

Consumer Disputes and Consumer Dispute Resolution in Japan

(Pertikaian Pengguna dan Penyelesaian Pertikaian Pengguna di Jepun)

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ABSTRACT

This article examines the consumer dispute resolution system, as well as some representative consumer disputes in Japan. In Japan, it can be said that the major three actors of the consumer dispute resolution system are public authorities pursuing consumer interests, bodies offering alternative dispute settlement for consumers and consumer organizations engaging in consumer protection activities. In this article, the structure and issues of each of these actors is analyzed. Then, the author provides an overview of some major categories of consumer disputes, which shed light to the tendencies and problems in the field of consumer law in Japan. The author reaches the conclusion that the legislation in force seems to be insufficient for ensuring a proper level of consumer protection, and that future reforms, as well as innovative activities by local authorities are to be counted on. Further, a deep reconstruction of the social phenomena giving birth to such disputes, as well as a shift from a “consumer protection versus business interests” mentality to a “consumer protection and plus business protection” model seems to be indispensable.

Keywords: consumer law; consumer disputes; consumer dispute resolution; Japan

ABSTRAK

Artikel ini meneliti sistem penyelesaian pertikaian pengguna dan beberapa perwakilan pertikaian pengguna di Jepun. Di Jepun, boleh dikatakan terdapat tiga pihak yang memainkan peranan penting dalam sistem pertikaian pengguna iaitu pihak berkuasa awam yang membela pengguna, badan yang menawarkan perkhidmatan penyelesaian pertikaian alternatif kepada pengguna dan organisasi pengguna yang memperjuangkan perlindungan pengguna. Artikel ini mengupas struktur dan isu berkaitan setiap pihak ini. Seterusnya, beberapa kategori pertikaian pengguna dibincangkan bagi menengahkan masalah yang dihadapi oleh bidang kepenggunaan di Jepun. Penulis berpendapat kerangka perundangan yang kini kedapatan di Jepun tidak mampu memberi tahap perlindungan yang memuaskan kepada pengguna. Adalah diharapkan penambahbaikan undang-undang dan aktiviti inovatif pihak berkuasa tempatan boleh memperbaiki keadaan ini. Selain itu, pembinaan semula fenomena sosial yang mencetuskan pertikaian tersebut dan peralihan mentaliti daripada ‘kepentingan perniagaan v perlindungan pengguna’ kepada model ‘perlindungan pengguna dan perlindungan perniagaan’ adalah sesuatu yang sangat diperlukan.

Kata kunci: undang-undang pengguna; pertikaian pengguna; penyelesaian pertikaian pengguna; Jepun

INTRODUCTION¹

The title of this paper is “Consumer Disputes & Consumer Dispute Resolution in Japan.” Consumer disputes and their resolution have been a central issue in Japan, gaining special importance during the recent years. This is also evident in the recent legislative developments in the relevant field. It is almost impossible to fully cover the relevant content in a single paper. Therefore, in this paper, I would like to focus on some specific issues, which could be regarded as being of a special importance.²

This paper is divided into two large parts, Chapter II and Chapter III. In Chapter II, I will give an overview of the consumer dispute resolution system in Japan. More

specifically, I will treat the public authorities pursuing consumer interests (Section 1), the alternative dispute settlement for consumers (Section 2), and the assertion of consumers’ rights by consumer organizations (Section 3). In Chapter III, I will present some major categories of consumer disputes in Japan which have drawn attention during the recent years, and analyze the main issues relating to them. The categories I have selected for the same Chapter are the following: residential lease contracts (Section 1), mobile communication service contracts (Section 2), and unrequested solicitation (Section 3). The above-mentioned content of this paper will be followed by some short closing remarks (Chapter IV).

CONSUMER DISPUTE RESOLUTION SYSTEM IN JAPAN

PUBLIC AUTHORITIES PURSUING CONSUMER INTERESTS³

Consumer Affairs Agency The main public authority pursuing consumer interests in Japan is the Consumer Affairs Agency,⁴ which emerged in 2009.

In the past, consumer-related administrative action was based on plural acts, belonging to the jurisdiction of various administrative agencies. Due to such fragmentation, the administration was facing difficulties in dealing with consumer issues in a swift and uniform manner. In view of this situation, and aiming at the promotion of a unitary consumer administration system, the three basic acts for the establishment of the Consumer Affairs Agency were introduced in 2009, and based on them, the Consumer Affairs Agency was newly established on September 1 of the same year. With the emergence of the Consumer Affairs Agency, the important (namely, not all) consumer protection-related acts that belonged until then to the jurisdiction of the respective administrative agencies were put under the jurisdiction or co-jurisdiction of the Consumer Affairs Agency.

Today, the Consumer Affairs Agency is the administrative body which deals in the first place with the affairs that are under its jurisdiction or co-jurisdiction, such as trade, labeling and safety, according to the relevant acts (e.g., the Consumer Affairs Agency gives directions to business operators or orders them to suspend their business, on the basis of the Acts).⁵

Secondly, the Consumer Affairs Agency widely collects, investigates and analyses information relating to consumer troubles from the whole country.

Thirdly, based on such investigation and analyzation, the Consumer Affairs Agency, acting as a central body for consumer administration, offers advice to other ministries and agencies and supports consumer administration by local governments. As mentioned above, even after the establishment of the Consumer Affairs Agency, not all acts related to consumer protection are under its direct jurisdiction, and not few Acts are still under the jurisdiction of other ministries and agencies. However, even in cases of such acts, the Consumer Affairs Agency can provide to such other ministries and agencies advice for proper administrative action.

Fourthly, the Consumer Affairs Agency has the authority to plan and draft new Acts that apply to the vacuums in the existing legislation for consumer protection. Based on such legislation, the Consumer Affairs Agency can take administrative measures against so-called “marginal cases” which have not been clearly belonging to the competence of a certain administrative authority until then.

Recently, the Consumer Affairs Agency has drowned public attention, because of government plans for its transfer from Tokyo to Tokushima prefecture in western

Japan.⁶ This transfer has been announced as part of an effort of the government to transfer governmental bodies to provincial areas, in order to redress the excessive concentration of such bodies in the capital and revitalize provincial areas. Accordingly, the Agency carried out, among others, trial operations in March and July 2016 to identify possible problems concerning the proposed relocation.⁷ Because of issues regarding the video conference system etc., it has been decided to establish an office of the Agency consisting of around 30 to 40 employees in Tokushima prefecture in 2017, and to decide about the transfer of the Agency as a whole around three years later.⁸ In general, the plan for this transfer has been met with criticism and concern especially by consumer organizations, mainly focusing on the possible outcome of weaker consumer protection administration.⁹

Consumer Committee At the same time with the emergent of the Consumer Affairs Agency, the Consumer Committee¹⁰ was also established. The Consumer Commission consists of commissioners (no more than 10) who are assigned by the Prime Minister, and may set up temporary commissioners and expert commissioners as needed.

Acting as an independent third-party organization, the Consumer Committee investigates and discusses various consumer issues, and submits opinions (proposals, etc.) to relevant government ministries and agencies, including the Consumer Affairs Agency.¹¹ Further, the Consumer Committee conducts investigations and deliberations in response to inquiries of the Prime minister, relevant Ministers or the Commissioner for Consumer Affairs Agency. In view of the necessity to deliberate a number of issues from a wide range of fields concerning consumer issues, the Commission conducts investigations and deliberations by setting up subsidiary committees in addition to the plenary meetings.

ALTERNATIVE DISPUTE SETTLEMENT FOR CONSUMERS

Local Consumer Centers In case a consumer dispute arises, the consumer can, besides from filing a lawsuit against the business operator (individually, or through consumer organizations, as mentioned below in Section 3), consult the local consumer centers, which are based on Art. 8 of the Consumer Safety Act.¹² The local consumer centers are established by local governments (prefectures and municipalities), and can provide mediation or agency in cases of consumer-related problems. Such mediation or agency by the centers is conducted as an administrative activity. However, such intervention on behalf of the local consumer centers is not enforceable against the businesses, which are free to deny taking part in them. The information related to consumer problems which is collected through this activity is gathered by local governments, analyzed and provided to the public, with the aim of preventing such problems in the future.

National Consumer Affairs Center

1. Activities of the Consumer Affairs Center

Consumers can also consult the National Consumer Affairs Center,¹³ an independent administrative agency based on the Act on the National Consumer Affairs Center. The main activities of the National Consumer Affairs Center are consumer information collection, analysis and release, consultation, public relations, publications and surveys, product testing, education and training, consumer ADR (provided by the ADR Committee mentioned below in (ii)) and international exchange.¹⁴

Among the above-mentioned activities, the collection and storage of information detailing consumer issues and safety hazards is done through PIO-NET (Practical living Information Online-NETWORK), an online network connecting the National Consumer Affairs Center and local consumer centers. Further, consultation is performed through activities to support local consumer centers across the country. The National Consumer Affairs Center also provides advice to local consumer centers and solves their cases in cooperation. Such resolution of consumer complaint cases may also involve product testing.

