the purchaser of the securities exists.<sup>32</sup> It is also difficult to use the system to sue a manufacturer for product liability claims because manufacturers usually lack a direct contractual relationship with consumers.<sup>33</sup>

The eligible claims against business operators for recovery of damages suffered by consumers, with regard to consumer contracts, include those which relate to: performance of a contract; unjust enrichment; a claim for damages relating to breach of contract; and a claim for damages arising out of torts.<sup>34</sup> Damage to property other than the subject matter of the consumer contract, lost profits, personal injury, pain and mental suffering are expressly excluded from the scope of claims that can be brought under the Act.<sup>35</sup> This is because these excluded damages are not common among affected consumers and because the unique circumstances of each such claim must be examined.<sup>36</sup> The leak of personal information by business operators has become a scandal worldwide, but can be compensated only by

29 *Ibid*, Art 65(4) (v); Consumer System Division, Consumer Affairs Agency (ed), *Ichimon ittô shôhisha saiban tetsuzuki tokurei-hô* [Questions and Answers for Act on Special Measures Concerning Consumer Group Action] (Shôji hōmu 2014), p 142.

30 Collective Redress Act, Art 3(3). The exceptions are business operators which are to perform an obligation under a consumer contract, or business operators which have another person solicit or encourage solicitation for the conclusion of consumer contracts. *Ibid*, Art 3(3) (ii).

31 See n 29 above, Consumer System Division, Consumer Affairs Agency (ed), p 32.

32 Koichi Miki et al, *Tokubetsu zadan-kai: shôhisha saiban tetsuzuki tokurei-hô no riron to kadai* [Special Round-Table Talk: Theories and issues concerning the Act on Special Measures Concerning Consumer Group Action], 9 *Quarterly Jurist* 138 (2014), p 148 [Katsutoshi Kano].

33 See n 32 above, Miki et al, p 148 [Katsutoshi Kano].

34 Collective Redress Act, Arts 3(1) (i)-(iv).

35 *Ibid*, Arts 3(2) (i)-(vi).

36 See n 29 above, Consumer System Division, Consumer Affairs Agency (ed), p 30.

consolation money; therefore, this type of damage also cannot be remedied under the new legislation.<sup>37</sup> With regard to these factors, the availability of this new system is inherently and significantly limited.

### *Notice*

After the court finds common liabilities of the business operator at the first stage of the proceedings and the judgment has become final and binding, the consumer entity must then file documentation to commence the second-stage proceedings. At this point consumers are notified of the judgment in the first-stage proceedings by way of publication and, to the extent possible, individual notices, and each consumer may choose whether or not to participate in the second-stage proceedings (ie, whether to opt in).<sup>38</sup> The costs for such notifications must initially be borne by the consumer entity and, later, may be reimbursed by the consumers who have opted in, by means of agreements.<sup>39</sup>

### *Settlement*

The business operator and the consumer entity can reach a settlement at both the first and second-stage proceedings.<sup>40</sup> The parties can agree to and settle with regard to the presence or absence of a common obligation and matters directly associated therewith at the first stage.<sup>41</sup>

However, the parties cannot enter into a settlement at the first stage with respect to the individual rights of a consumer.<sup>42</sup> This is because, at this first stage, the Act does not provide any measures to confirm an individual consumer's willingness to settle and it is difficult to ensure that such a settlement would reflect the opinions of the affected consumers. Although some ancillary matters – such as publication of the settlement at the cost of the business operator, an apology by the business operator (and its publication) and a commitment by the business operator to discontinue using the problematical boilerplate contracts at issue – may be included in the settlement agreement,<sup>43</sup> the settlement at the first stage generally will be inflexible, and settlements are not expected to occur frequently.<sup>44</sup>

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37 Kazuhiko Yamamoto, *Kōkai kōen kai: shūdanteki shōhisha higai kyūsai seido ni tsuite* [Open Lecture: On Collective Redress Systems for Consumers], 178 *Seimei hoken ronshū* 1 (2012), pp 33–34.

38 Collective Redress Act, Arts 25(1), 26(1).

39 See n 29 above, Consumer System Division, Consumer Affairs Agency (ed), p 71.

40 Collective Redress Act, Arts 10, 37; see n 3 above, Miki p 313.

41 Collective Redress Act, Art 10.

42 See n 3 above, Miki pp 313–314.

43 *Ibid.*

44 See n 32 above, Miki et al, p 153 [Hiroshi Nonoyama].

On the other hand, as previously explained, settlements are both possible and encouraged at the second stage of the proceedings. The Act does not provide the court with either supervisory power or a procedural mechanism to oversee the substance of a settlement between the parties, such as that possessed by US courts with regard to class action settlements. However, if the consumer entity abuses its power to enter into a settlement with a business operator, the Prime Minister may exercise its supervisory powers.<sup>45</sup> Therefore, the control over the substance of the settlement under the Act is more indirect than the US system.

