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Japan

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I. Structure of Japanese Consumer Law

Statutes or legal institutions with a title that specifically refers to the ‘consumer’¹ appeared in Japan during the 1960s. Since then, a fairly unified, cross-sectional system of ‘consumer law’, covering both private law and public law, seems to have been constructed.² Firstly, the underlying governmental policy is provided by the Basic Act on Consumer Policies (2004).³ The two main issues, consumer contracts and products

*Hisakazu Hirose (Sections I to VI, IX) – I would like to express my thanks to Simon Vande Walle and Yoshihisa Nomi for their constructive comments on my earlier draft. Karl-Friedrich Lenz largely wrote Section VII, and Tadashi Shiraishi Section VIII.

¹The legal concept of ‘consumer’ has been converging on ‘an individual (natural person) not engaging in business’. A corporations, an association or an individual engaging in business, etc., are ‘enterprises’ (Consumer Safety Act 2009, Art 2(1). The Consumer Contract Act 2000 contains a similar definition in its Art 2(1)). The term ‘business’ includes non-profit activities. However, this has not been carried through in case of consumer law in the substantial meaning. The fundamentals of consumer law are discussed in A Omura, *Shouhishahou [Consumer Law]* 4th edn (Tokyo: Yuhikaku, 2011). One element of his thesis (distinction between an ‘individual interest’ of a specific consumer (‘micro’ consumer law) and a ‘general interest’ of the public (‘macro’ consumer law) has received support from H Sono, ‘Private Enforcement of Consumer Law’ (2012) 16 *Hokkaido Journal of New Global Law and Policy* 63–80. Further discussions on ‘consumers’ from the enlarged viewpoints including market, government and society would also be fruitful. Ss V.B.ii, iii and V.C below are connected to this problem.

²Based on the infrastructural change after the World War II with the Constitution of 1946 and the State Redress Act of 1947 (below, at s V.B.iii) toward the popular sovereignty with the emphasis on individual dignity, freedom and equality, the development has unfolded as follows. From the 1960s to the early 1980s, pollutions and products accidents accompanied industrial recovery. Ministries started to enforce regulative measures based on the notion of consumers as an object of governmental support (eg Consumer Protection Fundamental Act 1968 or Consumer Product Safety Act 1973). From the mid-1980s to the turn of the century, trade conflict with the United States, market globalisation and end of Japan’s economic bubble caused a policy shift towards emphasising deregulation and privatisation, and in the area of consumer law to view the consumer as an independent market-player (eg Consumer Contract Act 2000 and Basic Act on Consumer Policies 2004). From 2009, the new re-regulative movement towards a more comprehensive system of consumer protection has started with the establishment of the tripartite governmental organs. Their efforts to face actual problems directly and to extend consideration for vulnerable consumers, in terms of their age, has become fruitful (see ss II.A.ii.a–d, IX.B.ii). A Osawa, ‘La mise en oeuvre et l’effectivité du droit de la consommation au Japon’ in H-W Micklitz and G Saumier (eds), *Enforcement and Effectiveness of Consumer Law* (Cham: Springer, 2018) 371–89 is an informative survey.

³Act No 78 of 1968 (reformed from Consumer Protection Fundamental Act 1968). Article 2(1) provides that ‘the consideration of the disparity in the quality and quantity of information and negotiating power between

(and services) safety, are dealt with respectively by the Consumer Contract Act (2000)⁴ and the Consumer Safety Act (2009) as well as various product-related Acts and regulations (for example the Consumer Product Safety Act (1973)).⁵ From the procedural perspective, not only the special litigation systems conducted by specified and qualified consumer organisations (so-called ‘Japanese class action’) but ADR or consultation activities have been gradually institutionalised.⁶ With regard to administrative organs, since 2009, the tripartite cooperation⁷ of Consumer Affairs Agency,⁸ Consumer Commission⁹ and National Consumer Affairs Center¹⁰ has taken an initiative to collaborate with other concerned Ministries, Agencies and local consumer institutions.

However, these are only part of the larger group of Japanese laws which substantially concern consumers: ever since the introduction of western, modernised legal systems by the Meiji government in the late nineteenth century,¹¹ consumers have been protected, for example in the private law field, by the Civil Code,¹² the Commercial Code¹³ or other statutes,¹⁴ and by case law developments. However, these protections have applied to such individuals in their capacity as ‘a person’, ‘a lessee’, ‘a customer’, etc.¹⁵ A similar phenomenon is observable in the public law area. This implies that consumer laws in the substantial meaning had not only existed long before the emergence of the formal ‘consumer law’ noted above, but that they continue to be applicable to cases not covered by the formal ‘consumer law’. In this respect, among many others, the recent enactment of the largely reformed Civil Code of 2017 (hereinafter: Civil Code), which took effect in 2020, deserves special attention.¹⁶ This chapter strives to cover both formal and substantial consumer laws.

consumers and enterprises’ is the basis of the legislation (emphasis added). The same consideration had been already featured in the Consumer Contract Act 2000, Art 1. English translations of these Acts are provided by the Japanese Law Translation Database System: www.japaneselawtranslation.go.jp.

⁴ Act No 61 of 2000. See below at ss II–IV, IX.

⁵ See below at s VI.

⁶ See below at s IX.

⁷ For details see www.cao.go.jp/consumer/en/e-index.html.

⁸ An external bureau of the Cabinet Office founded by the Act for Establishment of the Consumer Affairs Agency and Consumer Commission (Act No 48 of 2009). See the Agency’s survey report on its first 10 years: www.caa.go.jp/en/publication/annual_report/2019/white_paper_summary_09.html.

⁹ An independent, third-party organisation in the Cabinet Office, monitoring the consumer administration generally and offering recommendations and opinions to the Prime Minister and the relevant government Ministries.

¹⁰ Originally established in 1970, newly founded in 2003 by the Act on National Consumer Affairs Center of Japan (Act No 123 of 2002). See www.kokusen.go.jp/ncac_index_e.html and below, at s IX.

¹¹ The Meiji government (1868–1912) made much effort to absorb western legal systems with the intention of revising the unequal treaties the previous shogunate government had been forced to conclude. For the historical background, see H Oda, *Japanese Law* 4th edn (Oxford: Oxford University Press, 2021) 4–5, 11–18.

¹² With the exception of the parts on family law and inheritance law, the original Civil Code (Act No 89 of 1896), had mostly survived until 2020, when the largely amended Civil Code promulgated in 2017 came into effect.

¹³ Act No 48 of 1899. Its Arts 596–98 provide a responsibility of inn keepers, etc for the loss of the customer’s belongings.

¹⁴ eg Interest Rate Restriction Act (Dajyōkan-Fukoku No 66187 of 1877) providing the maximum limit of interest rates per annum. See below at s IV.C and n 89.

¹⁵ For a recent overview in French, P Bloch et al (eds), *Droit japonais des affaires* (Brussels: Lacier, 2019).

¹⁶ See below, at ss II–IV.

II. Information Duties and Right of Withdrawal

A. Information Duties Regulated under Private Law

The Civil Code adopts the basic principle of private autonomy with the idea of self-responsibility,¹⁷ and thus does not provide a general contractual ‘duty to inform’.¹⁸ However, in the field of consumer law, both the Basic Act on Consumer Policies of 2004 and the Consumer Contract Act of 2001 prescribe a duty for enterprises to provide consumers with necessary information.¹⁹ Nonetheless, the nature of the Basic Act is to declare governmental policy guidelines (so-called ‘program provisions’) and Article 3(1) of the Consumer Contract Act obliges an enterprise only to ‘make an effort’ to provide plain and clear information regarding the contents of the consumer contracts.²⁰ These provisions therefore usually do not have direct, specific legal effect, though the provision of the Consumer Contract Act seems to have assisted judges in deciding cases (for example on damages liability) or consumer consultants solving problems.²¹

At the same time, we should not overlook that courts and the legislature have developed at least two types of measures for a ‘customer’ (including a consumer) to face these information problems: entitling a customer to claim damages and allowing the customer to rescind the contract or withdraw therefrom.

i. Damages

Courts have often used the principle of good faith under the Civil Code²² to affirm the damages liability of an enterprise for infringements of pre-contractual information duties against the customer. As the Supreme Court has recognised the nature of this liability as tortious,²³ the claimant (that is, the customer) must prove, *inter alia*, negligence²⁴ by the defendant (that is, the enterprise), causation and the amount of loss.²⁵ The main areas affirmed by the courts have been real estate transactions,

¹⁷ Civil Code, Art 521.

¹⁸ For a comparison to French law, though partly outdated, M Maeda, ‘Les contrats du consommateur au Japon’, in Association Henri Capitant (ed), *Le consommateur* (Paris: Bruylant 2007) 151–58. For a more recent survey, K Nakata, ‘Die Modernisierung des Rechts der Willenserklärungen in Japan’ (2019) 47 *Zeitschrift für japanisches Recht* 247; M Nozawa, ‘L’information et la désinformation des consommateurs: Papport Japonais’ in G Straetmans (ed), *Information Obligations and Disinformation of Consumers* (Cham: Springer, 2019) 447–56.

¹⁹ Basic Act on Consumer Policies of 2004, Art 5(1)(ii); Consumer Contract Act of 2001, Art 3(1).