2. ADR Committee

In cases of important consumer conflict cases that need to be solved on a nationwide scale, consumers can further apply to the ADR Committee established by the National Consumer Affairs Center on April 1, 2009. The Committee consists of members who have special knowledge including legal expertise, and has an independent authority to carry out mediation and arbitration in such cases. A summary of the outcome of mediation and arbitration procedures is released as necessary, in order to prevent the occurrence of similar problems and the expansion of already existing ones.

Other ADR Procedures Apart from the judicial ADR procedure (conciliation of civil affairs), consumers also have the option to recourse to certain private ADR procedures. For example, although it does not apply solely to consumers, the Act on Promotion of Use of Alternative Dispute Resolution,¹⁵ aiming at promoting the use of ADR procedures, stipulates that persons who carry out private dispute resolution services on regular basis may obtain certification by the Minister of Justice for their services (Art. 5). An example of such certified persons is the Nippon Association of Consumer Specialists.¹⁶ This association was established in June 1988, has around 3,200 members (as of March 2015) and conducts, among other consumer-related activities, a consumer ADR procedure to resolve consumer disputes.

ADR procedure is also used by centers established by business operators' organizations for the resolution of disputes related to the Product Liability Act, as well as

by professional associations such as medical associations etc.

Regarding such private ADR procedures, some issues have been pointed out. These issues have to do with the low awareness about their existence, with the lack of a sufficient number of experts to participate in them, with the financial problems most of such ADR organizations which face deficits, and with the fact that they are not (same as the administrative ADR procedures) binding but rely on the will of the other party to participate in them.¹⁷

ASSERTION OF CONSUMERS' RIGHTS BY CONSUMER ORGANIZATIONS

Injunction Demands The Consumer Contract Act (hereinafter referred to as the "CCA"),¹⁸ which has as purpose to protect the interests of consumers, in consideration of the disparity in the quality and quantity of information and negotiating power between consumers and business operators (Art. 1), includes provisions related to injunction demands by qualified consumer organizations (Art. 12 ff.). "Qualified consumer organizations" have the right to demand injunctions on behalf of the consumers, against unfair acts of business operators. The term "qualified consumer organizations" refers to consumer organizations that fulfil the criteria set by law, apply to the Prime Minister and are certified by him/her.¹⁹

The acts of business operators that are subject to injunction demands by qualified consumer organizations are (1) unfair solicitation acts (representations that are not true, conclusive evaluations of uncertain items that change in the future, representation of advantages and omission of representation of disadvantageous facts, failure of the business operator to leave or not allowing a consumer to leave) and (2) the use of unfair contract clauses (clauses which exempt a business operator from liability for damages, clauses which provide the amount of the damages paid by consumers, clauses that impair the interests of consumers one-sidedly) (Art. 12 CCA). Further, qualified consumer organizations can also perform injunction demands against unfair practices regarding the 7 transaction types stipulated in the Act on Specified Commercial Transactions²⁰ (door-to-door sales, mail order sales, telemarketing sales, multilevel marketing transactions, specified continuous services, business opportunity sales transactions and door-to-door purchases. Art. 58-18 ff. of the Act) as of 2009, against unjustifiable representations stipulated in the Act against Unjustifiable Premiums and Misleading Representations²¹ (Art. 30 of the Act) as of 2009, and against false labelling on food etc. stipulated in the Food Sanitation Act²² (Art. 11 of the Act) as of 2013.

The content of the court decisions or settlements related to such injunction demands are widely announced to consumers and business operators.²³

*Actions for Collective Redress*²⁴ Further, a new consumer group action scheme, sometimes also referred to as the “Japanese class action,” has been introduced in Japan with the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers²⁵ and is effective as of October 2016. Unlike the injunction system within the CCA which allows only for a court decision ordering the business operator not to perform a certain action or practice as mentioned above, the new system allows also for claims for compensation, aiming at the collective recovery of consumer damage. This new system aims at facilitating the recovery of consumer damage by enabling “specified qualified consumer organizations”²⁶ to bring an action against business operators, and then allowing consumers to join in the procedure, after the liability of the defendant (business operator) has been determined by the court.²⁷

Thus, the new system provides for a two-phase procedure. Where property damage is incurred by a considerable number of consumers in connection with consumer contracts, the first phase starts with an action seeking a declaratory judgment whereby the business operator has an obligation to pay money to these consumers based on factual and legal causes common to them. During this first phase (civil litigation proceeding pertaining to litigation seeking declaratory judgment on common obligations, Chapter II, Section 1 of the Act), the court considers only the common issues of the case (namely, the issues which relate to all of the class members commonly), and determines whether the defendant is liable to pay damages to the plaintiff class members.

If the liability of the defendant is admitted in the first phase, the case moves to the second phase (proceedings for determining the target claims, Chapter II Section 2 of the Act), where the claimant (namely the specified qualified consumer organization) notifies all class members and invites them to join the procedure. During the simple determination proceedings, on the premise of the results of the first phase litigation and on the basis of the proofs of claims filed with the court, the other party states its approval or disapproval regarding the claims of each class member having joined in. A claim fully accepted by the defendant is determined as such, and in cases of claims argued by the defendant, the court determines the amount of damages to be paid to the respective class member.²⁸

Despite of being an important step towards the realization of enhanced redress for collective consumer damage, this new system has been strongly criticized. The main reasons for such criticism have been the high standards set for the designation of specified qualified consumer organizations by the Consumer Affairs Agency (only one consumer organization has been specified up

to date),²⁹ and the limited applicability of the new action, which applies only to a few types of cases.

More specifically, regarding the applicability of the Act, a specified qualified consumer organization may file an action for a declaratory judgment on common obligations only with regard to monetary payment obligations borne by a business operator against a consumer which pertain to the following claims concerning consumer contracts: (1) claims for performance of a contractual obligation; (2) claims pertaining to unjust enrichment; (3) claims for damages based on non-performance of a contractual obligation; (4) claims for damages based on a warranty against defects; and (5) claims for damages based on a tort (Art. 2 para. 1 of the Act).

Further, no action can be filed when the damage incurred is any of the following: (i) damage due to the loss or damage of property other than the objects of a consumer contract resulting from the nonperformance of a contractual obligation, a defect of goods, rights, or any other object of a consumer contract, or a tort; (ii) damage due to the loss of profit which would have been gained through the disposition or use of the object of a consumer contract if the object had been provided; (iii) damage due to the loss or damage of property other than goods pertaining to manufacturing, processing, repair, transport, or retention under a consumer contract or any other subject of the service which was the object of a consumer contract, resulting from the nonperformance of a contractual obligation, a defect of a service which is the object of a consumer contract, or a tort; (iv) damage due to the loss of profit which would have been gained through the use of the service which is the object of a consumer contract or through the disposition or use of the subject of the service if the service had been provided; (v) damage due to harm done to the life or body of a person; or (vi) damage due to mental suffering (Art. 2 para. 2 of the Act).³⁰

On their part, qualified consumer associations have expressed concerns about this new scheme. Apart from the above-mentioned limited applicability of the act, one of the main reasons for such concerns is the burden that specified qualified consumer associations will bear, especially during the stage of allotment of damages to a large number of consumers if the outcome of the lawsuit is successful. This issue is also affected by the lack of financial and human resources³¹ of qualified consumer organizations, with the need for stronger financial support by the state being emphasized by them³² (currently, state funding is very limited). Given the fact that by undertaking the above-mentioned functions, (specified) qualified consumer organizations aid and partially substitute the state in its function of ensuring consumer protection in a reliable and sound market, the present author agrees with the necessity of an increase of state support.³³

CONSUMER DISPUTES

In Japan, the term “consumer law” has a wide meaning, including various acts that deal with specific areas and issues, some of which have already been presented in Chapter II. Same as this term, the term “consumer disputes” is also broad, including a variety of disputes arising between consumers and business operators. In the following, some major consumer disputes which have drawn attention in Japan and which give a picture of the relevant landscape in the same country will be presented.

