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1. Introduction

On March 1, 2022, the Japanese Consumers Affairs Agency submitted a bill for deliberation which would amend the Japanese Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers, Law No. 96 of 2013 (the “Collective Redress Act”). This newsletter will explain the important items proposed in the bill.

In addition to amending the Collective Redress Act, the bill proposes to amend the Consumer Contract Act, Law No. 61 of 2000. However, this newsletter does not address the items in the bill that relate to the Consumer Contract Act, due to space limitations.

2. Background

Japan does not have a U.S.-style class action system. However, the Collective Redress Act was enacted, and entered into force in October 2016, to provide for quasi-class actions (or a collective redress system) for certain categories of monetary claims, brought on behalf of affected consumers¹. Under the Collective Redress Act, a qualified consumer entity certified by the Prime Minister (a “Specified Qualified Consumer Entity”) may bring a lawsuit on behalf of affected consumers to request the court declare a business operator’s common liability for monetary claims. This process is called the first stage proceeding. After the court renders a judgment declaring the common liability of the business operator to the affected consumers in the first stage proceeding, each affected consumer may opt in to the next stage of proceedings to confirm his or her own individual claim through the Specified Qualified Consumer Entity. This process is called the second stage proceeding. This type of proceeding is an “opt-in” system, as opposed to the “opt-out” system seen in U.S. class actions.²

Recoverable damages under the Collective Redress Act are limited to those incurred where the following elements are met:

¹ For an English translation of the current Collective Redress Act, see:

<https://www.japaneselawtranslation.go.jp/ja/laws/view/2727>.

² For a general discussion of the current Collective Redress Act, see Taeko Morita & Daisuke Eguchi, *A Review of the Current Status of, and Future Issues Facing, Consumer Class Action Systems in Japan*, in THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS (Cambridge University Press, 2021).

- (i) property damage is incurred by a considerable number of consumers;
- (ii) in connection with consumer contracts;
- (iii) the business operator has an obligation to pay money to these consumers;
- (iv) based on factual and legal causes common to these consumers³; and
- (v) at the second stage proceeding, it will not be difficult to determine the presence or absence, and the contents, of the claims appropriately and promptly.⁴

Eligible claims under the Collective Redress Act are limited to those involving performance of a contract, unjust enrichment, claims for damages relating to breach of contract, and claims for damages arising from torts.⁵ Damage to property other than the subject matter of a consumer contract, lost profits, personal injury, and damages for pain and suffering (i.e., consolation money) are excluded from the scope of claims that may be brought under the Collective Redress Act.⁶

However, as of February 28, 2022, only four cases (against five total defendants) had been filed under the Collective Redress Act since it entered into force in October 2016. Thus, the current bill was submitted to the Diet to amend the Collective Redress Act and make the Japanese collective redress system more effective.⁷

3. Important Proposed Revisions

(1) Expansion of Eligible Claims

As explained above, the current version of the Collective Redress Act does not allow damages for pain and suffering. The bill adds certain types of pain and suffering damages to the eligible claims. Specifically, damages for pain and suffering will be recoverable under the bill, if: (a) the primary factual relationship on which damages for pain and suffering are calculated is common to all affected consumers; and (b) either (i) the pain and suffering damages are claimed along with property damages, or (ii) the damages arose from an intentional act.⁸

In the process of discussions on revising the collective redress system, a concern was raised about a chilling effect on the use of personal data, if damages for pain and suffering are added to eligible claims and if claims that arise from the leakage of personal information are allowed under the Collective Redress Act. However, the bill did not exclude cases involving the leakage of personal information.

³ The Collective Redress Act, art. 2(iv).

⁴ The Collective Redress Act, art. 3(4).

⁵ The Collective Redress Act, art. 3(1).

⁶ The Collective Redress Act, art. 3(2).

⁷ It generally is difficult to increase the number of cases under an opt-in class action system. See Akihiro Hironaka & Yui Takahata, *Is the Opt-in System Doomed to Fail? An Experience with the New Japanese Legislation on Collective Redress*, Dispute Resolution International, Vol. 14, No. 1, at 27-40 (2020).

⁸ Bill, art. 3(2)(vi).

(2) Expansion of Defendants

(a) Expansion of Defendants to Include Certain Individuals

The current version of the Collective Redress Act limits the defendants against which a lawsuit may be filed to “a corporation or any other association or foundation and an individual when the individual conducts a business”.⁹ Representatives of a corporation and employees cannot be named as defendants under the Collective Redress Act as currently in force. This is because lawsuits under the Collective Redress Act are to determine the claims of substantial numbers of consumers, collectively, and the burdens on the defendants to defend themselves are larger than those in general lawsuits. However, the assets of business operators who engage in fraudulent business practices tend to be scattered and concealed, and also tend to be transferred to the personal possession of a representative or other person who controls the fraudulent business being operated. For this reason, the bill expands the scope of eligible defendants to a certain extent. Specifically, the bill would permit an individual to be named as a defendant if: (a) vicarious liability or liability for supervising a business is claimed, in cases where there is intent or gross negligence in the selection or supervision of employees, or (b) tort liability of an employee is claimed, in cases where the relevant employee acted with intent or gross negligence.¹⁰