²⁰ The Consumer Contract Act recommends enterprises to ‘make an effort’ to provide pre-contractual, plain and clear information regarding the contents of consumer contracts, considering the knowledge and experience of each consumers (Art 3(1)).

²¹ In contrast to these private law measures, public law (regulative) measures intervene more directly into the consumer transactions on which we will see in ss II.B and VI.A.

²² See Civil Code, Art 1(2).

²³ Supreme Court judgment of 22 April 2011, Minshu 65, 3, 1405. Theoretical overview by K Yamamoto, ‘Basic Question of Tort Law from a Japanese Perspective’ in H Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (Vienna: Jan Sramek Verlag, 2015) 559–62.

²⁴ In this report, the word ‘negligence’ is mainly used for tortious liability and ‘fault’ for contractual liability.

²⁵ Civil Code, Art 709. The prescription period is three years (five years for personal injury) from the time the victim comes to know of the damage and of the identity of the perpetrator (or 20 years from the time of the tortious act). Civil Code, Arts 724 and 724-2.

financial transactions, insurance contracts, franchise agreements and medical malpractices cases, where the enterprise possesses structural superiority regarding information, knowledge, experience and information processing ability over the customer. In cases where the defendant is a trusted specialist (for example a lawyer, a doctor or a specialist in the securities market), courts not only affirm the duty to inform but may further accept that the specialist should positively give advice and/or warning to the customer. Moreover, in case of a risky speculative market, the Supreme Court acknowledged the possibility of adopting a 'suitability rule' so that a stockbroker was obliged to carefully propose a product which is suitable to the individual customer, or to refuse to solicit in an unsuitable situation.²⁶

In 2000, this case law development gave birth to the 'Act on Sales, etc. of Financial Instruments',²⁷ which contains a pre-contractual information duty with special damages sanctions, protecting in particular non-professional customers. The targeted products broadly cover securities, insurance, and derivatives, as well as bank deposits and savings. The Act provides for a special tort liability with the distinguishing features of: non-negligent characteristics, presumption of the causal relationship and presumption of the amount of loss, all of which, compared to the aforementioned general tort law, supports the claimant by making it easier to claim damages and facilitates the rapid resolution of the financial market conflict. This Act, originally of private law character, plays a role as one of the important counterparts of administrative regulations.²⁸

ii. Rescission and Withdrawal

The second measure focuses on the manifestation of contractual intention by the customer to whom the imprecise or false information was provided and allows for rescission or withdrawal from the contract. There are three levels of provisions, which range from the general to the specific: Civil Code, Consumer Contract Act and more specific statutes. In this section, we shall treat the right to withdraw – as a 'cooling off' right – separately.

a. Civil Code

The Civil Code has rules on mistake,²⁹ fraud and duress³⁰ which entitle a customer to make the contract voidable. However, because of the difficulties the customer

²⁶ Supreme Court judgment of 14 July 2005, Minshu 59, 6, 1323. The question arises as to the relationship between this severe liability to the 'warning defect' of product liability, see below at s V.

²⁷ Act No 101 of 2000.

²⁸ See s II.B.

²⁹ Civil Code, Art 95. The Civil Code largely amended the law on mistake, reflecting the case law development. For example, its effect has become 'voidable' (from 'void') and its conditions are more explicit. In case of 'motivation mistake' ie when the mistake derives from the untrue perception on the basic circumstances of the contract, the fact that such circumstances were the basis of the contract must have been *indicated* at the transaction (Art 95(2)). The mistake must be *material* (Art 95(1)), and the mistake must *not* be made by the declarant's *gross negligence*, unless the other party knew (or did not know with gross negligence) or was under the same mistake (Art 95(3)). See more in detail, Nakata, 'Die Modernisierung', 251–57.

³⁰ Civil Code, Art 96. Fraud and duress, as traditional causes of rescission, have mostly remained unchanged in the Civil Code. Both may also be subject to criminal sanctions (Penal Code, Arts 246, 246-2, 248–50).

usually faces,³¹ these provisions are not so helpful, except for their longer prescription periods.³²

b. Consumer Contract Act

As to the second level, the Consumer Contract Act,³³ which applies to almost all types of contracts between an enterprise and a consumer, has introduced a refined version of rescission rules in seeking to respond to actual consumer complaints.³⁴

In the area of fraud, the Act picked up three ‘misleading’ types of conduct: ‘misrepresentation’ as to the material information,³⁵ ‘affirmation of conclusive evaluation’ of uncertain items subject to future change³⁶ and representation of only advantageous facts while intentionally or with gross negligence omitting disadvantageous facts.³⁷

Second, adding to the Act’s original two types of ‘overwhelming’ duress by the enterprises (that is, detainment and confinement),³⁸ six new types of their coercive and fraudulent solicitations were included in 2018, among which are information-related cases³⁹ such as prompting fears of the consumer and conveying that the goods, rights or services are necessary to fulfil their aspirations, although there is no reasonable grounds or rational basis;⁴⁰ causing anxiety about their breaking of falsely enchanted romantic relationships with the salesman/woman;⁴¹ exploiting uneasiness of the aged or disadvantaged consumers about maintaining their current life;⁴² or unreasonable indication of the future suffering of a serious incident which, according to the enterprises, could be avoided by their services.⁴³

In 2016, the Act introduced a special case of ‘excessive provision’ where the enterprise knowingly supplies the object of the contract in a quantity that grossly exceeds what would normally be required by that consumer.⁴⁴

³¹ Especially in case of fraud or duress, a client is obliged to prove the other party’s (enterprise) intention to deceive or coerce the client, which is difficult to establish. Mistake has been more frequently invoked by clients, however, with various hurdles, as outlined above in n 29.

³² Five years from the time that ratification became possible or 20 years from the time of the conclusion of the contract (Civil Code, Art 126).

³³ A. Ohsawa, ‘La réforme de la loi sur les contrats de consommation au Japon’ (2020) 2 *RIDC* 523–43.

³⁴ Consumer Contract Act, Art 4. This right of rescission is subject to prescription of one year from the time that ratification became possible or five years from the time of the conclusion of the contract. Consumer Contract Act, Art 7(1). The periods are shorter than tortious liability or mistake and fraud under the Civil Code.

³⁵ The ‘material information’ is further categorised in detail (Consumer Contract Act, Art 4(5)), which makes it easier to decide whether legal steps should be taken.

³⁶ See also Consumer Contract Act, Art 4(1).

³⁷ *ibid*, Art 4(2).

³⁸ *ibid*, Art 4(3)(i) and (ii).

³⁹ As duress does not always concern information problems, we refer here only to examples which concern the exploitation of the information asymmetry.

⁴⁰ eg such essential desires as ‘admission to schools, finding employment, marriage, etc’, or as ‘improvement of style, figure, or any other important physical state’. These are typically the cases of such young adult consumers who are ‘lacking in the sufficient experience of life in society’ (Consumer Contract Act, Art 4(3)(iii)).

⁴¹ Consumer Contract Act, Art 4(3)(iv). This is an interesting feature which requires further detail: in essence, the saleswoman creates the impression for the consumer that she is in love with him and the consumer purchases goods as a reciprocation of his love.

⁴² Consumer Contract Act, Art 4(3)(v).

⁴³ *ibid*, Art 4(3)(vi).

⁴⁴ *ibid*, Art 4(4), amended in 2016. Elderly consumers living alone with a weakened judgement ability have been victimised by these crooked traders. To compare to the similar rule in the Act on Specified Commercial Transactions, see text below.

Compared to the rescission rules under the Civil Code, the conditions noted here are in a way broadened in favour of consumers (especially regarding vulnerable consumers), but are in another way restricted to the narrowly formulated, concrete categories, which enhances foreseeability but limits their spheres of protection.

c. Specific Statutes

Among the third level of specific statutes, the Act on Specified Commercial Transactions⁴⁵ provides a similar rescission system but only in five types of such potentially aggressive or tempting selling practices. Further, an additional cancellation system in case of 'excessive sales' is stipulated for just Door-to-Door Sales and Telemarketing Sales. The difference from the excessive sales noted above is that here the victim can rescind by proving objectively only the gross 'excessiveness', without proving the knowledge of the enterprise. This is again a measure to protect vulnerable consumers.

d. 'Cooling Off'

A consumer may be permitted to withdraw from the contract without requiring any reason (the right to withdraw or 'cooling off'), although within a short period (for example, eight to 20 days usually after the receipt of the formal documents from the enterprise) and only in certain limited transactions. The Act on Specified Commercial Transactions is the most prominent statute which contains this right.

First, only Mail Order Sales lack a cooling-off measure because they involve neither surprise visits nor complex or intriguing contracts. However, in order to protect the mail-order customer from the information deficit of a 'sight unseen purchase', the Act provides an alternative (but a weaker, non-mandatory) measure of cancellation by returning the goods within eight days after their delivery.⁴⁶

Second, an additional 'termination' measure after the expiration of each cooling-off period applies in multilevel marketing transactions and for the provision of specified continuous services. It often takes longer for a customer to realise the real problems accompanying such transactions and thus the protective measures are more extensive.

Third, since around 2010, the elderly living alone have become targets for Door-to-Door Purchases, in which they have been persuaded by enterprises to sell products (for example their personal jewellery) in their homes fraudulently or/and forcefully. Together with 'excessive sales', these incidents picked up by this Act are symbolic examples of victimisation not only of the vulnerable but also of well-off elderly persons often living alone.

e. Act on Specified Commercial Transactions: Overview

Table 1 provides an overview of the different rights under the Act on Specified Commercial Transactions, as referred to above.