RESIDENTIAL LEASE CONTRACTS³⁴

In Japan, Art. 8, 9 and 10 CCA provide for the nullity of consumer contract clauses.³⁵ More specifically, Art. 8 provides for the nullity of clauses which exempt a business operator from liability for damages,³⁶ Art. 9 the nullity of clauses that stipulate the amount of damages to be paid by consumers, etc.,³⁷ and Art. 10 the nullity of clauses that impair the interests of consumers unilaterally.³⁸

A large part of the lawsuits related to the unfairness of contract clauses based on the above-mentioned provisions of the CCA have to do with clauses in residential lease contracts, imposing on the lessee the obligation to pay to the lessor certain amounts as key money or security deposits and at the same time giving to the lessor the right to deduct a certain amount from them at the end of the lease without reason, or renewal fees.³⁹ Lower court decisions on whether such clauses are void under the above-mentioned provisions of the CCA have been various, increasing indistinctness in this field. However, three Supreme Court decisions that were reported in 2011 contributed to a certain degree to the clarification of the delimitations of the unfairness of clauses in this category of contracts.⁴⁰ Two of these concerned clauses in residential lease contracts providing that the lessor may deduct part or all of security deposits at the time when the lessee moves out, regardless of whether there has been any damage to the residence or any other reason justifying this (hereinafter referred to as “automatic deduction clauses”), which have been the source of much dispute and litigation; and one concerned a renewal fee clause.⁴¹

The first Supreme Court decision (March 24, 2011)⁴² concerned an apartment lease (with initial term of two years; monthly rent: 96,000 yen; renewal fee: 96,000 yen; security money: 400,000 yen) with an automatic deduction clause providing that the lessor would deduct the following amounts from the security money, depending on the period of time that has lapsed from the commencement of the lease until the evacuation of the premises by the lessee: 180,000 yen if less than one year; 210,000 yen if less than two years; 240,000 yen if less than three years; 270,000 yen, if less than four years;

300,000 yen, if less than five years; and 340,000 yen if five years or more. Characteristic of this deduction clause was the fact that the longer the period lapse would be, the larger the amount deducted would be, and that it was expressly agreed that any wear and tear of the building that would be caused from the normal use by a lessee or that would necessarily be caused due to aging shall be covered by such deduction, and the lessee shall not have the obligation of restoration from such wear and tear. The premises were evacuated in less than two years, and the lessor withheld the amount of 210,000 yen.

The Supreme Court decided that under the circumstances of the case, the amount to be deducted, being between around two to three and a half times the amount of the monthly rent, could not be said to be too high, and therefore the relating clause could not be declared void under Art. 10 CCA. However, the Court left open the possibility of other automatic deduction clauses being declared void, by stating that (1) if it can be judged that the amount withheld is too high, in the light of (a) the expenses usually necessary for normal wear and tear, (b) the amount of rent, (c) the existence of other lump sums (e.g. key money) and (d) the amount of such lump sums; and (2) there are no special circumstances (e.g., the amount of the rent of the premises at issue is considerably lower compared to the standard rent of other buildings of a similar type in the vicinity of the building in question), automatic deduction clauses can be declared void under Art. 10 CCA. This was the first Supreme Court decision judging about the validity of such clauses, and indicating the criteria to be used for such judgment. This decision is criticized for allowing situations which lack transparency about the monetary burden to be borne by the lessee, by admitting that repair expenses for normal wear and tear can be collected from two sources at the same time, namely the monthly rent and the security deposit.⁴³

The second Supreme Court decision (July 12, 2011)⁴⁴ concerned an apartment lease (initial term of two years; initial monthly rent: 175,000 yen lowered to 170,000 yen after the first renewal; security money: 1,000,000 yen, of which 600,000 yen was a security deposit) with an automatic deduction clause providing that the lessor would deduct the security deposit of 600,000 yen from the security money. At the time of reimbursement of the deposit, the lessor also deducted an amount of 208,074 yen as restitution expenses, etc. to be borne by the lessee. The Supreme Court, quoting the above-mentioned Supreme Court decision of March 24, held that the amount deducted, being three and a half times the amount of the monthly rent, is not large, and therefore the automatic deduction clause cannot be declared void under Art. 10 CCA.⁴⁵

The third Supreme Court decision (July 15, 2011)⁴⁶ concerned an apartment lease (monthly rent: 38,000 yen, fixed repair contribution: 120,000 yen) where the renewal fee was equal to two monthly rents. The Supreme Court judged that renewal fee clauses that are expressly

mentioned in a lease contract in a manner where they can be interpreted in a single context cannot be declared void under Art. 10 CCA, except for cases where there are exceptional circumstances, that is, when the renewal fee is excessively large in the light of the amount of the rent and the term of the lease contract, etc. According to the Supreme Court's decision, in this concrete case, no such exceptional circumstances existed. This is the first Supreme Court decision judging about the validity of renewal fees. Also against this decision, there is criticism that it is problematic in the aspect that it allows for situations lacking transparency regarding the actual rent to be borne by the lessee.⁴⁷

Although the Supreme Court rejected the claims of the lessees in all of the aforementioned decisions, it also emphasized the importance of transparency of such clauses imposing additional payments in lease contracts. This has to do with the necessity of enabling lessees to calculate the actual monthly rent borne by them, including such external payments. Such actual monthly rent will also be the basis for comparison between the renting options provided to each lessee. However, despite the contribution of these decisions to a certain clarification of the criteria based on which the unfairness of such clauses can be judged, the validity question remains controversial.⁴⁸

MOBILE COMMUNICATION SERVICE CONTRACTS⁴⁹

In this context, it is also interesting to overview a series of district and high court decisions related to mobile communication service contracts. These decisions relate to standard contract terms used in mobile communication service contracts of major mobile phone companies, providing that in cases of mobile communication contracts of a determinate duration of two years, customers who terminate the contract before the expiration of the term shall pay an amount of 9,975 yen as a termination charge, except for cases where the contract has been terminated during the month in which the term expires, etc. The customer's benefit from choosing such a contract of determinate duration, despite the existence of such restrictions, is basic usage charges being reduced to half during the whole term, or to zero for the two months following the month of the renewal depending on the company.

Kyoto Consumers Contract Network (KCCN),⁵⁰ a nonprofit organization and qualified consumer organization based in Kyoto, filed lawsuits demanding an injunction of the said clauses in the interest of the consumers in general,⁵¹ against the three major mobile communication service companies, namely NTT DoCoMo, Softbank, and KDDI. The NTT DoCoMo Kyoto District Court and Osaka High Court decisions (March 28, 2012⁵² and December 7, 2012⁵³ respectively), as well as the Softbank Kyoto District Court and Osaka High Court decisions (November 20, 2012⁵⁴ and July 11, 2013⁵⁵

respectively), rejected KCCN's claims. On the contrary, the KDDI Kyoto District Court decision (July 19, 2012)⁵⁶ admitted that part of the relevant clause was void under Art. 9 para. 1 and 10 CCA, but was overruled by the KDDI Osaka High Court decision (March 29, 2013).⁵⁷

More specifically, the KDDI Kyoto District Court decision held that the relevant clause is void with respect to provision that customers who have terminated the contract during the 23rd month of the initial term or later shall pay termination charges, since the amount of 9,975 yen exceeds the normal amount of damages caused by the termination of a contract of the same kind to the business operator in accordance with the reason, the time of the termination, etc., as provided in Art. 9 para. 1 CCA, and impairs the interests of customers against the principle of good faith as provided in Art. 10 CCA.

A final appeal was submitted to the Supreme Court against all the above-mentioned high court decisions. The outcome of the proceedings at this level, which would affect a large majority of Japanese mobile phone users, was expected to contribute to the clarification of the notion of "normal amount of damages" in Art. 9 para. 1 CCA, which currently still causes legal uncertainty. However, the Supreme Court refused to accept the final appeal, and the three High Court decisions admitting the validity of the relevant clauses became final.

After the rendition of the above decisions, a "Task Force for the Verification of Services from the Viewpoint of Users (*Riyoshashiten kara no Sabisukenshotasukufosu*)" at the Ministry of Internal Affairs and Communications started its deliberations on May 20, 2015, and published on July 16, 2015 a report that questioned the validity and legality of such practices adopted by the companies.⁵⁸ It should be mentioned that this report is not directly linked to any future legislative intervention, but simply urges voluntary initiatives to be taken by the companies.⁵⁹ The publication of the above report has led to what seemed to be positive reactions from the companies. KDDI (au)'s president declared on August 7, 2015, the intention to reconsider the two-year fixed term contracts,⁶⁰ and according to media reports, DoCoMo and Softbank have declared the same intention. However, media reports also point out a tendency of the companies aiming to introduce alternative systems that might have the same (or even more burdensome) binding effects on consumers. A major reason for this is the sharp competition between the companies trying to keep their customers, especially after the introduction of the Mobile Number Portability (MNP) system in Japan starting October 24, 2006, which allows users to change their mobile communication company while keeping the same mobile number, thus creating a larger movability.