### *Res judicata*

If the business operator prevails in the first stage of the proceedings, the other consumer entities cannot file the same lawsuit again against the business operator.<sup>46</sup> However, individual consumers can file an individual lawsuit against the same business operator because no opt-in by individual consumers was possible when the business operator prevailed in a previous lawsuit. If the business operator loses, fully or partially, against the consumer entities during the first stage of the proceedings, consumers who have opted in for the second-stage proceedings are bound by the judgment at the first stage.<sup>47</sup> For example, if the court upholds only part of the claims and dismisses the rest at the first stage, consumers who have opted in at the second stage will be bound by the partial dismissal of the claims at the first stage. In this sense, the judgment at the first stage binds consumers who have opted in at the second stage, both favourably and unfavourably.<sup>48</sup>

### *Cost allocation*

It has been said that the United Kingdom ‘cost-follows-event’ rule regarding litigation cost allocation has a chilling effect on the willingness of representative class members and the eligible entity to file a collective redress action, due to the fear of bearing the defendants’ legal fees and costs in the event the plaintiffs’ action fails. This is said to be one of the reasons for suppressed use of the collective redress system in many jurisdictions.

The Japanese civil procedure system has generally adopted the American rule of cost allocation, and the prevailing party is entitled to recover only limited expenses from the losing party, including court filing fees, daily allowances, lodging and travel expenses paid to witnesses and remuneration

45 See n 29 above, Consumer System Division, Consumer Affairs Agency (ed), pp 54–55, 58.  
See also Collective Redress Act, Art 86(2) (i).

46 Collective Redress Act, Art 9.

47 *Ibid.*

48 See n 3 above, Miki, pp 281–283, 306–308.

paid to experts. This general rule is applicable to the first stage of the proceedings.<sup>49</sup> The Act contains some provisions regarding cost allocation of the second stage of the proceedings,<sup>50</sup> but these provisions provide the cost-follows-event rule only as to certain filing fees relating to the second-stage proceedings and do not extend the rule to the expensive portions of the legal costs, including counsel fees. Therefore, the concern that the plaintiff may have to bear the defendant's legal fees and costs does not apply to the Japanese system and is not a reason for its suppressed use.

#### *Contingent fee arrangement*

There is no bar to contingent fee arrangements in Japan. Therefore, it is possible for consumer entities to make a contingent fee arrangement with their legal counsel. However, it is difficult to make an arrangement to receive contingent fees from the proceeds awarded to affected consumers at the first stage of proceedings because the consumer entity cannot commit to sharing part of the potential proceeds received from the business operator with its legal counsel before individual consumers opt in. Therefore, the consumer entity apparently cannot use contingent fee arrangements when filing a collective action on behalf of the affected consumers; however, the trends in actual practice under the new system are not yet predictable.

#### *Third-party funding*

There is no explicit prohibition against third-party funding in Japan. Potentially relevant regulations include the rules that the third-party funder cannot be assigned the disputed claims;<sup>51</sup> that a non-lawyer third-party funder cannot give legal advice;<sup>52</sup> and that legal counsel cannot share legal fees with non-lawyers, including a third-party funder.<sup>53</sup> Whether a particular scheme for third-party funding is permissible under these regulations requires a case-by-case analysis and sometimes the extent to which third-party funding is permissible may not be clear. Therefore, a desire for explicit legislation

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49 Law on Costs of Civil Procedure, Law No 40 of 1971.

50 Collective Redress Act, Arts 48, 49.

51 Trust Act, Art 10; Attorney Act, Art 73. Violation of Art 73 of the Attorney Act is subject to criminal punishment of either imprisonment at labour for up to two years or a criminal fine of up to JPY 3m. *Ibid*, Art 77(iv).

52 Attorney Act, Art 72. Violation of this article is subject to criminal punishment of either imprisonment at labour for up to two years or a criminal fine of up to JPY 3m. *Ibid*, Art 77(iii).