⁴⁵ Act No 57 of 1976 see Table 1.

⁴⁶ This does not apply when the enterprise had indicated a special provision concerning the cancellation in its advertisement following the regulations (Art 15-3). This measure is a result of a compromise.

Table 1 Act on Specified Commercial Transactions

	Private Law				Public Law			
	Cooling-Off	Rescission	Termination	Excessive sales cancellation	Injunction*	disclosure**	Regulation of solicitation	advertising
'Surprising visit'								
Doorstep sales	8 days	Yes	No	Yes	Yes	Yes	Yes	No
Doorstep purchase***	8 days	No	No	No	Yes	Yes	Yes	No
Telemarketing	8 days	Yes	No	Yes	Yes	Yes	Yes	No
'Intriguing group'								
Multi-level marketing	20 days	Yes	Yes	No	Yes	Yes	Yes	Yes
Business opportunity	20 days	Yes	No	No	Yes	Yes	Yes	Yes
Continuous services	8 days	Yes	Yes	No	Yes	Yes	Yes	Yes
'Sight unseen'								
Mail order	Yes/No****	No	No	No	Yes	No*****	Yes/No	Yes

* By a Qualified Consumer Organisation. See s IX.A.ii.

** Documentation is mandatory. See s II.B.

*** Referring to situations in which the consumer sells to the business. See s II.A.ii.d.

**** Art 15-3 allows the enterprise to exclude the right to withdraw under the mandatory advertisement requirement. See s II.A.ii.d and n 46.

***** Written notification of acceptance is, however, necessary in cases of pre-payment. Art 13 (1).

B. Information Duties Regulated under Public Law

Governmental efforts in the form of administrative regulations have also played a significant role in tackling consumer information problems. Many government bodies have played a part, though the Consumer Affairs Agency and the Financial Services Agency are the most notable.

The Consumer Affairs Agency started in 2009, taking initiative in its three areas of competence: consumer transactions, consumer safety and labelling and representation. Each is related to information issues, but consumer safety is still supplemental to the traditional administrative authorities discussed below. Here the focus is on consumer transactions. The 'public law' sections in Table 1 above cover (i) the 'regulation of disclosure' (for example mandatory disclosure of the sales purpose and of the main elements of the contract before solicitation, mandatory delivery of contract documents right after its conclusion, etc), (ii) the 'regulation of (unfair) solicitation' (for example prohibition of fraudulent, aggressive, or unsuitable solicitations), and (iii) the 'regulation of advertisements' (for example, prohibition of misleading advertisement and mandatory indication of certain material facts in the advertisement) under the Act on Specified Commercial Transactions (now under the jurisdiction of the Consumer Affairs Agency). The sanctions against the enterprise that violates these regulations include, for example, an administrative action, an order to improve or to suspend the business, etc, and sometimes a criminal penalty.

A particularly conspicuous development is seen also in the field of finance law supervised by Financial Services Agency (in charge of, for example, the Financial Instruments and Exchange Act, Insurance Business Act, etc). Here the three features (i) to (iii) above are also present. The striking example of (ii) (regulation of solicitation or suitability) is that business money lenders must investigate the customer's solvency and are prohibited from lending more than one-third of the annual income (Money Lending Business Act, Article 13-2). Behind these tendencies of governmental intervention were two inter-related background factors. One is the aging of the Japanese society producing a large older generation with savings prepared against the poor annuity system, who so often became the target of shrewd businesses. Another is the fact that particularly since the 'Japanese financial big bang' at the end of twentieth century, a traditional prohibition on banks, insurance companies, etc, to do business in the speculative financial market was removed and a growing number of ordinary consumers, including the elderly with assets, have begun to enter into such markets. The government who backed up this market vitalising policy became obliged to enact regulations to stop it going too far.

C. Comments

Although the private law versus public law divide introduced in the nineteenth century has been firmly institutionalised in the Japanese legal system, we could also observe a tendency that private law measures such as damages, rescission, cancellation and withdrawal and the aforementioned public law measures have started to complement each

other. The injunction by the qualified consumer organisations is usually classified as a private law measure, but has quasi-public law characteristics, too.

Dealing with consumer problems, there seem to exist at least two different approaches: one towards looking into the concrete facts of each case and characteristic of individual customers (their ability, needs or even psychological inclination), the other towards more formal or objective categorisation of the client's or enterprise's conduct. In the face of the increasing problems caused by sophisticated business practices trying to evade the clutches of the regulations, the former approach seems inevitable, especially in court. On the other hand, the latter approach would be in conformity with the demand of consumers for easier claims, with enterprises' need for predictability, and with the requirement of administration for equal and efficient treatment.

III. Sale of Goods: Consumer Sales Contract

A. Overview and Status Quo

Although the Consumer Contract Act applies to almost all types of contracts, including the sale of goods, the Act deals only with (1) contract formation,⁴⁷ (2) unfair terms⁴⁸ and (3) a special litigation procedure for qualified consumer organisations.⁴⁹ Substantive rules such as contractual obligations on consumer sales are therefore found in the Civil Code, especially in its section on sales as well as in the sections commonly applicable to contracts or obligations in general (Part III: Law of Obligations), which we explain, focusing on the particularly important topic of conformity of goods.⁵⁰

B. Civil Code

Articles 562–66 of the Civil Code afford a buyer (a consumer or an enterprise) with four rights in the event the delivered goods do not conform to the sales contract: cure, price reduction, damages and cancellation of the contract. The non-conformity liability of seller may not be disclaimed in a consumer contract.

i. Right to Cure

The right to cure permits a buyer to demand from the seller either repair, delivery of substitute goods or delivery of the missing part.⁵¹ These measures have long

⁴⁷ Above at s II.

⁴⁸ Below at s IV.

⁴⁹ Below at s IX.

⁵⁰ In case of non-conformity of transferred right to terms of contract, Art 565 provides the *mutatis mutandis* application.

⁵¹ Civil Code, Art 562(1).

existed in Japanese business practices. Partly inspired by international legislative movements including the UN Convention on Contracts for the International Sale of Goods (CISG)⁵² and the UNIDROIT Principles of International Commercial Contracts (PICC),⁵³ they are newly introduced in the Civil Code as special provisions for sales and other onerous contracts.⁵⁴ As to the choice between these three types of cure, although a buyer can first choose any one of the three (for example repair), the seller can cure the performance by a different means than chosen by the buyer (for example substitute delivery), provided that the seller's choice would not put a disproportionate burden on the buyer.⁵⁵

ii. Price Reduction

The remedy of price reduction comes into play if cure is unsuccessful (that is, the additional reasonable period for cure, having been set by the buyer, has expired without the seller's performance). However, the buyer may demand cure immediately if, *inter alia*, the cure itself was impossible or unrealistic.⁵⁶ As this price reduction is considered to be a partial cancellation of the contract, the repair and delivery of a substitute correspond to those of the general cancellation system considered below.

With regard to the remaining two rights – damages and cancellation – the Civil Code states that they are not precluded by the claim either for cure or for price reduction,⁵⁷ so that they therefore fall under the more general rules of the Civil Code.

iii. Damages

Article 415 of the Civil Code concerns the buyer's claim for 'damages' against the seller for non-performance. According to this provision, the buyer (obligee) cannot claim damages from the seller (obligor) where the latter's non-performance is due to grounds not attributable to him. Whether this implies the continuation of the traditional 'fault' (or 'negligence') principle or not has been the subject of discussion. However, a substantial difference in consequence between these seemingly different opinions is not so significant especially when the former conceives 'fault' objectively as a breach of duty legally (and sometimes extensively) required under the circumstances, which has been the position taken by the Japanese courts. We must watch the future developments.

With regard to the effect side of the non-performance, the question arises as to how far the damage or harm should be compensated by the obligor (seller). Under the

⁵² CISG, Art 48, substantially Art 46. Japan ratified the CISG in 2008 (entry into force in 2009).

⁵³ PICC, Arts 7.1.4 and 7.2.3. T Uchida, 'Contract Law Reform in Japan and the Unidroit Principles' (2011) *Uniform Law Review* 705, 710.

⁵⁴ Civil Code, Art 559.

⁵⁵ *ibid*, Art 562(1).

⁵⁶ *ibid*, Art 563(2) states concrete cases as follows: impossibility of cure; apparent rejection of cure by the seller; delayed performance where time is of the essence; and other cases where there is apparently no prospect for curing performance.

⁵⁷ *ibid*, Art 564.