It should be noted here that KCCN has filed lawsuits demanding injunctions against the above three companies, as well as other companies, regarding other issues pertaining to mobile communication contracts too. It could be said that the existence itself of such a large

number of injunction demands regarding various aspects of mobile communication contracts might be indicative of the need for improved transparency of transactions in this field in Japan.

UNREQUESTED SOLICITATION⁶¹

Introduction Unrequested solicitation is any solicitation performed by businesses one-sidedly, without any request for such solicitation on the part of consumers.⁶² The main reasons why it has been in general regarded as necessary to provide for a special treatment of such solicitation, is that it is often conducted at residences/workplaces or during personal times, which are not originally intended for business purposes; that such solicitation includes elements of surprise for consumers; and that on account of such characteristics, it is capable of causing a nuisance to a large number of consumers.

In Japan, there exists data that demonstrates consumers' abhorrence of unrequested solicitations. According to the results of a "Consumer Attitude Survey on Door-to-Door Solicitation, Telephone Solicitation and Fax Solicitations"⁶³ conducted by the Consumer Affairs Agency in 2014, among 2,000 consumers who replied, the rate of those who "totally do not want" to be solicited was 96.4% for telephone solicitation and 96.2% for door-to-door solicitation.

The debate regarding telephone and door-to-door solicitation in Japan has mainly focused on the issue of introducing a system that would either prohibit in general such solicitation made without the consumer's consent, or that would make it possible for consumers to comprehensively refuse *ex ante*. This debate has been strongly influenced by the worldwide spreading of such systems for telephone solicitation and the existence of such systems for door-to-door solicitation abroad. Just to mention some recent developments in the Asian region, Singapore and Korea introduced a so-called Do-Not-Call system in 2014⁶⁴, and in Australia, court decisions delivered in 2013 have contributed to an enhancement of the regulation of door-to-door solicitation.⁶⁵

The comprehensive *ex ante* regulation of unrequested solicitations in countries other than Japan is mainly conducted based on two systems. The first is an "opt-in" system under which solicitations are prohibited, unless there has been a previous request on the part of the person to be solicited. The second is an "opt-out" system, under which unrequested solicitations are in principle allowed, and the persons to be solicited are provided with the ability to express their refusal against such solicitations beforehand and in a comprehensive manner.⁶⁶

Regulation in Japan In Japan, there currently exists no Act providing for such a comprehensive system. The Act on Specified Commercial Transactions, which covers seven transaction types (transactions arising from door-to-door sales, mail order sales, and telemarketing sales, multilevel marketing transactions, transactions arising

from the provision of specified continuous services, business opportunity sales transactions, and door-to-door purchases) offers protection only with regard to those categories of telephone and door-to-door transactions that are included in its scope.

Among transactions that do not fall within its scope, the most problematic where severe consumer damage has been occurring as a result of unrequested solicitation have been those of financial and commodity derivatives.⁶⁷ Unrequested solicitation regarding these types of transactions has been especially prohibited (with some exceptions, however) by the relevant special acts.⁶⁸ However, there is no other act regulating unrequested solicitation in transactions that do not fall under the scopes of the above-mentioned acts. This means that under the existing legislation, consumers in Japan are not granted the right to refuse unrequested solicitation comprehensively and beforehand, except for such specific transaction types.

At the level of local authorities, there exist consumer affairs ordinances which provide for similar systems. Such ordinances stipulate that in cases where consumers have previously expressed their intention to refuse solicitation, practices of businesses that ignore such intentions fall under the category of "unfair commercial practices" and are therefore prohibited.⁶⁹ In general, there are two main types of ordinances dealing with the issue of the refusal of solicitation, namely (i) ordinances giving effect only to *ex post* refusals of solicitations (in a comprehensive manner, contrary to the currently existing regulation under the acts), and (ii) ordinances giving effects to *ex ante* refusals too.⁷⁰

Among type (ii), the systems where ordinances recognize manifestations of intention made in the form of a usage of stickers etc. as legally effective refusals are similar to those of the U.S.⁷¹ or Australia. However, unlike these countries, enforcement of such ordinances in Japan seems to be insufficient. For cases of breaches of such intentions expressed by means of stickers etc., most of the local authority ordinances provide only for investigations, administrative guidance, adjurations, or publications of the businesses in breach, and no stricter sanctions such as cessations of business, penalties, invalidity of the contracts concluded as a result etc. can be found.⁷²

Recent Debate about the Introduction of New Regulations In view of the above, in Japan, the necessity of the introduction of an opt-in or opt-out system regarding unrequested telephone and door-to-door solicitation has been debated for a long time. The relevant debate has been quite detailed, referring to many aspects.

In January 2015, the Prime Minister consulted with the Consumer Commission of the Cabinet Office for a revision of the Act on Specified Commercial Transactions. From March 2015, an Expert Examination Committee (hereinafter referred to as the "Committee")⁷³ established within the Consumer Commission began to

review the provisions of the same Act, with the purpose of ensuring that it corresponds to the social changes etc. that had taken place after its previous amendment in 2008. In August 2015, the Committee published an Intermediary Report, and in December of the same year a Final Report.⁷⁴ During this procedure, the introduction of provisions regarding unrequested telephone and door-to-door solicitation was also deliberated.

Businesses strongly opposed the introduction of such regulation. More specifically, according to the opinions of business representatives expressed at a hearing of the Committee, during the preparatory procedure for the above-mentioned review of the Act on Specified Commercial Transactions, businesses are in favor of a strengthening of the currently existing regulation against malicious door-to-door and telephone solicitation businesses, but against an introduction of legislative measures for a comprehensive regulation system against unrequested solicitation.

The main reasons for their opposition were that there is no sufficient factual evidence indicating the necessity for such comprehensive regulation (namely, a sufficient number of verifiable incidents where consumers have incurred damage due to such solicitation); that a comprehensive regulation of these practices would be equal to their prohibition even if an opt-out system was to be adopted; that since the current consumer damage is in fact caused by dishonest businesses that do not observe the existing legislation, the establishment of a proper enforcement system would be sufficient; and that door-to-door solicitation is an important means of commercial activity for small businesses that do not have enough funds for publicities.⁷⁵ Thus, businesses positioned themselves against the introduction of any regulation other than that currently in existence.

The Intermediary Report concludes that no common understanding about the necessity of an enhancement of the relevant regulation has been formed among the members of the Committee, and that considerations on this issue should further continue.⁷⁶ Further, the Final Report concludes that no common understanding could be formed among the members of the Committee on the necessity of an enhancement of the existing regulation on door-to-door and telephone solicitation.⁷⁷

A Draft Bill, not including any suggestions about the introduction of a system allowing for a general *ex ante* refusal of telephone and door-to-door solicitation, was submitted to the Diet on March 4, 2016, with the final Bill being adopted on May 25 of the same year, and promulgated on June 3. The only new element regarding unrequested solicitation introduced by this Bill is the prohibition (adoption of an opt-in system) of unrequested solicitation by fax (an extension of the already existing opt-in regulation on e-mails). It will come into force within one year and six months from the day of its promulgation, and will be revised within five years after coming into force. According to the supplementary

resolutions of the House of Representatives⁷⁸ and the House of Councilors,⁷⁹ if the necessity arises due to new consumer damage, such revision will be made earlier than five years. Further, if damage to elderly people etc. continues to occur, strengthening the regulation will also be considered. Regarding this point, the supplementary resolution of the House of Councilors mentions that such strengthening will take place also “taking into consideration initiatives taken in foreign countries,” a reference which might accelerate and facilitate such review procedure.

CLOSING REMARKS

In this paper, I have given an overview of the consumer dispute resolution in Japan, and I have presented some aspects of consumer disputes in the same country. In this closing chapter, I would like to make some remarks regarding the way ahead in Japan, focusing on the issues presented in Chapter III.

The first remark is related to the issue of the provisions of the CCA. As it has been shown in this paper, the provisions of this act, especially those dealing with the regulation of the content of contracts, have been frequently used in lawsuits after CCA came into force. However, despite of the fact that these provisions have been introduced to increase legal protection of consumers, and that the establishment itself of the CCA has been an important step towards a higher level of consumer protection, the outcome of the relevant disputes indicates that these provisions of CCA have not managed yet to function as effectively as they have been expected to do.