53 Japan Federation of Bar Associations, Basic Rules of Duties of Lawyers, Art 12.

on this issue has been expressed.<sup>54</sup> Third-party funding is not frequently used in Japanese litigation, but several cases of domestic litigation in Japan which made use of third-party funding have been reported.<sup>55</sup> The legislature did not give much consideration to how litigation should be funded under the Act, and there are no explicit provisions prohibiting a consumer entity from making use of third-party funding. However, it is difficult for third-party funders to arrange a feasible structure under the Act. First, at the beginning of the first-stage proceedings, it is difficult to estimate how many consumers will opt in; therefore, a third-party funder cannot calculate the stakes of the litigation precisely. Second, a consumer entity cannot commit to share a part of the potential future proceeds from the business operator with a third-party funder before the individual consumers opt in. That said, it is not easy to predict future practices with regard to this type of funding in collective redress cases in Japan.

#### *International jurisdiction*

The business operators targeted under this legislation include non-Japanese entities. However, to sue a non-Japanese business operator in Japan, the Japanese court must be able to exercise international jurisdiction over the relevant entity. With regard to the first-stage proceedings, if the non-Japanese business operator does business in Japan and the lawsuit is related to the business conducted in Japan, the business operator will be subject to the jurisdiction of the Japanese court.<sup>56</sup> Therefore, so long as this requirement is met, the Japanese court generally will have international jurisdiction.

54 For the general analysis of the status of the third-party funding in Japan, see Aoi Inoue, *The Third Party Funding in Japan: The perspective from Japanese law*, 39 JCAA Newsletter (2018), [www.jcaa.or.jp/e/arbitration/docs/Newsletter%20No.39%20.pdf](http://www.jcaa.or.jp/e/arbitration/docs/Newsletter%20No.39%20.pdf), at 1, accessed 14 September 2019; Akihiro Hironaka, *GAR Know How – Litigation: Japan (2019)*, <https://globalarbitrationreview.com/jurisdiction/1005881/japan>, Question 45, accessed 14 September 2019.

55 Deminor DRS, ‘Olympus (Japan): Deminor’s clients achieve the highest recovery’ (28 December 2016), <https://drs.deminor.com/en/olympus-japan-deminors-clients-achieve-the-highest-recovery>, accessed 14 September 2019. See also Deminor DRS, ‘Investment Recovery: Toshiba’, <https://drs.deminor.com/en/case/toshiba-corporation>, accessed 14 September 2019.

56 CCP, Art 3-3(v); see n 29 above, Consumer System Division, Consumer Affairs Agency (ed), p 46; Makoto Ito, *Shôhisha saiban tetsuzuki tokurei-hô* [The Collective Redress for Property Damage Incurred by Consumers] (Shôji hômu 2016), p 21. Art 3-4(1) of the CCP is not applicable to the first-stage proceedings under the new Japanese legislation for collective redress because the consumer entity does not fall into the category of ‘consumer,’ as stated in the article. *Ibid.* Dai Yokomizo, *Shûdanteki shôhisha higai kyûsai no kokusaiteki sokumen – teishokuhôteki kôsatsu* [International Aspects of Remedies for Collective Redress for Consumers – from a Conflict of Laws Perspective], in Emiko Chiba et al (eds), *Shûdanteki shôhisha rieki no jitsugen to hô no yakuwari* [Realisation of Collective Interests of Consumers and Roles of Law] 439 (Shôji hômu 2014), pp 442–443.

With regard to the second-stage proceedings, the individual claim of each consumer must fall under the international jurisdiction of Japan.<sup>57</sup> The court will generally find that it has international jurisdiction over the claim in a case where the affected consumer is domiciled in Japan.<sup>58</sup>

### Why was the opt-in system adopted?

In the process of drafting the new legislation, the Japanese industrial sector perceived the opt-out system as the cause of a flood of litigation in the US and thus strongly opposed it. As a result, the legislature did not adopt an opt-out system. However, this belief lacks objective foundation. Some Canadian provinces and Australia also have opt-out systems but have not experienced a flood of litigation comparable to that in the US. The abuse of the US litigation system actually arises due to several of its other features, such as punitive damages, the jury system, the extensive discovery process and the existence of entrepreneurial lawyers.<sup>59</sup> Nevertheless, the Japanese legislature considered the following factors in adopting the opt-in system and accommodated the unfounded negative reaction from the Japanese industrial sector.