Civil Code, the obligor's foreseeability over the circumstances causing the harm is a prerequisite for confirming the compensatory liability.⁵⁸ International sets of rules, and almost all the contractual damages rules in the world, hold the view of judging this foreseeability at the time of conclusion of the contract, considering that the contractual parties would take measures (for example setting the appropriate price or buying insurance) to meet the future risks foreseeable at the time of its conclusion.⁵⁹ However, according to established Japanese case law, the obligor's foreseeability should be judged at the time of non-performance. This reveals the weakness of the 'contract' idea in the Japanese contractual damages rule.⁶⁰ Japanese judges seem to be inclined to make sure that, even in case of circumstances that were unforeseeable at the time of conclusion but had become foreseeable at the time of (non-)performance, the obligor should perform reasonably so as not to cause (or increase) damage which might spring out of such special circumstances. This is an idea closer to 'negligence' liability in tort.

iv. Cancellation

The contract cancellation⁶¹ (termination) system in the Civil Code abandoned the traditional 'fault' ('negligence') principle much more clearly than in the new damages system. Instead it focuses on the degree or seriousness of the breach (or non-performance).⁶²

IV. Unfair Terms

The restriction of the use of unfair terms under Japanese private law is spread across three levels: the Consumer Contract Act, the Civil Code, which contains general provisions and special provisions on unfair terms in standard form contracts⁶³ and other specific statutes.

A. Consumer Contract Act

Unfair terms in a consumer contract are regulated by the Consumer Contract Act. These provisions are general and specific in their application. Unfair terms are

⁵⁸ *ibid*, Art 416(2).

⁵⁹ CISG, Art 74; PICC, Art 7.4.4.

⁶⁰ This remark was first made by Y Nomi, 'Proportionality in Tort and Contract Law' in E Hondius (ed), *Modern Trends in Tort Law* (Alphen aan den Rijn: Kluwer, 1999) 216–17.

⁶¹ I follow here a Japanese semi-official translation ('*cancellation*') for the legal term '*Kaijo*'.

⁶² Under the Civil Code, cancellation is divided into cancellation after demand (eg delayed performance), where cancellation is possible if the degree of breach is not trivial (Art 541), and cancellation without demand (eg impossibility of performance): cancellation is possible if it is impossible to accomplish the purpose (Art 542). The degree of the breach is the principal question in both.

⁶³ Civil Code, Arts 548-2 to 548-4.

not only void but are also subject to a special injunction by Qualified Consumer Organisations.⁶⁴

i. General Provision: Nullity of Terms that Impair the Interests of Consumers Unilaterally

According to Article 10 of the Consumer Contract Act, any consumer contract term is void that restricts the rights or expands the duties of the consumer more than the application of provisions unrelated to public order in any other laws and regulations (1),⁶⁵ and which unilaterally impairs the interests of the consumer, in violation of the fundamental principle of good faith (2).

A case about the renewal fee for an apartment lease illustrates how this provision functions in practice.⁶⁶ The lease contract provision in Article 601 of the Civil Code mentions the payment of *rent* as a duty of the lessee, but not the *renewal fee*. Therefore, the Supreme Court affirmed the first pre-requisite (1), saying that the renewal fee term expands the duty of the lessee more than as prescribed in the Civil Code. However, it denied the second pre-requisite (2) stating that the gap between the contract parties as to the information and the negotiation power was not so significant, the renewal fee term was clearly and concretely stated in the contractual document, and the amount of the renewal fee (two month rental payment) also was not too excessive. Hence the term was deemed valid.

The comprehensive consideration of both objective and subjective factors resembles the consideration in case of profiteering decisions under Article 90 of the Civil Code ('Public Policy and Good Morals').⁶⁷ However, the rigidly ordered, two-stage assessment procedure provided in Article 10 merits attention. In particular, the first stage of screening unfair terms focusing on their objective contents with a measure of non-mandatory rules of law may function to screen unfair terms by way of a 'grey' list (with room for discretion) as provided in the European Unfair Terms Directive.⁶⁸ The comparatively limited number of unfair terms in the ('black') list given below seem thus supplemented by these non-mandatory legal norms referred to in the first pre-requisite, although the room for discretion is much wider here (due to the second pre-requisite) and the final judgment is less predictable for both consumers and enterprises.

⁶⁴ Consumer Contract Act, Arts 12 et seq. See also s IX.A.ii.

⁶⁵ The Supreme Court judgment of 15 July 2011, Minshu 65, 5, 2269 interpreted the first pre-requisite extensively that compared 'provisions unrelated to public order' should include not only statutory provisions but general legal principles. In this provision, a term where 'the Consumer is deemed to have manifested his/her intention to offer or accept the Consumer Contract based on his/her inaction' is referred as an example of this first pre-requisite (eg a rental contract term under which the fee is free for the period of three months but becomes fee-charging if the customer continues using it after that expiration date without returning the item). Such a term may restrict the right of consumer more than what the general principle of contract formation requires. Therefore, it may fulfil the first pre-requisite. However, it will become void only if the second pre-requisite is also fulfilled.

⁶⁶ *ibid.* See M Okino, 'Recent Developments in Consumer Law in Japan' (2002) 4 *UT Soft Law Review* 10 at 14.

⁶⁷ Below at s IV.B.ii.

⁶⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993, No L95, p 29.

ii. List of Unfair Terms

Articles 8–9 of the Consumer Contract Act contain a list of specific unfair terms. For exemption clauses, Articles 8 and 8-2 provide that the following terms are void.⁶⁹

- Terms which fully exempt an enterprise from liability arising from either non-performance or a tort,⁷⁰ or which authorise an enterprise to decide whether the enterprise is liable or not.⁷¹
- Terms which partially exempt an enterprise from liability, or terms authorising an enterprise to decide the limit of its liability, arising from either non-performance or a tort in case of an intentional act or gross negligence on the part of the enterprise.⁷²
- Terms which fully exempt a seller⁷³ from liability to compensate a consumer, or terms authorising a seller to decide whether not at all or to what extent the seller is to compensate the consumer, for damages caused by the non-conformity of the goods delivered, provided that the enterprise seller is to be liable for cure or for price reduction in case the delivered goods do not conform to the sales contract.⁷⁴
- Terms which force consumers to waive their right to cancel, or terms authorising the enterprise to decide whether the consumers have the right to cancel in case of non-performance by the enterprise.⁷⁵

With regard to terms stipulating the amount of damages to be paid by consumers, the following are void to the extent provided in each respective item:

- Terms that stipulate an amount of liquidated damages (and/or a fixed penalty) in the event of consumer's cancellation, wherein the total amount exceed the normal amount of damages: The term is void by the amount the total exceeds the normal amount.⁷⁶

⁶⁹ Consumer Contract Act, Art 8-3 is a notable provision responding to a practice whereby a lease (housing) contract could be terminated if the leaseholder becomes an adult ward (eg in the event of illness such as dementia). Such terms are now void. The rule is quite symbolic of the focus towards protecting vulnerable members of society.

⁷⁰ Only in case the tort is committed during the enterprise's performance of a consumer contract.

⁷¹ Consumer Contract Act, Art 8(1)(i) and (iii).

⁷² *ibid*, Art 8(1)(ii) and (iv).

⁷³ Art 8(2) of the Consumer Contract Act stipulates more generally on onerous contracts and on non-conformity of the delivered object, however the text here focusses on sales contracts.

⁷⁴ *ibid*, Art 8(2).

⁷⁵ *ibid*, Art 8-2.

⁷⁶ *ibid*, Art 9(1)(i). For example, applicants for university entrance examinations had to pay each university not only the examination fee, but once passed, entrance fee as well as part of the tuition fees, often before the date of passing announcement of some other universities. Therefore, most of those successful candidates would pay such fees to several universities even though they would enter into only one. The Supreme Court in its judgment of 27 November 2006, Minshu 60, 9, 3597 interpreted these fees to be the liquidated damages in case of cancellation by the successful candidate and applied Article 9(1)(i) of the Consumer Contract Act. Although the entrance fee is valid (entitling the successful candidate to acquire the possibility of entering into that university), the judgment says, the tuition fee should be regulated by the Act as liquidated damages and the amount by which the total exceeds the normal amount is to be invalid. As in most of these cases the cancellation took place before the beginning of a school year on 1 April, 'normal amount' is zero as the school does not start yet. This judgment not only ended the conflict between the claimants and the defendant universities but entirely changed the traditional custom of excessive tuition payment in Japan. This kind of policy direction is one important function that consumer litigation can fulfil. S Kozuka takes up this judgement in his, 'Judicial Activism of the Japanese Supreme Court in Consumer Law: Juridification of Society through Case Law?' (2009) 27 *Zeitschrift für japanisches Recht* 84–86.

- Terms that stipulate an amount of liquidated damages (and/or a fixed penalty) in the event of a total or partial default by the customer, wherein the total amount 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 per cent per annum in accordance with the number of days from the due date to the day on which the money is actually paid: The term is void by the amount by which the total amount exceeds the calculated amount.⁷⁷

B. Civil Code

i. *Unfair Terms in Standard Form Contracts*

Legislation of the law on standard form contracts had been the subject of a long, heated controversy between business groups and academics during the promulgation process. The Civil Code has finally succeeded in introducing a group of special provisions on standardised transactions.⁷⁸ First, it permits an enterprise to authorise the inclusion of its standard terms⁷⁹ not only by an 'agreement' with the customer, but by the enterprise's easier 'manifestation of intention' to the customer.⁸⁰ Second, for controlling unfair terms, it stipulates a general provision similar to Article 10 of the Consumer Contract Act.⁸¹ Finally, no list of unfair terms is provided, but one special provision on amendment of the standard terms has been inserted.⁸² These were the results of a compromise and some worry has been expressed as to the possibility of regression of customers' protection (especially that of consumers and small businesses).

⁷⁷ *ibid.*, Art 9(1)(ii).