When the CCA was introduced, excessive fears against possible negative effects on sound businesses, such as unwanted effects that would hinder even transactions which are could be said to be beneficial for consumers, have apparently led to a shrinkage of the content and extent of its regulation, as expressed in the wording “have a small baby and raise him to grow big,” which was repeatedly used at the time of its establishment. However, the author has the impression that the CCA has not managed yet to grow big.⁸⁰ Hopefully, the ongoing procedure for the amendment of the CCA will lead to the desirable results.⁸¹

The second remark has to do with the fact that there have been many lawsuits related to issues of mobile phone contracts, including those presented in this paper. This could be seen as being indicative of the fact that the landscape regarding mobile phone contracts in Japan lacks transparency and legal certainty. As mentioned in this paper, despite the willingness of the companies to improve the terms of their fixed term contracts, rumors and facts disseminated by the media indicate that the companies are shifting to other means for binding their customers. Most probably, a deeper reconstruction of

the market competition conditions that give birth to these issues is necessary,⁸² including a facilitation of the participation of new companies in this market. Further, the method of providing discounts against fixed term contracts, the use of which seems not to be restricted to mobile telecommunication but existing in many ways, forms, and fields in Japan, needs to be revised from a consumer protection viewpoint. This applies especially to cases where the fixed term is excessively long, when taking into consideration the general characteristics of the market in question.

Thirdly, regarding the regulation of unrequested solicitation, the author believes that despite the recent not favorable legislative developments in the relevant field, the supplementary resolutions of both Houses of the Japanese Diet demonstrate a certain degree of understanding and willingness to embrace the introduction of new systems in this field. The author also has the impression that perhaps this currently existing gap in Japanese legislation might be covered by the gradual adoption of ordinances by more local authorities. The adoption of such ordinances by the vast majority of local authorities, could possibly lead to a *de facto* existence of a nationwide system.

Finally, it could be said that in the field of consumer protection in Japan, a general shift of the debate is required, towards a deeper appreciation of the positive effects of consumer protection on market restoration, which also leads to the protection of sound companies. This would mean the abandonment of a “consumer protection versus business interests” debate basis, which seems to be the mainstream in current Japan, to a “consumer protection and/plus business protection” model. Future developments in this field in Japan certainly deserve attention.

NOTES

¹ This paper is a revised version of the paper presented at a public lecture at the Faculty of Law, Universiti Kebangsaan Malaysia (National University of Malaysia), on February 16, 2017. The author of this paper would like to address his gratitude to the organizers of this public lecture.

First, I would like to express my gratitude to the Dean of the Faculty of Law, Prof. Dr. Zinatul Ashiqin Zainol, for welcoming me and professor Kunihiro Nakata (Ryukoku University, Japan) at the public lecture with a warm speech. Secondly, I would like to thank from the bottom of my heart Assoc. Prof. Dr. Sakina Shaik Ahmad Yusoff for kindly arranging not only the public lecture, but a focus group discussion the day before about consumer law in Malaysia, other Asean countries, and Japan, and her research group for actively participating to the focus group discussion. Further, I would like to thank Professor Seunghyeon Seong of Chonnam National University (Korea), for supporting also on this occasion the exchange between the Malaysian and Japanese academic and research society. Last but not least, I would like to deeply thank the audience for kindly participating to the public lecture.

² The author kindly requests for the understanding of the readers of this paper, regarding the fact that it covers only specific selected aspects and issues of a wide range of topics, in view of the aim and audience of the above-mentioned public lecture.

³ For an outline of administrative regulation for the realization of consumer rights in general, see Jisuke Nagao/Kunihiro Nakata/Naoko Kano (eds.), *Rekucha Shohishaho [Consumer Law Lectures]* (5th edition, Kyoto: Horitsubunkasha 2011), p. 251 ff. [Tsuneharu Yonemaru].

⁴ <http://www.caa.go.jp/en/> (in English, last visited May 30, 2017).

⁵ To give a recent example, in January 2017, the Consumer Affairs Agency has ordered Mitsubishi Motors Corp. to pay a fine of around 485 million yen for making false claims in sales literature about the fuel efficiency of its cars. For details, see the relevant article published on January 27, 2017, in the online version of the Japan Times, <http://www.japantimes.co.jp/news/2017/01/27/business/corporate-business/mitsubishi-motors-hit-%c2%a5485-million-fine-bogus-fuel-efficiency-data/#.WRwCoMakLic> (in English, last visited May 30, 2017).

⁶ See for example the article published on January 14, 2016 in the online version of the Japan Times, www.japantimes.co.jp/news/2016/01/14/national/government-eyes-transfer-two-agencies-functions-prefectures/#.WS0MYsakLic (in English, last visited May 30, 2017).

⁷ Regarding this issue, see among others the articles published in the online version of the Japan Times, on March 14, 2016, <http://www.japantimes.co.jp/news/2016/03/14/national/tokyo-bureaucrats-trial-working-from-tokushima-prefecture/#.WSLOsakLic> and on January 27, 2017, <http://www.japantimes.co.jp/news/2016/07/04/national/consumer-affairs-agency-tests-water-moving-hq-tokushima/#.WS0HucakLic> (both in English, last visited May 30, 2017).

⁸ See the relevant announcement made by the Office of the Prime Minister on September 12, 2016, available at <http://www.kantei.go.jp/jp/singi/sousei/about/chihouiten/h28-09-01-kongonotorikumi.pdf> (in Japanese, last visited May 30, 2017).

⁹ Regarding this issue, see for example the article published on the online version of Mainichi Shimbun, <https://mainichi.jp/articles/20160429/ddn/004/070/043000c> (In Japanese, last visited May 30, 2017).

¹⁰ <http://www.cao.go.jp/consumer/en/e-index.html> (in English, last visited May 30, 2017).

¹¹ An outline of proposals and suggestions made by the Consumer Commission can be found at the website of the Commission, <http://www.cao.go.jp/consumer/en/e-pso.html> (in English, last visited May 30, 2017).

¹² Act No. 50 of June 5, 2009. Art. 8 of this Act (Implementation of Consumer Affairs Consultations and Other Administrative Functions by Prefectural and Municipal Governments) provides as follows:

- (1) “Article 8(1) Prefectural governments are to perform the following administrative functions:
- (i) coordinating communication among municipal governments, providing necessary advice, cooperating, providing information, and giving other assistance to municipal governments in their performance of the administrative functions set forth in the items of the following paragraph;
 - (ii) performing the following main administrative functions for Ensuring Consumer Safety:
 - (a) handling any request for a consultation involving a Consumer complaint against an Enterprise which requires a broader perspective than that of the municipal area;
 - (b) mediating any processing of a Consumer complaint against an Enterprise which requires a broader perspective than that of the municipal area;
 - (c) implementing any necessary investigation or analysis to assess the status or movements of an Actual or Potential Consumer-Related Incident which requires expert knowledge and skill;
 - (d) collecting information that is necessary for Ensuring Consumer Safety from a broader