(b) Expansion to Include Business Operators Who Make Misleading Representations

In the discussions on revising the Collective Redress Act, an opinion was raised that it should be clarified that the concept of claims “in relation to Consumer Contracts” in the Act includes tort claims that relate to making misleading representations under the “Act against Unjustifiable Premiums and Misleading Representations,” if the relevant business operator falls within the category of “the Company who solicits, has another person solicit, or encourages solicitation for the conclusion of the Consumer Contract”, as provided in the Collective Redress Act.¹¹ Ambiguity exists as to whether a claim against such a business operator can be brought under the Collective Redress Act, because the relevant business operator does not have direct privity with consumers in such cases. The bill does not include the proposed interpretation explicitly; however, it is anticipated that official material prepared by the Consumer Affairs Agency will clarify this point.

(3) Individual Notices to Consumers

Under the current version of the Collective Redress Act, if a common obligation is declared in the first stage proceeding, the Specified Qualified Consumer Entity that applies for the second stage proceeding (the “Petitioner Entity”) must send notices to individual consumers and make a public notice.¹² The expenses of making these individual and public notices are characterized as preparation for pursuing litigation, and the Petitioner Entity is responsible for bearing these expenses. Pursuant to the bill, if the Petitioner Entity so demands: (a) the business operator must send notices to individual known consumers regarding certain information, including an outline of the case, the substance of the claims, and the scope of the affected consumers, and (b) the business operator must give notice to the Petitioner Entity of certain information,

⁹ The Collective Redress Act, arts. 2(ii), 3(3).

¹⁰ Bill, arts. 3(1)(v), (3).

¹¹ The Collective Redress Act, art. 3(3)(ii).

¹² The Collective Redress Act, arts. 25, 26.

including the names, addresses, and contact information of the affected consumers to whom the notices were sent, within a week from the date the notices were sent.¹³ In addition, the business operator must respond to the Petitioner Entity within a week, if the Petitioner Entity demands information about: (a) the prospective number of affected consumers, (b) the number of known consumers, (c) the prospective date on which the business operator will make the notices to the affected consumers, and (d) other items provided in the relevant Cabinet Order.¹⁴

(4) Increasing the Flexibility of Settlements in the First Stage Proceeding

Under the Collective Redress Act as currently in force, the business operator and the Specified Qualified Consumer Entity can reach a settlement at both the first and second stage of the proceedings. However, in the first stage proceeding, these parties can achieve a settlement only with regard to the presence or absence of a common obligation¹⁵ and ancillary matters. The parties cannot enter into a settlement at the first stage proceeding with respect to the individual rights of a consumer, and settlements reached in the first stage proceeding are inflexible. The bill proposes to change this situation, and to enable the parties to reach a settlement pursuant to which the defendant will pay settlement money, to give more flexibility in settlement.¹⁶ For example, the following types of settlements will be possible if the bill becomes law: (a) the business operator agrees to make a payment without clarifying the presence or absence of a common obligation; (b) the business operator agrees to a total amount of payment to be made to the affected consumers; (c) the business operator agrees to make a donation to a third party; (d) the parties agree on the confidentiality of settlement terms; (e) the parties agree not to make use of the second stage proceeding (i.e., to provide information to affected consumers outside of court proceedings, and to determine the consumers to whom payment will be made, and proceed with those payments, again without court involvement). If the parties agree not to file litigation against the business operator with regard to the common obligation subject to the litigation, the settlement terms will bind all other Specified Qualified Consumer Entities.¹⁷

(5) Other Items

The bill also includes the following, among other items, to make the collective redress system more effective:

- (a) Introduction of a certification system for legal entities that provide support for the Specified Qualified Consumer Entities¹⁸; and
- (b) Introduction of special treatment of the statute of limitations, in order to preserve the affected consumers' rights, for example, if the claim brought by the Specified Qualified Consumer Entity is dismissed as unlawful in the first stage proceeding.¹⁹

¹³ Bill, arts. 28(1), (3).

¹⁴ Bill, art. 30.

¹⁵ The Collective Redress Act, art. 10.

¹⁶ Deletion of the Collective Redress Act, art. 10.

¹⁷ Bill, art. 11(3).

¹⁸ Bill, arts, 98-113.

¹⁹ Bill, art 68.

4. Conclusion

It is still unknown how effective these amendments will be to the existing system, once the bill passes the Diet and the revised Collective Redress Act enters into force. It is true that the proposals in the bill do not change the basic framework of the current Collective Redress Act drastically. However, in particular, expansion of the eligible claims to include pain and suffering damages will have some practical importance.

The Japanese subsidiaries of non-Japanese business operators are of course subject to the Collective Redress Act, but so long as Japanese courts have international jurisdiction over the relevant entity, non-Japanese business operators also are subject to the Collective Redress Act. Business operators doing business in Japan should continue to be mindful of reviewing their compliance systems to mitigate the risks of facing lawsuits under the Collective Redress Act.

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