⁷⁸ A standard transaction is a transaction conducted by a specified person (enterprise) with an *unspecified and large number of persons as the counterparties*, in which the *uniformity of the whole or part of the transaction is reasonable to both parties* (Civil Code, Art 548-2(1)). The italicised parts reveal the typically targeted enterprises to be such big entities facing the general public as transportation companies or electricity (or gas) supplying companies. In this regard, these provisions are not directly facing the global issue of an abuse of bargaining power by commercial enterprises enforcing their one-sided general conditions. Although the German law development on general conditions has been quite influential among Japanese academics since Ludwig Raiser's *Das Recht der Allgemeinen Geschäftsbedingungen* (Hamburg: Hanseatischer Verlag, 1935), the exceptional measure regarding the general conditions for public services in the German Civil Code (BGB) § 305a seems to have become the central issue in the Japanese Civil Code. This focus, linked to the privatisation of these services as well, was a result of the compromise due to the confrontation during the promulgation process.

⁷⁹ According to Article 548-2(1) of the Civil Code, standard terms are a collection of provisions prepared by that specific person (enterprise) with the purpose of applying them as the terms of a contract for a standard transaction.

⁸⁰ *ibid.*, Art 548-2(1).

⁸¹ *ibid.*, Art 548-2 (2).

⁸² *ibid.*, Art 548-4. An enterprise may be deemed to have been agreed by customers to amended terms, without making any individual agreement with them, if the necessary announcement beforehand by Internet etc is made, and also (1) if the amendment to the standard terms conforms to the general interest of the customers, or (2) if the amendment is not contrary to the purpose of the contract and is reasonable in light of the need to change, the appropriateness of the contents after the change, whether there is the provision of possibility of amendment to the standard terms, the contents of such provisions and the other circumstances relating to the amendment.

ii. Other Provisions

The Civil Code sets the limits to the basic principle of contractual freedom by providing some specific mandatory rules⁸³ (for example Article 572)⁸⁴ and such general principles of a juristic act as respecting 'Public Policy and Good Morals',⁸⁵ and 'Good Faith'.⁸⁶ Unfair terms in any type of contract have fallen under these restrictions. However, since the enforcement of the Consumer Contract Act with its general and specific mandatory provisions, the significance of these prohibitive rules in the Civil Code has considerably decreased.⁸⁷

C. Other Specific Statutes

It is rather the mandatory provisions outside the Civil Code which continue to take a lively role for substantive control over unfair contract terms. Several tenant protection measures in the Act on Land and Building Leases⁸⁸ and mandatory, maximum (for example 20 per cent) ceiling of annual interest rate in the Interest Rate Restriction Act⁸⁹ are well known examples of direct governmental intervention for protecting the lives of weaker contractual parties.

D. Comments

There have been at least three different approaches toward 'unfair terms': (1) focusing on consumer contracts, (2) on standard terms and (3) on the type of unfairness of the term itself (usually with the specific characteristics of the typical contractual situations: for example maximum interest-rate ceiling for a money lending contract, or a maximum duration of an immovable lease). The styles of legal intervention are at least twofold: 'standard' ('general clause') and 'rule'-oriented. The former is fit for the

⁸³ *ibid.*, Art 91.

⁸⁴ *ibid.*, Art 572 invalidates an exemption agreement of seller's non-conformity liability in case the seller knew but did not disclose the existence of the non-conformity of the sold object.

⁸⁵ *ibid.*, Art 90. Supreme Court decision of 1 May 1934, Minshu 13, 875.

⁸⁶ *ibid.*, Art 1(2).

⁸⁷ For example, contrary to Art 572 of the Civil Code, even an innocent seller cannot exempt himself from the non-conformity liability under Consumer Contract Act (Art 8(2)). As regards a general provision of Public Policy and Good Morals under Article 90 of the Civil Code, its important role of settling unfair term disputes against the profiteers (considering both a subjective, exploitative element and an objective excessive profit-making element), has been largely replaced by Consumer Contract Act (Art 10 and other specific mandatory rules) in consumer-related cases.

⁸⁸ For example, the Act on Land and Building Leases states that the Land Lease Right shall be 30 years (Art 3) and that any contractual provisions that run counter to these provisions and which are disadvantageous to the Land Lease Right Holder shall be invalid (Art 9). Therefore, a contract term providing a land-lease for 10 years for example is invalid and the lease continues for 30 years.

⁸⁹ The Interest Rate Restriction Act stipulates mandatory, maximum ceiling of annual interest rate between 15 per cent and 20 per cent depending upon the amount of the principal. There are also criminal sanctions against the business contract with the interest rate exceeding 20 per cent (Act Regulating the Receipt of Contributions, the Receipt of Deposits, and Interest Rates, Act No 195 of 1954, amended in 2007).

traditional, judicial system of courts solving the conflict *ex post* between the specific parties, considering the individual facts and situations in detail, whereas the latter is in conformity with the forward-looking direction of everyday practices considering the foreseeability, efficiency and policymaking for the concerned mass market transactions. The developments we have seen here show both the polarisation and the combination (for example Article 10 of the Consumer Contract Act) of these two styles.⁹⁰

V. Product Liability

Damage caused by a defective product can be recovered in both contract and tort⁹¹ under the Civil Code. However, since the Product Liability Act 1994⁹² introduced the 'defect' liability against manufacturers and importers, this Act has become the main source of recovery.

A. Characteristics of the Japanese Product Liability Act

At first glance, the Japanese Product Liability Act appears to resemble the European Product Liability Directive.⁹³ However, there are at least three distinguishable points.⁹⁴ First, with regard to the recoverable damage, Article 3 of the Product Liability Act mentions only 'damages arising from the infringement of life, body or property of others', without stating any further restrictions of its coverage as are stated

⁹⁰ Cf above, at s II.C.

⁹¹ Long before the promulgation of the Product Liability Act, the courts have taken the meaning of 'negligence' of tortious liability (Civil Code, Art 709) objectively and flexibly. Especially in case of damages from medicines or food as well as those from pollution in the 1970s and 80s, the courts interpreted the word 'negligence' very extensively and affirmed the damages claims of injured victims. Some commentators on the famous, medicine-induced suffering case of SMON (Tokyo District Court judgment of 3 August, 1978, Hanrei Jiho 899, 48) observed the court's interpretation of negligence getting infinitely close to a non-fault, strict liability. These judgments can be interpreted as extending a helping hand to the victims of the dark side of the post-war rapid – but sometimes rough – industrial development.

⁹² Act No 85 of 1994. Regarding the original text with explanations as well as its promulgation process, see A Omura, 'The Product Liability Law of Japan' (1997) 5(5) *Consumer Law Journal* 153 and L Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (Abingdon: Routledge, 2004). For a more recent overview, Y Shiomi, 'Product Liability in Japan' in K Oliphant et al (eds), *Product Liability: Fundamental Questions in a Comparative Perspective* (Berlin: de Gruyter, 2017) 62–79. A brief survey of Japanese consumer safety law in French, see H Hirano, 'La sécurité du consommateur au Japon' in Association Henri Capitant (ed), *Le consommateur* (Paris: Bruylant 2010) 407–14.

⁹³ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 No L210, p 29. For example, similar to this Directive, Articles 3–4 of the Japanese Product Liability Act provide a non-fault 'defect' liability as a rule with some 'defences' as exceptions. The substantive content of the 'defect' standard with the three important – but not the exclusive – list of circumstances is quite similar. The Japanese Product Liability legislation (1994) was considerably inspired by the European Product Liability Directive of 1985 and also by many other foreign product liability legislation.

⁹⁴ The concept of 'product' ('movable which is manufactured or processed', Art 2(1)) excluding primary agricultural products is more limited than the Directive. However, the definition was partly inspired by the European Product Liability Directive of 1985 (Art 2). Regarding 'processed' fish for food, see the case at n 102.

in Article 9(1)(b) Product Liability Directive (limiting property damage to *consumer* property). Therefore, the extent of liability is subject to the general tort law rule under the Civil Code,⁹⁵ which means it is fairly extensive, without the lower threshold of the European Directive (500 ECU), nor clearly excluding pure economic loss. The orientation of the Japanese Product Liability Act towards consumer protection is less significant.⁹⁶ Second, the targeted responsible enterprises extend to a 'substantial manufacturer' who did not actually manufacture the product, nor had such appearance (name, brand etc.) as manufacturer of the product, but who substantially committed to the process of making or/and distributing such a product.⁹⁷ Third, the starting point for calculating the limitation period (prescription) becomes flexible in case where the human damage (for example disease) was caused by the product with a long incubation period.⁹⁸

B. Cases under the Product Liability Act

The cases after the enactment of the Product Liability Act have already been the subject of some detailed work in English.⁹⁹ We only pick up on those topics not yet fully discussed but which may become important.

i. 'Negligence' versus 'Defect'

At the time of the promulgation process concerning the Product Liability Act, the then government stressed the substantial continuity of the case law on 'negligence' to the newly introduced 'defect' liability, which was persuasive to the business side. The actual phenomena after the enactment has not been so clear. The 'defences', especially the development risk defence, has not yet been affirmed by the courts and the decision as to the 'defect' has become vital for both parties. The results of court decisions as to 'defect' might not be so different from their 'negligence' decisions if the 'negligence' is extensively and objectively interpreted as before.¹⁰⁰ However, instead of one whole

⁹⁵ Product Liability Act, Art 6.