- perspective than that of the municipal area, and providing it to local residents.
- (iii) exchanging information about the occurrence of Actual and Potential Consumer-Related Incidents with the municipal governments;
 - (iv) coordinating communication among relevant organizations to Ensure Consumer Safety;
 - (v) administrative functions incidental to those set forth in the preceding items.
- (2) Municipal governments are to perform the following administrative functions:
- (i) handling requests for consultations involving Consumer complaints against Enterprises in order to Ensure Consumer Safety;
 - (ii) mediation for the settlement of Consumer complaints against Enterprises in order to Ensure Consumer Safety;
 - (iii) collecting information that is necessary for Ensuring Consumer Safety and providing it to local residents;
 - (iv) exchanging information about the occurrence of Actual and Potential Consumer-Related Incidents with the prefectural governments;
 - (v) coordinating communication among relevant organizations to Ensure Consumer Safety;
 - (vi) administrative functions incidental to those set forth in the preceding items.
- (3) When a municipal government deals with the administrative functions set forth in the items of the preceding paragraph in cooperation with another municipal government or entrusts another municipal government with said administrative functions, the prefectural government may conduct necessary coordination between relevant municipal governments to meet the requests from said municipal government.
- (4) Any of prefectural officials who engage or engaged in the administrative functions set forth in the items of paragraph (1) and municipal officials who engage or engaged in the administrative functions set forth in the items of paragraph (2) shall not divulge any confidential information learned in the course of the administrative functions entrusted thereto.”
- All English translations of Japanese acts in this paper are based on the Japanese Law Translation Website (Japanese Law Translation Database System), <http://www.japaneselawtranslation.go.jp/?re=02>, prepared by the Ministry of Justice (last visited May 30, 2017).
- ¹³ http://www.kokusen.go.jp/ncac_index_e.html (in English, last visited February 30, 2017).
 - ¹⁴ It should be mentioned here that a Memorandum of Understanding has been concluded between the National Consumer Complaints Centre of Malaysia and the National Consumer Affairs Center of Japan, on March 7, 2017 in Kuala Lumpur, in order to ensure mutual cooperation in solving cross border consumer complaints. Based on this MOU, the two centers will make cooperative efforts to solve problems faced by consumers in transactions between Malaysia and Japan, for example, troubles associated with international travels, cross-border online shopping etc. For details, see the articles on this subject on the website of the National Consumer Complaints Centre of Malaysia (<http://www.nccc.org.my/v2/index.php/component/content/article/1782-press-release>) as well as of the National Consumer Affairs Center of Japan (http://www.kokusen.go.jp/e-hello/previous_events/data/de-20170307.html) (both in English, last visited May 13, 2017). The author of this paper would like to thank, on this occasion, Dato Paul Selvaraj and Ms. Shabana Naseer of the National Consumer Complaints Centre of Malaysia for kindly allowing Prof. Kunihiro Nakata and the author to visit their office on February 17, 2017, engage in a fruitful discussion and obtain invaluable information on consumer protection in Malaysia.
 - ¹⁵ Act No. 151 of December 1, 2004, available in English translation at the above-mentioned Japanese Law Translation Website.”
 - ¹⁶ <http://nacs.or.jp/> (in Japanese, last visited May 30, 2017).
 - ¹⁷ Kunihiro Nakata/Naoko Kano, *Kihonkogi Shohishaho* [Basic Lectures of Consumer Law] (Tokyo: Nihonhyoronsha 2016), p. 305 [Kazuhiko Yamamoto].
 - ¹⁸ Act No. 61 of May 12, 2000, available in English translation at the Japanese Law Translation Website.
 - ¹⁹ As of May 30, 2017, there are 16 such organizations throughout Japan, according to the information available on the website of the Consumer Affairs Agency, <http://www.caa.go.jp/planning/zenkoku.html> (in Japanese, last visited May 30, 2017).
 - ²⁰ Act No. 57 of June 4, 1976.
 - ²¹ Act No. 134 of May 15, 1962.
 - ²² Act No. 233 of December 24, 1947.
 - ²³ According to Art. 39 CCA, the Prime Minister shall immediately make public any judgment pertaining to the injunction demand or a summary of any extra-judicial settlement if he has been notified by a qualified consumer organization.
 - ²⁴ For a detailed explanation of the content of the new action system, see Nihonbengoshirengokai Shohishamondaitaisakuiinkai [Japan Federation of Bar Associations, Consumer Affairs Committee] (ed.), *Konmentaru Shohishasaibantetsuzukitokureiho* [Commentary on the Act on Special Measures for Consumer Trial Procedures] (Tokyo: Minjihokenkyukai 2016), Makoto Ito, *Shohishasaibantetsuzukitokureiho* [Act on Special Measures for Consumer Trial Procedures] (Tokyo: Shojihomu 2016), Kazuhiko Yamamoto, *Kaisetsu Shohishasaibantetsuzukitokureiho* [Commentary on the Act on Special Measures for Consumer Trial Procedures] (2nd edition, Tokyo: Kobundo 2016).
 - ²⁵ Act No. 96 of December 11, 2013.
 - ²⁶ Corporations certified by the Prime Minister pursuant to the provisions of Article 65 as a qualified consumer organization having the qualifications necessary for conducting court proceedings for redress for damage (Art. 2 (x) of the Act).
 - ²⁷ According to Art. 1 of the Act, the purpose of this Act is to protect the interests of Consumers by enabling specified qualified consumer organizations to conduct court proceedings for the collective redress for the property damage incurred by consumers in connection with consumer contracts, given the fact that it is sometimes difficult for consumers to achieve redress of damages on their own due to the disparity in the quality and quantity of information and negotiating power between consumers and companies and by doing so, contributing to the stabilization and improvement of the general welfare and lives of the citizens and sound development of the national economy.
 - ²⁸ For a detailed presentation of this new collective redress system, see Michael. J. Madderra, *The New Class Actions in Japan*, Pacific Rim Law & Policy Journal 23(3)(2014): 795 ff.
 - ²⁹ As of May 30, 2017, according to the information available on the website of the Consumer Affairs Agency, http://www.caa.go.jp/policies/policy/consumer_system/collective_litigation_system/about_qualified_consumer_organization/list_of_specified_organizations/
 - ³⁰ Because of this limited applicability, and of the fact that this act does not apply to monetary payment obligations pertaining to claims concerning consumer contracts concluded prior to its enforcement (Art. 2 of the supplementary provisions to the Act), as of May 30, 2017, no action has been filed yet based on the act.
 - ³¹ Such concerns were expressed for example at the symposium held by the Kyoto Bar Association on March 8, 2014 in Kyoto, regarding the introduction and application of the new group action.
 - ³² See, for example, the research report published by the Kyoto Bar Association, *Girisha/Furansu ni okeru Shudantekishohishahigaikafikusoshoseido no Un'yojokyo ni kansuru Chosahokokusho* [Research Report on the Operational Status of the Recovery Lawsuit Systems for Collective Consumer Damages in Greece and France],” Kyoto Bar Association (2014), p. 20 ff. The report can be downloaded at https://www.kyotoben.or.jp/siritai/menu/pages_kobetu.cfm?id=768 (last visited May 30, 2017). The author of this paper participated to this research as coordinator and interpreter.

³³ Using the wording of professor Atsushi Omura this issue has to do with the “macro-consumer law” dimension, since it is related to the protection of the general interest. According to the same professor, issues having to do with individual interests, or collective interests as an aggregation thereof belong to the “micro-consumer law” dimension. See Atsushi Omura, *Shohishaho [Consumer Law]*, 4th edition, 2011, p. 11 ff.; Hiroo Sono, *Private Enforcement of Consumer Law: A Sketch of the Japanese Landscape*, Hokkaido Journal of New Global Law and Policy 16(2012): 64.

³⁴ For an overview of recent developments in the regulation of unfair contract terms, including the court decisions on residential lease agreements, see Antonios Karaikos, *Recent Developments in the Regulation of Unfair Contract Terms in Japan*, Kansai University Review of Law and Politics 36(2015): 85 ff.

³⁵ Regarding the regulation of unfair contract terms in Japan before and after the introduction of the CCA, see Antonios Karaikos, *Regulation of Unfair Contract Terms in Japan*, Waseda Bulletin of Comparative Law 28(2010): 21 ff.

³⁶ Art. 8 CCA provides as follows:

“(1) The following Consumer Contract clauses are void:

- (i) Clauses which totally exempt a Business Operator from liability to compensate a Consumer for damages arising from default by the Business Operator;
- (ii) Clauses which partially exempt a Business Operator from liability for damages arising from default by the Business Operator (limited to default which arises due to an intentional act or gross negligence on the part of the Business Operator, the Business Operator’s representative or employee);
- (iii) Clauses which totally exempt a Business Operator from liability for damages to a Consumer which arise from a tort pursuant to the provisions of the Civil Code committed during the Business Operator’s performance of a Consumer Contract;
- (iv) Clauses which partially exempt a Business Operator from liability for damages to a Consumer arising from a tort (limited to cases in which the same arises due to an intentional act or gross negligence on the part of the Business Operator, the Business Operator’s representative or employee) pursuant to the provisions of the Civil Code committed during the Business Operator’s performance of a Consumer Contract; and
- (v) Where a Consumer Contract is a contract for value, and there exists a latent defect in the subject matter of the Consumer Contract (including where a Consumer Contract is a contract for work, and there exists a defect in the subject matter of a Consumer Contract for work; the same shall apply in the following paragraph): Clauses which totally exclude a Business Operator from liability to compensate a Consumer for damages caused by such defect.

(2) The provisions of the preceding paragraph shall not apply to clauses as provided in item (v) of the preceding paragraph that fall under the cases enumerated in the following items:

- (i) Where a Consumer Contract provides that a Business Operator is responsible to deliver substitute goods without defects or repair the subject where a latent defect exists in the subject matter of the Consumer Contract; and
- (ii) Where a Consumer contract is concluded between a Consumer and a Business Operator simultaneously with or after another contract is concluded between the Consumer and another Business Operator entrusted by the Business Operator, or between the Business Operator and another Business Operator for the benefit of the Consumer, and said other contract provides that the other Business Operator is responsible to provide compensation for all or part of the damages caused by a defect, deliver substitute goods without defects or repair

the defective subject where a latent defect exists in the subject matter of the Consumer Contract.”