First, the legislature considered that if the opt-out system were adopted, the class would have to be more closely scrutinised than it would in the case of an opt-in system.<sup>60</sup> The Japanese opt-in system is more flexible than an opt-out system, as it can be used, for example, by only 20–30 potential claimants,<sup>61</sup> and even by approximately ten potential claimants in some circumstances.<sup>62</sup> By contrast, greater numbers of claimants are required for systems such as the US class action system, where it is said that ‘[a]bove a certain point – 100 or more putative class members – most courts find the numerosity requirement to be per se satisfied’.<sup>63</sup> Furthermore, in the US practice, conflicts of interest among class members have been closely scrutinised.<sup>64</sup>

Second, if an opt-out system had been adopted, the burden of providing appropriate notice to all class members to allow them to opt out would have been very heavy to protect the class members’ due process right to opt out

57 Collective Redress Act, Art 30(3).

58 See n 56 above, Ito, p 127. Art 3-4(1) of the CCP is applicable to the summary determination proceedings. *Ibid.*

59 Miki, See n 3 above, Miki, p 250; see n 29 above, Consumer System Division, Consumer Affairs Agency (ed), p 9.

60 See n 3 above, Miki, pp 251–252.

61 See n 29 above, Consumer System Division, Consumer Affairs Agency (ed), p 17.

62 See n 3 above, Yamamoto, note p 152.

63 Jay Tidmarsh and Roger H Trangsrud, *Complex litigation and Its Alternatives* (Foundation Press 2018), p 156.

64 Eg, *Amchem Products Inc v Windsor*, 521 US 591 (1997).

of the proceedings.<sup>65</sup> In the US individual notices are required, pursuant to Supreme Court precedent, to protect the claimants' rights under the opt-out system.<sup>66</sup> The Japanese legislature avoided this heavy burden by adopting the opt-in system and requiring notice, to the extent practicable, at the beginning of the second stage.<sup>67</sup>

Third, there is concern that under an opt-in system a number of the individual class members may file individual lawsuits which the business operator would have to deal with individually. However, the new system targets circumstances where an individual consumer cannot file a claim individually, especially where the amount of the claim is too small. Moreover, in Japan, which is known as a litigation-averse culture, this concern was not significant. Therefore, it was not a substantial problem in terms of adopting the opt-in system.

### **Results of the new system**

As explained at the beginning of this article, what has happened after the implementation of the new system is notable. Although Japanese industry expressed significant concerns about the system before its implementation, in fact it was not used for more than two years after its implementation.

There are numerous reasons for this, including some of the system's characteristics, such as the strict limitations on standing and on the scope of the eligible claims. A more important reason appears to be that the opt-in system is not attractive to the consumer entities that have standing to file litigation under the Act. In the US the number of claimants who actually opt out of class action litigation is very small. A survey in 2004 reported that '[t]he median percentage of class members opting out, in the 143 cases in which the opinion reveals both the number of opt-outs and the number of class members, is a mere 0.1 percent'.<sup>68</sup> Under an opt-out system the monetary value of the claims belonging to the 'silent majority' that does not have any particular opinion about pursuing those claims is large, which creates a significant incentive for the representative of the claimants. If the Japanese government wanted to create a workable system, in light of the significant number of actual cases, it should have adopted an opt-out system; however, in the authors' view, the government decided to adopt the opt-in system simply to suppress the amount of litigation arising under

65 See n 3 above, Miki, p 252.

66 *Eisen v Carlisle & Jaquelin*, 417 US 156, 173 (1974).

67 See n 37 above, Yamamoto, pp 18–20.

68 Theodore Eisenberg and Geoffrey P Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 *Vanderbilt L Rev* (2004), pp 1529, 1546.

it. As the Japanese legal system does not have any of the above-mentioned problematic features of the US litigation system, adopting an opt-out system would not have caused a flood of litigation, as seen in the US, that Japanese industry was concerned about.

## **Conclusion**

The new Japanese system for collective redress was very prudently – perhaps too prudently – legislated. The opt-in system cannot create sufficient incentive for consumer entities to file and pursue litigation against business operators. Compared with its operating costs, the kinds of damages that can be addressed through this system are too small. The scope of the claims is too narrow and standing for the first stage is too restricted. Therefore, this new system has not been used frequently. It is true that whether a given system is successful cannot be measured only by the number of cases it generates. It has been said that many systems of collective redress with opt-out features are driven by entrepreneurial lawyers and third-party funders and that a significant percentage of the funds recovered from defendants under such systems are not returned to the injured plaintiffs. Even so, it is still unfortunate that this new, sophisticated Japanese system, which is perhaps too moderate, has been rarely used and fails to provide a meaningful tool to redress consumer damages. The situation is in some ways unsurprising – the legislature was apparently too accommodating to Japanese industry and intentionally designed the system so that it would not be frequently used. However the future of this system remains unknown, and it may ultimately prove more beneficial than it appears.