⁹⁶ Compare Article 1 of the Product Liability Act ('Purpose': to protect the victim of the injury to life, body, or property ...) to the idea of *consumer* protection expressed in the preamble of the Product Liability Directive. One of the reasons for our extended application beyond consumers was the necessity to assist Japan's numerous small and medium enterprises.

⁹⁷ *ibid*, Art 2(3)(iii). The 'substantial producer' is included by the experience of a medicine's side-effect case of SMON (n 91), where not only the actual producer of the medicine but also the well-known medicine producing and selling company (with a label '*Hanbai-moto*' (a selling agency)), who had the substantial monopolistic power over the whole distribution process and who had let another smaller company produce this medicine, was claimed damages by the victims. The lower courts admitted the claim and the case was settled. The Product Liability Act did not extend the liability to a seller even when manufacturers are not found (as the Product Liability Directive did). Instead, it introduced this type of substantial extension as to the responsible entity.

⁹⁸ *ibid*, Art 5(3). This derives also from such medicine-induced suffering cases as SMON (n 91).

⁹⁹ For example, Nottage, *Product Safety and Liability Law in Japan*, an additional survey by the same author and M Kato, including the Product Liability Act with cases on until approx. 2006; Nottage, *Business Law in Japan*, 175–312.

¹⁰⁰ See n 91. A similar argument appeared (above at s III.B.iii) on the contractual liability between non-fault v. fault interpretation.

concept of 'defect', the three categories of 'defect', namely, manufacturing defect, design defect and warning or instruction defect, have become popularly used in recent litigation and it seems that a tendency towards more fragmented decision-making focusing on each of these sub-categories has become observable. There might exist a danger of leaving some important facts, which might have been more comprehensively argued over the proof of 'negligence', out of the subject of discussion.¹⁰¹ The fragmented decision-making of 'defect' liability might sometimes become less protective to victims than 'negligence' liability.

ii. 'Defect' Liability and Insurance

The problem related to the function of insurance has become one of the controversial issues for deciding the defect. Sometimes it is related to the development risk defence provided in Article 4(1). An interesting decision involved a small restaurant owner in Chiba Prefecture, who cooked and served a fish (raw and grilled) rarely found in that district (named a striped beak perch), which turned out to be infected with ciguatera (food-poisoning bacteria which is nearly impossible for a chef to discover and which has strong resistance to high heat cooking as well). Some customers suffered from food-poisoning and sued the restaurant owner based on the Product Liability Act. The defendant owner alleged the development risk defence. The Tokyo District Court rejected the defence saying that the level of knowledge necessary for the development risk defence must be measured objectively by the best scientific or technical knowledge of the whole society at that time (and not subjectively by that of the specific defendant).¹⁰² The court in this case mentioned also that the availability of liability insurance and the fact that the defendant restaurant had actually taken out such insurance should justify this non-fault liability.¹⁰³

This argument gives us a possibility of looking at the product liability problem from a perspective of the risk distribution through insurance. Some countries already adopted product liability law with a compulsory insurance system.¹⁰⁴ Japan also has the SG mark system using an insurance mechanism.¹⁰⁵ However, not only problems such as moral hazard (the insured enterprise might become less cautious about taking

¹⁰¹ In the Supreme Court judgment of 12 April 2013, Minshu 67, 4, 899, concerning a side-effect of a new drug ('Iressa'), the issue of discussion was narrowed down to whether there existed a warning defect on the side of the import (and selling) company and the argument became focussed on (1) the foreseeability of the fatal side-effect risk at the time of the delivery and (2) the appropriateness of the warning expression on the attached document for doctors. Other surrounding circumstances such as the actual conduct by the defendant before and after the delivery (including the side-effect information gathering and its prompt giving to the customers (ie doctors)), which might have been discussed in a litigation of 'negligence' liability, were paid much less attention.

¹⁰² Tokyo District Court judgment of 13 December 2002 Hanrei Jiho No 1805, 14. The Appellate Court dismissed as well: Tokyo High Court judgment of 26 January 2005, LEX/DB 28101913.

¹⁰³ Although this insurance argument has not always been discussed by the commentators, according to the writer's opinion, it was certainly one of the decisive factors for this decision.

¹⁰⁴ For example, the Austrian Product Liability Law (*Produkthaftungsgesetz*), Art 16, see R Welser and C Rabel, *Produkthaftungsgesetz Kommentar* 2nd edn (Vienna: LexisNexis, 2004) 189–91; Scandinavian Product Liability Act, see G Howells, *Comparative Product Liability* (London: Dartmouth, 1993) 147 et seq.

¹⁰⁵ See below at s VI.C.

safety measures) but the question of how to realise a fair mechanism for the distribution of risk by the (private) insurance market should be further considered.¹⁰⁶

iii. Product Liability and State Liability

One characteristic feature of Japanese law related to the question of product liability is that the State (or the government) can be liable under the State Redress Act.¹⁰⁷ For example, in cases of medicine-induced sufferings, not only the manufacturer of the medicine, but also the State (Japanese government) may be liable if the public officer in charge of supervising the safety of the medicine negligently overlooked the dangerous side-effect of the medical products. Regarding medicines whose distribution into the market is only allowed under the strict, prior governmental approval,¹⁰⁸ damage caused by side effects that went negligently unnoticed in prior governmental examinations, may be compensated by the government.¹⁰⁹ On the other hand, regarding automobiles whose safety is supposed to be checked and maintained by the initiative of each car driver,¹¹⁰ who is licensed by the national examination, the government is not easily considered to be liable even when the defects of an automobile which went negligently unnoticed at the official car inspection caused damage.¹¹¹ According to an administrative law specialist, the difference is based on the degree of the people's expectancy toward the governmental intervention.¹¹² This opinion is supportable as here the actual and final burden of compensation (in case of an affirmative decision of damages) is put on the populace generally through tax.

C. Comment

Japanese law features diverse paradigms to distribute the product-related risk. If we focus on who will be put under the final burden, possibilities thus far are (1) victim (refusal to attribute liability or by exemption clause), (2) enterprise (by non-fault liability),

¹⁰⁶ Interesting discussions took place between F Nagano and H Koziol in H Koziol (ed), *Comparative Stimulations for Developing Tort Law* (Wien: Jan Sramek, 2015) 38–43, 50–51.

¹⁰⁷ Act No 125 of 1947, Art 1(1). See above, at s I.

¹⁰⁸ Pharmaceuticals and Medical Devices Act (originally, 'Pharmaceuticals Affairs Act' Act No 145 of 10 August 1960).

¹⁰⁹ In the SMON case, the claim against State as well as against the medicine manufacturing company were affirmed (see n 91). However, the Supreme Court judgment of 23 June 1995, Minshu 49, 6, 1600 (chloroquine case) dismissed the claim with a remark that the State's liability would be affirmed only when the non-use of the competent power by the public officer deviated from the permissible limits and became grossly unreasonable. In the recent Iressa case, the Supreme Court (n 101) rejected not only the importer's liability but also the State's liability (the government's rapid approval – the first purchaser in the world, permitting the phase III trials exceptionally *after* the approval – with the permission of the insufficient documental warning, which became later officially amended, were questioned). Some commentators expressed criticism that this kind of unpredictable risk should not be put solely on the victims but be shared by the whole society. Concurring opinions (by Judges Takehiko Otani and Masaharu Ohashi) in that Supreme Court judgment suggested also that idea of social distribution.

¹¹⁰ Road Transport Vehicle Act (Act No 185 of 1951).

¹¹¹ For example, Kanazawa District Court judgment of 16 July 1976, Hanrei Jiho 824, 40.

¹¹² K Uga, *Kokka Hoshō Ho* [State Compensation Law] (Tokyo: Yuhikaku, 1997) 164–66.

(3) participants of the insurance market (by insurance system) and (4) tax payers (by State liability), and the discussion should be continued. However, we must also take a forward-looking perspective from the viewpoint of risk prevention, which we consider next.

VI. Product Safety

A. Overview

The present consumer safety system can be divided into three stages: the pre-market, design and production stage, the in-market stage and the post-accident stage. Having discussed the post-accident stage above, this section focuses on the preceding stages, for which the governmental control systems consist of both item (product)-specific, vertical regulations by each responsible Ministry and a supplemental, horizontal regulation by the Consumer Affairs Agency (CAA).¹¹³ Table 2 provides an overview.¹¹⁴

Table 2 Main Product Safety Legislation

Item	Main Legislation	Competent Authorities
Food	Food Sanitation Act (No 23 of 24 December 1947)	Ministry of Health, Labor and Welfare & Consumer Affairs Agency
	Food Safety Basic Act (No 48 of 2003)	Food Safety Commission (Cabinet Office)
	Food Labeling Act (No 70 of 2013)	Consumer Affairs Agency
Medicine	Act on Securing Quality, Efficacy and Safety of Products Including Pharmaceuticals and Medical Devices (No 145 of 1960)	Ministry of Health, Labor and Welfare
Automobiles	Road Transport Vehicle Act (No 185 of 1951)	Ministry of Land, Infrastructure, Transport and Tourism
Electrical Appliances	Electrical Appliance and Material Safety Act (No 234 of 1961)	Ministry of Economy, Trade and Industry
Other Goods	Consumer Product Safety Act (No 31 of 1973)	Ministry of Economy, Trade and Industry & Consumer Affairs Agency
Buildings	Building Standards Act (No 201 of 1950)	Ministry of Land, Infrastructure, Transport and Tourism
Generally	Consumer Safety Act (No 50 of 2009)	Consumer Affairs Agency

¹¹³ See above at s I.