³⁷ Art. 9 CCA provides as follows:

“The following Consumer Contract clauses are void to the extent provided in each respective item:

- (i) a clause that stipulates an amount of liquidated damages and/or establishes a fixed penalty in the event of cancellation, wherein the total amount of damages and/or penalty exceed the normal amount of damages that would be caused to a Business Operator by the cancellation of a contract of the same type in accordance with the reason for the cancellation, the time of the cancellation, etc.: The amount by which the total exceeds the normal amount; and
- (ii) a clause in a Consumer Contract that stipulates an amount of liquidated damages and/or establishes a fixed penalty in the event of a total or partial default by the customer (if more than one payment is to be made, every delinquent payment is a default under this item), wherein the total amount of damages and/or penalty exceeds the amount calculated by deducting the amount actually paid from the amount which should have been paid on the due date and multiplying the result by 14.6% a year in accordance with the number of days from the due date to the day on which the money is actually paid: The amount by which the total amount exceeds the calculated amount.”

³⁸ Art. 10 CCA provides as follows:

“Any Consumer Contract clause that restricts the rights or expands the duties of the Consumer more than the application of provisions unrelated to public order in the Civil Code, the Commercial Code (Act No. 48 of 1899) and any other laws and regulations, and that unilaterally impairs the interests of the Consumer, in violation of the fundamental principle provided in the second paragraph of Article 1 of the Civil Code, is void.”

³⁹ In Japanese practice, key money is an amount typically equivalent of one to three months of rent, paid to the lessor as a gift, based on a traditional practice, and therefore not returned after the lease is terminated.

Security deposit is a sum of money held by the lessor, to ensure the cost of repair in relation to any damage agreed between the lessor and the lessee, which did in fact occur. Unlike the above-mentioned key money, the remaining amount of security deposit after the amount needed to cover such damage is to be returned.

Finally, renewal fee is a lump sum paid to the lessor at the time of each renewal of the lease. Although none of these is stipulated as compulsory payable in any provision of the Japanese legislation, clauses on such amounts (all or some of them) can be seen in the majority of residential lease agreements. The amounts payable as key money seem to have traditionally been especially high in the Kansai region (the region which lies in the southern-central part of Japan’s main island Honshu, including among others the prefectures of Osaka and Kyoto).

⁴⁰ Earlier than these decisions, there was a series of Supreme Court decisions concerning the validity (partially in the light of the provision of the CCA) of clauses providing that tuition fees etc. already paid to universities etc. shall not be reimbursed in case a student does not enroll, or terminates the contract of studentship after having enrolled. For details, see Shoichiro Kozuka, *Judicial Activism of the Japanese Supreme Court in Consumer Law: Juridification of Society through Case Law?*, Z.Japan.R/J.Japan.L., no. 27 (2009), p. 84 ff., Tsuneo Matsumoto/Makinori Goto (eds.), *Shohishahohanrei Indekkusu [Consumer Law Precedents Index]* (Tokyo: Shojihomu 2017), p. 60 ff. [Keiko Tanimoto]. Further, the Supreme Court decision of March 16, 2012 (available at http://www.courts.go.jp/app/hanrei_en/detail?id=1154, last visited May 13, 2017), judged that standard terms in a life insurance contract, according to which the contract lapses without previous notice in case of a non-payment of the premium, cannot be declared void under Art. 10 CCA when they meet certain conditions stated in the same decision. See Tsuneo Matsumoto/Makinori Goto (eds.)

- Shohishahohanrei Indekksu [Consumer Law Precedents Index]* (Tokyo: Shojihomu 2017), p. 70 ff. [Naoko Kano].
- ⁴¹ Of high importance regarding the regulation of contract terms in residential lease agreements is also the Supreme Court Decision of December 16, 2005, regarding the unfairness of a restoration charge clause (imposing upon the lessee the obligation to pay for the restoration of the premises to their “original state” at the end of the term of the lease agreement). This was the first Supreme Court decision judging that the lessee does not bear expenses for the repair of normal wear and tear, which are to be covered by the monthly rent. For details of this case, where the CCA was not applicable since the agreement was concluded before its effectuation, see Masami Okino, *Recent Developments in Consumer Protection in Japan*, UT Soft Law Review, no. 4 (2012), p. 11 ff., Tsuneo Matsumoto/Makinori Goto (eds.) *Shohishahohanrei Indekksu [Consumer Law Precedents Index]* (Tokyo: Shojihomu 2017), p. 22 ff. [Kenji Saigusa].
- ⁴² Published in Saikosaibanshominjihandreishu [Supreme Court Civil Law Casebook] vol. 65, no. 2 (2011) p. 903 ff. An English translation of the decision is available at http://www.courts.go.jp/app/hanrei_en/detail?id=1098 (last visited May 30, 2017).
- ⁴³ Tsuneo Matsumoto/Makinori Goto (eds.) *Shohishahohanrei Indekksu [Consumer Law Precedents Index]* (Tokyo: Shojihomu 2017), p. 67 [Aya Osawa].
- ⁴⁴ Published in Hanrei Jiho no. 2128 (2011), p. 43 ff.
- ⁴⁵ Judge Kiyoko Okabe expressed a dissenting opinion to this decision, indicating that the lessor bears an obligation to express clearly to the lessee who is a consumer, not only the amount of the rent and of the deposit withheld, but also the nature (i.e., reason and content) of such deduction, and that a breach of this obligation, combined with other factors, voids the clause.
- ⁴⁶ Published in Saikosaibanshominjihandreishu [Supreme Court Civil Law Casebook] vol. 65, no. 5 (2011), p. 2269 ff.
- ⁴⁷ Tsuneo Matsumoto/Makinori Goto (eds.) *Shohishahohanrei Indekksu [Consumer Law Precedents Index]* (Tokyo: Shojihomu 2017), p. 69 [Emiko Maruyama].
- ⁴⁸ Okino, *Recent Developments in Consumer Protection in Japan*, UT Soft Law Review, no. 4 (2012), p. 14.
- ⁴⁹ Regarding the issue of mobile telecommunications and consumer protection in Japan, see Antonios Karaiskos, *Mobile Telecommunications and Consumer Protection in Japan: Evaluating the Validity of Cancellation Fee Clauses*, Kansai University Review of Law and Politics, no. 37 (2016), p. 1 ff.
- ⁵⁰ The website of the organization <http://kccn.jp/index.html> (in Japanese, last visited May 30, 2017) contains information related to its consumer protection activity.
- ⁵¹ The injunction demands were joined with individual claims by customers demanding the reimbursement of termination charges paid, on the basis of unfair enrichment etc.
- ⁵² Hanreijiho, no. 2150 (2012), p. 60 ff.
- ⁵³ Hanreijiho, no. 2176 (2013), p. 33 ff. Tsuneo Matsumoto/Makinori Goto (eds.) (op. cit. at note 40), p. 72 ff. [Aya Osawa].
- ⁵⁴ Hanreijiho, no. 2169 (2013), p. 68 ff.
- ⁵⁵ Case law database LLI, case no. L06820363.
- ⁵⁶ Hanreijiho, no. 2158 (2012), p. 95 ff.
- ⁵⁷ Hanreijiho, no. 2219 (2014), p. 64 ff.
- ⁵⁸ The content of the deliberations of the task force and the report can be found at http://www.soumu.go.jp/main_sosiki/kenkyu/ict_anshin/index.html (in Japanese, last visited May 30, 2017).
- ⁵⁹ Therefore, research regarding this issue not only maintains but even gains more importance. As an example of such research attempting to find solutions and make suggestions by conducting a comparative analysis of foreign legislation, see Aya Osawa, *Furansu no Keitaidenwariyokuyaku ni okeru Saiteikeiyakukikanjyokokisei – Kikankosokujyoko no Futoseihandankijun to Futojokorisuto no Jujitsuka ni mukete [Regulation of Minimum Contract Term Clauses of Mobile Phone Usage Agreements in France – Towards an Enrichment of the Unfairness Judgment Criteria for Term Restriction Clauses and of the Unfair Contract Term List]*, NBL, no. 1047 (2015), p. 27 ff.
- ⁶⁰ Article of Asahi Shimbun Digital at <http://www.asahi.com/articles/ASH875PY2H87ULFA026.html> (last visited May 30, 2017).
- ⁶¹ For a thorough analysis of the regulation of telephone and door-to-door solicitation in Japan and other countries, see Antonios Karaiskos, *Regulation of Unrequested Solicitation in Japan: The Way Toward a Do-Not-Call and Do-Not-Knock System?*, Kansai University Review of Law and Politics, no. 38 (2017), p. 21 ff.
- ⁶² Makinori Goto, *Wagakuni ni okeru Fushoseikanyukisei no Arikata [Current State of Affairs of the Regulation of Unrequested Solicitation in Japan]*, Gendaishohishaho, no. 9 (2010), p. 38.
- ⁶³ The results of this survey can be found in Shohishacho [Consumer Affairs Agency], *Heisei 26nendo Shohishaseisaku no Jissijokyo [Implementation Status of Consumer Policy in 2014]*, p. 84, chart 2-2-6. This document (in Japanese) can be downloaded from http://www.caa.go.jp/adjustments/pdf/27hakusho_honbun.pdf#search=%27%E5%B9%B3%E6%88%9026%E5%B9%B4%E5%BA%A6%E6%B6%88%E8%B2%BB%E8%80%85%E6%94%BF%E7%AD%96%E3%81%AE%E5%AE%9F%E6%96%BD%E7%8A%B6%E6%B3%81%27 (last visited May 30, 2017).
- ⁶⁴ Regarding the Do-Not-Call system of Singapore, see Kinkibengoshikairengokai [Kinki Federation of Bar Associations], *Osutoraria/Shingaporu ni okeru Do Not Call Register no Unyoyokyo ni kansuru Chosahokokusho [Research Report on the Operational Status of the Do Not Call Register in Australia and Singapore]*, 2015 (the author of this paper participated in this research as coordinator and interpreter), Akira Hasegawa/Kozo Nagano/Gensei Ohama, *Osutoraria/Shingaporu no Do Not Call Seido Chosahokokusho [Research Report on the Do-Not-Call System in Australia/Singapore]*, Shohishahonyusu, no. 104 (2015), p. 152 ff., Akira Hasegawa, *Shingaporu no Do-Not-Call Seido [The Do-Not-Call System of Singapore]*, Webuban Kokuminseikatsu, no. 38 (2015), p. 15 ff. Further, regarding the Do-Not-Call system of Korea, see Yasuhiro Yoshioka, *Kankoku no Do-Not-Call Seido [The Do-Not-Call System of Korea]*, Webuban Kokuminseikatsu, no. 38 (2015), p. 16 ff.
- ⁶⁵ Regarding the Do-Not-Knock system of Australia, see Gensei Ohama, *Osutoraria no Do-Not-Knock Seido [The Do-Not-Knock System of Australia]*, Webuban Kokuminseikatsu, no. 46 (2016), p. 17 ff., Shinji Minai, *Osutoraria no Do-Not-Knock Sutekka – Homonhanbaikanyu ni taisuru Jizenkyohi no Shien – [The Do-Not-Knock Sticker of Australia: Assistance of Ex Ante Refusal Against Door-to-Door Solicitation]*, Shohishahonyusu, no. 99 (2014), p. 99 ff.
- ⁶⁶ In Japan, the terms “opt-in” and “opt-out” are used with the meaning explained in this paper. However, the usage of these terms may differ in other countries, with the terms being used with the contrary meaning. This has to do with a difference as to the object to which the person to be solicited will opt “in” or “out.” In Japan, it is unrequested solicitation that is regarded as being such an object, whereas in countries where the terms have the contrary meaning, the object is the state where no unrequested solicitation is performed.
- ⁶⁷ Shinji Minai, *Nihon ni okeru Denwakanyukisei to Kongo no Tenbo [Regulation of Telephone Solicitation in Japan and Future Perspectives]*, Webuban Kokuminseikatsu, no. 45 (2015), p. 17.
- ⁶⁸ Financial Instruments and Exchange Act (Act No. 25 of April 13, 1948) and Commodity Derivatives Act (Act No. 239 of August 5, 1950) respectively.
- ⁶⁹ An overview of such ordinance provisions gives a strong impression that their content shares many similarities with that of the Unfair Commercial Practices Directive 2005/29/EC.
- ⁷⁰ Regarding the classification and concrete examples of such ordinances, see Yoshinori Matsuo, *Nihon ni okeru Homonkanyuhanbai no Jizenkyohi to Chihojichitai no Torikumi [Ex Ante Refusal of Door-to-Door Solicitation and Initiatives of Local Authorities in Japan]*, Webuban Kokuminseikatsu, no. 48 (2016), p. 16 ff.