¹¹⁴ Movable items are mostly selected from the list of regulative laws provided by the Appended Table (related to Art 2) of the Consumer Product Safety Act.

B. Consumer Product Safety Act

The Consumer Product Safety Act is theoretically a core statute¹¹⁵ for the pre- and in-market regulations, and classifies consumer products into three kinds, with differing levels of pre-market control:

- ‘Specified products’ (10 items)¹¹⁶ must be inspected and verified by the manufacturer to ensure that the products conform to the technical requirements¹¹⁷ (self-inspection). The inspection record must be prepared and preserved. After the verification, the ‘PSC Mark’ (signifying Product Safety Consumer Goods) is to be placed on the products.
- ‘Special specified products’ (four items)¹¹⁸ are among ‘specified products’, but are specially required to be inspected by a third party (a registered conformity inspection body) in addition to self-inspection. The ‘PSC Mark’ on the products is to be placed after the verification.
- The un-designated, ‘un-specified products’ (all other consumer product items not included in the ‘specified products’ above) can be manufactured and distributed in the market without the aforementioned inspection.

Regarding the in-market control, manufacturers of the ‘specified products’ (including ‘special specified products’) are subject to the following administrative orders: Order for improvement of manufacturing (or inspection, etc); Order for prohibition of labelling; Hazard Prevention Order;¹¹⁹ and Collection of Reports and On-Site Inspection. Manufacturers of ‘un-specified products’ can also be subject to the following orders: Hazard Prevention Order¹²⁰ and Collection of Reports and On-Site Inspection. Most of these orders are accompanied by penal sanctions against their infringements.¹²¹

¹¹⁵ However, note that this Act does not cover such important movables as food, medicines, automobiles, etc., nor immovables as Table 2 (other goods versus other items) shows.

¹¹⁶ ‘Specified Products’ are autoclaves and pressure cookers for household use; helmets (limited to those for riding a two-wheeled motor vehicle or motorised bicycle); baby beds; climbing ropes; portable laser application devices; hot water circulators for baths; oil water heaters; oil bath boilers; oil heaters; lighters.

¹¹⁷ These requirements are under the control of the government.

¹¹⁸ ‘Special specified products’ include baby beds; portable laser application devices; hot water circulators for baths; lighters.

¹¹⁹ ‘When the competent minister believes that there exists a risk of danger to the lives or bodies of general consumers regarding specified products, and when the minister finds it particularly necessary to prevent the occurrence and increase of such danger, the minister may order the business enterprise to recall the products and otherwise to take all necessary measures’ (Art 32).

¹²⁰ ‘When “serious product accidents” have occurred due to defects in the consumer products other than specified products or when serious danger has occurred to the lives or bodies of general consumers or the occurrence of such danger is considered to be imminent, and when the competent minister finds it particularly necessary to prevent the occurrence and increase of such danger, the minister may order, to the extent necessary, to recall the consumer products and to otherwise take measures necessary to prevent the occurrence and increase of serious danger to the lives or bodies of general consumers’ (Art 39).

¹²¹ Consumer Product Safety Act, Arts 58–62 provides imprisonment with work for not more than one year or a fine of not more than JPY one million (approximately USD 9100).

C. 'SG Mark' System

A weakness of the above-mentioned system of consumer product safety is that the number of targeted items is very small.¹²² A great many items classified as 'un-specified products' fall outside the scope of the pre-market safety controls and even at the in-market stage are only subject to a few exceptional orders. Their safety controls rely upon the post-accident, damages liability systems of the Product Liability Act or tort law. However, we should remember that, when the Consumer Product Safety Act was enacted in 1973, it introduced another subsidiary system: the Safe Goods Mark (SG Mark). It is run by the organisation 'Consumer Product Safety Association' (hereinafter: CPS Association).¹²³ Over one hundred items of various consumer products have been (and continue to be) registered under the mark and the victim of the product accident is protected by a kind of insurance system.¹²⁴ After the de-regulation movement, the Association changed its nature to a general foundation in 2012. However, the SG Mark continues to be functioning as a unique subsidiary system to support the Consumer Product Safety Act.

D. Product Recall

For the safety measures at the in-market stage, product recall has become a major scheme. The Consumer Product Safety Act prepares administrative, compulsory orders to require the manufacturers recall the products (including un-specified products) in case the products pose a risk of danger to the lives or bodies of general consumers.¹²⁵ There have been cases of actual implementation of these orders,¹²⁶ but most of the recalls in this area are voluntarily exercised by enterprises without a specific legal basis.

If we extend our observation to such special areas as medicine, food and automobiles, their recalls as well as their pre- and in-market safety activities in general are far more strictly controlled by regulatory laws than by the Consumer Product Safety Act and, although their recalls are mostly started at the initiative of each enterprise as well, those enterprises are usually obliged to report to the competent authority when they start a recall,¹²⁷ which the authority will monitor. For an enterprise not falling under any responsible authorities, the direct recall system by the Consumer Affairs Agency (the Prime Minister) has been introduced.¹²⁸

¹²² 'Specified products' (including 'Special specified products') cover only 10 items.

¹²³ www.sg-mark.org.

¹²⁴ M Ramseyer, 'Product Liability Through Private Ordering: Notes on a Japanese Experiment' (1996) 144 *University of Pennsylvania Law Review* 1823, 1828–40; H Sarmida, 'Comparative Institutional Analysis of Product Safety Systems in the United States and Japan: Alternative Approaches to Create Incentives for Product Safety' (1996) 29 *Cornell International Law Journal* 79.

¹²⁵ See nn 119 and 120.

¹²⁶ For example, hot air heaters with a danger of carbon monoxide poisoning were recalled compulsorily in 2005 by the Hazard Prevention Order.

¹²⁷ Pharmaceuticals and Medical Devices Act, Art 68-11, Food Sanitation Act, Art 58, Road Transport Vehicle Act, Arts 63-2, 63-3, 63-4.

¹²⁸ Consumer Safety Act, Arts 40–42.

E. Accidents Reporting (and Publication) Systems

In 2006, after some serious accidents,¹²⁹ the Consumer Product Safety Act was revised and introduced the following reporting and publication system: an enterprise, who becomes aware that 'serious product accidents' (including the accidents where the actual or potential danger is serious) have originated with its manufactured or imported consumer products, shall report to the competent minister the details of the accidents within 10 days after knowing of the accident.¹³⁰ The competent minister, having received the report, shall make public the name and type of the consumer products pertaining to said serious product accidents, the details of the accidents and any other matters that contribute to avoiding the dangers.¹³¹

The Consumer Safety Act of 2009 provided that the head of the administrative organ (etc)¹³² becomes obliged to notify the Prime Minister (CAA) of such information as a 'serious accident'¹³³ immediately and a 'consumer accident'¹³⁴ promptly, both of which cause actual or potential harm to the consumer's life and person.¹³⁵

VII. Adaption to Digital Age

The Consumer Policy Development Plan adopted by the Cabinet in March 2015 notes¹³⁶ that the development to a highly developed information society has resulted in a massive increase in Internet consumer transactions. Between 2008 and 2013, these grew by a factor of 1.8, from JPY 6.1 trillion to 11.2 trillion (approximately USD 55.7 billion to 102.3 billion).

This in turn has increased the number of consumer enquiries to consumer protection centres that concern information services to more than 20 per cent of all enquiries. The topics concern contracts for telecommunication services, Internet distance contracts and their payment methods, problems related to adult and game Internet sites, spam mail and leaking of personal information.

¹²⁹ For example, a fatality caused by carbon monoxide poisoning through a defective water heater, and injuries caused to a baby whose fingers became entangled in a paper shredder.

¹³⁰ Consumer Product Safety Act, Art 35(1), Cabinet Office Order, Art 3.

¹³¹ *ibid*, Art 36(1).

¹³² Besides the head of an administrative organ, prefectural governor, municipal mayor and president of the National Consumer Affairs Center of Japan are listed (Consumer Safety Act, Art 12(1)).

¹³³ The 'serious accident' (*ibid*, Art 2(7)) which concerns harm to the consumer's life or person (not just that to property damage), is similar to the 'serious product accident' in the Consumer Product Safety Act mentioned above, but the 'serious accident' here is not limited to the accident caused by 'consumer products' but extends to consumer services.

¹³⁴ *ibid*, Art 2(5). The 'consumer accident' is that which does not amount to a 'serious accident' but the notification becomes necessary in cases where the harm will increase in scope or that a similar type of the accident will occur.

¹³⁵ As regards a 'consumer accident', the notification is necessary only in case it is likely that the harm will increase in scope or that a similar type of the accident will occur (*ibid*, Art 12(2)).

¹³⁶ *Shōhisha kihon keikaku*, Cabinet decision of 24 March 2015, p 6.