- ⁷¹ Regarding the Do-Not-Knock system of the U.S., see Antonios Karaiskos, *Amerika no Do-Not-Knock Seido* [*The Do-Not-Knock System of the United States*], *Webuban Kokuminseikatsu*, no. 46 (2016), p. 18 ff., Shinji Minai, *Amerika no Chihojichitai ni okeru Homonhanbaikisei – No Soliciting Sutekka to Kanyujyorei – [Regulation of Door-to-Door Solicitation in Local Authorities of the United States: No Soliciting Stickers and Solicitation Ordinances]*, *Shohishahonyusu*, no. 100 (2014), p. 197 ff., Masato Yamada, *Shohisha no Jinkakuken to Homonhanbai to no Kankei – Beikoku no Jitsurei o Sanko ni – [The Relation Between Personal Rights of Consumers and Door-to-Door Solicitation: Using Examples in the United States as a Reference]*, *Gendaishohishaho*, no. 30 (2016), p. 70 ff.
- ⁷² Yoshinori Matsuo, *Nihon ni okeru Homonkanyuhanbai no Jizenkyohi to Chihojichitai no Torikumi* [*Ex Ante Refusal of Door-to-Door Solicitation and Initiatives of Local Authorities in Japan*], *Webuban Kokuminseikatsu*, no. 48 (2016). The same author also shows concern about the fact that even the procedures of investigations and administrative guidance etc. stipulated in the ordinances are used by the local authorities only rarely.
- ⁷³ The Committee was presided by Professor Makinori Goto (Waseda University), and consisted of 15 members with various backgrounds (university professors, lawyers, board members of business or consumer organizations etc.). The member list of the Committee as well as details of the works performed and reports published by it can be found (in Japanese) on the website of the Cabinet Office, <http://www.cao.go.jp/consumer/kabusoshiki/tokusho/> (last visited May 30, 2017). The author of this paper was invited to participate as observer to the 6th meeting of the Committee, where the hearings of business representatives were held.
- ⁷⁴ The Intermediate Report and the Final Report (both in Japanese) are available at the website of the Cabinet Office, <http://www.cao.go.jp/consumer/history/03/kabusoshiki/tokusho/index.html> (last visited May 30, 2017).
- ⁷⁵ Intermediate report, p. 7.
- ⁷⁶ Intermediate Report, p. 11 ff.
- ⁷⁷ Final report, p. 16.
- ⁷⁸ Supplementary Resolution Regarding the Draft Bill Revising Part of the Consumer Contract Act, of the Special Committee for Consumer Issues (April 28, 2016), which can be found on the website of the House of Representatives, http://www.shugiin.go.jp/Internet/itdb_rchome.nsf/html/rchome/Futai/shohishaA74D4C40873FAA049257FAF001FD4C7.htm (last visited February 12, 2017).
- ⁷⁹ Supplementary Resolution Regarding the Draft Bill Revising Part of the Act on Specified Commercial Transactions, of the Special Committee for Provinces/Consumer Issues (May 20, 2016), which can be downloaded (in Japanese) from the website of the House of Councilors, http://www.sangiin.go.jp/japanese/gianjoho/ketsugi/190/futai_ind.html (last visited February 12, 2017).
- ⁸⁰ For these issues, see also the comment of professor Masami Okino at the symposium “Shohishakeiyakuho no Kadai wo Kangaeru [Thinking about the Issues related to Consumer Contract Law]” held by the Research Task Team on the CCA on February 2, 2013. The minutes of the symposium can be found at the website of the Cabinet Office, http://www.cao.go.jp/consumer/history/02/kabusoshiki/other/meeting1/0202_sympo-gijiroku.html (in Japanese, last visited May 30, 2017).
- ⁸¹ An Expert Examination Committee for the revision of the CCA has been established within the Consumer Commission and is conducting preparatory works for the amendment. For details regarding the composition and works of this Committee, see the website of the Cabinet Office, <http://www.cao.go.jp/consumer/kabusoshiki/other/meeting5/> (in Japanese, last visited May 13, 2017).
- ⁸² Regarding this issue, Kazuo Tosa, *Ninenkosoku / Jidokoshinjyoko to Kaiyakukin ni tsuite no Kento – Shijotekiseika no Kanten kara* [*A Study of the Two Years Restraint / Automatic Renewal Clauses and Cancellation Fees – From the Viewpoint of Market Improvement*], *Gendaishohishaho*, no. 25 (2014), p. 21 ff. asserts that even though the fixed term agreement practices of the mobile companies can hardly be declared as being in breach of the Antimonopoly Act, it is necessary to further examine their validity under the CCA, and also attempt to ameliorate the conditions that give birth to such practices from the viewpoint of user protection.

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