A. E-commerce Regulation

As regards issues of the E-commerce regulation, there are four relevant topics: minimum information requirements, input error protection, cooling-off periods and credit card abuse.

i. Minimum Information Requirements

Internet commerce is not tied to a physical address. Therefore, if the consumer needs to contact or even sue the seller, they need a physical address displayed on the relevant home pages.

The largest damage to consumers in Japan in recent years (measured in hundreds of millions of dollars) resulted from the collapse of the Bitcoin Internet exchange MtGox in 2014. While this exchange was active, it did not display its physical location on its home page. It did display such a location in its terms of use, but that address did not actually exist.¹³⁷ Obviously, such a state of affairs is unacceptable from a point of view of consumer protection.

The consumer protection law dealing with this problem is Article 11 of the Act on Specified Commercial Transactions.¹³⁸ That Article requires the selling price, time and method of payment, time of delivery, matters regarding return and exchange and any matters specified by an Ordinance of the Ministry of Economy, Trade and Industry to be disclosed in all commercial communications about distance contracts. The relevant Ordinance¹³⁹ requires in its Article 8 No 1 that the seller includes information about his name and address. Article 8 No 2 requires information about the legal representative if the seller is a legal person.

ii. Input Error Protection

When ordering goods over the Internet, a consumer may sometimes be confused by the webpage layout and order a different number of items than intended or click on some item without actually wanting it. The Japanese system to tackle such problems is covered in the Act on Special Provisions to the Civil Code Concerning Electronic Consumer Contracts of 2001.¹⁴⁰ This works by providing an exception to Article 95 of the Civil Code.¹⁴¹ According to this provision, a manifestation of intention is voidable if it is based on a mistake wherein the person lacks the intention that corresponds to the manifestation of intention and if the mistake is material in light of the purpose of the juridical act and the common sense in the transaction.¹⁴² However, if a mistake is due to gross negligence on the part of the person making the manifestation of intention, that person may not rescind a manifestation of intention.¹⁴³

¹³⁷ See K-F Lenz, 'Where is MtGox?', 21 October 2013, available under bit.ly/3hmp3dw.

¹³⁸ Act No 57 of 1976 (above n 45). See above at II.B and Table 1.

¹³⁹ Ordinance No 89/1976 of the Ministry of Economy, Trade and Industry.

¹⁴⁰ Act No 95 of June 2001, amended in 2017.

¹⁴¹ Act No 89 of April 1896, amended in 2017. See above at II.A.ii. a and n 29.

¹⁴² Civil Code, Art 95(1).

¹⁴³ *ibid*, Art 95(3).

The Act on Electronic Consumer Contracts works by first exempting consumers from the requirement of not being grossly negligent in Article 95 of the Civil Code and grants an exception for cases where the merchant in question has taken measures to confirm the consumer's intention to make an offer or accept the offer by electromagnetic means on the visual browser, or where the consumer manifests expressly the intention to the business entity that there is no need for such confirmation measures.¹⁴⁴

Since most merchants will be interested in being granted this exception, they will usually provide a step in the ordering process for finally confirming orders. That gives the consumer a chance to correct all potential mistakes. If merchants do so, all mistakes by consumers in gross negligence leave the contract intact. Keeping up an error even after looking at a confirmation screen is gross negligence, so the merchant will be protected in most such cases.

iii. Cooling Off

In contrast to EU law,¹⁴⁵ Japan has no consumer protection regulation in place that guarantees consumers a cooling-off period in all distance contracts. In principle, consumers have a cooling-off period of eight days, however merchants (in mail order sales) can indicate special provisions on withdrawal in its advertisement, such as excluding the right or subjecting it to particular conditions.¹⁴⁶

Considering that consumers are able to compare prices and quality of goods more easily when shopping over the Internet than when actually walking around through physical stores, this approach seems to be not without merit. The fact alone that consumers use the Internet as opposed to a contract in a physical shop does not mean that their ability to acquire information on the goods in question is fully impaired. While it is true that consumers may not be able to see the goods before concluding a contract with distance sales, the consumer in a physical shop is not able to see prices at competing shops easily. On the other hand, if the seller does not wish to grant the consumer a right of withdrawal, it seems to be fair to ask him to say so clearly before receiving an order. The Japanese system achieves this. The right of withdrawal is not granted unconditionally. If the consumer knows that there is no such right and still orders anyway, the seller is not forced to accept a withdrawal.

iv. Credit Card Abuse

Since Internet commerce contracts are distance contracts, until recent years the only way for the consumer to pay was using a credit (or debit) card. Compared to using a cryptocurrency like Bitcoin, this is inherently unsafe. The consumer needs to hand over all information needed for payment to the merchant. If the merchant's database is hacked or some employee of the merchant sells the consumer's card data, any third

¹⁴⁴ Act on Electronic Consumer Contracts, Art 3.

¹⁴⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ 2011 No L304, p 64.

¹⁴⁶ Act on Specified Commercial Transactions, Art 15-3(1). See above, at II.A.ii.d, especially n 49.

party can use that data for fraudulent payments. As a consequence, annual global credit card fraud has reached USD 28.65 billion in 2019; by 2025 gross card fraud is projected to reach over USD 35 billion.¹⁴⁷

Japanese law does not protect consumers from losses related to credit card fraud. However, that does not mean that consumers actually pay for these losses.

Most credit cards come with a special insurance called ‘theft insurance’ (*tōnan hoken*). That insurance covers losses from credit card fraud as a general rule. There is no protection if someone living with the cardholder abuses the credit card or in cases of gross negligence (for example choosing a birthday date for a PIN number).

In the absence of regulation requiring the credit card issuer to cover these losses, such an insurance model is what is expected to happen. If the credit card issuers did not provide for insurance, consumers would be reluctant to use credit cards. Therefore, providing this form of consumer protection is also in the interest of the credit card companies.

v. Anti-spam

The Japanese anti-spam law¹⁴⁸ is based on an opt-in model. The outdated translation available at the Japanese government translation site still shows the original opt-out concept of 2002. That was changed in 2009. Now this Act requires prior consent for sending of commercial email messages. Article 3 of the Act restricts sending of spam mail to the cases of prior consent, the receiver giving their mail address to the sender, or an existing business relationship. Article 4 of the Act requires the sender to include their name in the spam mail. Articles 5 and 6 prohibit sending spam mail from false or fictitious mail addresses.

B. Bitcoin Consumer Protection

Japan has enacted legislation in 2016¹⁴⁹ to regulate cryptocurrency exchanges. This law introduced a new chapter in the Payment Services Act (*Shikin kessai ni kan suru hōritsu*).¹⁵⁰ This was in response to the MtGox bankruptcy. In 2014, MtGox was the world’s largest bitcoin exchange. Mainly because it lost several hundred thousand bitcoins due to ‘theft’ (worth several hundred million dollars even at the time), it collapsed. This resulted in a bankruptcy procedure with over 20,000 creditors, most of them based outside of Japan, and claims of over JPY 40 billion (approximately USD 365 million). At the time, anybody could start a bitcoin exchange. There was no special regulation in place. To avoid such spectacular failures damaging great numbers of investors, the new legislation requires registering any cryptocurrency exchange with the Financial Services Authority (*Kinyūchō*), for which minimum requirements apply.¹⁵¹

¹⁴⁷ ‘Card Fraud Losses Reach \$28.65 Billion’, nilsonreport.com, 1 December 2020.

¹⁴⁸ Act on Regulation of Transmission of Specified Electronic Mail, Act No 26 of 2002.

¹⁴⁹ Act No 62 of 2016 changing the Payment Services Act.

¹⁵⁰ Act No 59 of 2009, Arts 63-2 to 63-22.

¹⁵¹ Payment Services Act, Art 63-5.

The applicant needs to be a stock company. A foreign operator of an exchange needs to have a representative resident in Japan. The applicant needs to show a financial base sufficient for operating the exchange, set by Cabinet Ordinance¹⁵² to a capital of JPY 10 million (approximately USD 91,000). The applicant must be able to safely and appropriately execute the exchange business. It must show an organisation that makes sure the relevant rules are followed. The executives of the exchange may not be bankrupt or convicted of crimes.

Article 63-11 of the Payment Services Act orders exchanges to keep their own funds (fiat currency and virtual currency) separate from their customers' funds. These funds need to be audited regularly. Article 63-14 requires regular reports on these funds. These measures give some minimum assurance against large scale failures like the MtGox case. The new regulation also gives the regulator oversight powers.

As a result, Japan was able to capture a large percentage of worldwide bitcoin trading volume¹⁵³ with the newly regulated exchanges being more trustworthy. This in turn helps Japan to develop its financial industry and position the Japanese financial market for the twenty-first century, which is already seeing a strong increase in the use of trustless blockchain assets.

VIII. Unfair Commercial Practices

A. Overview

'Unfair Commercial Practices' is a vast concept that may concern almost all the parts of this chapter. Especially the fraudulent and coercive commercial practices have been the subjects of our survey as a part of the information-related topics. Although we examined the problems from the viewpoints of both private law (for example the Civil Code and Consumer Contract Act) and administrative regulations (for example some provisions in the Act on Specified Commercial Transactions), we have not yet covered the consumer protection aspects of competition law in Japan.¹⁵⁴

B. The Antimonopoly Act

The Antimonopoly Act¹⁵⁵ – the Japanese competition law – covers cartels, resale price maintenance (RPM), refusals to deal and predatory pricing, among others. If the customers of the relevant market are end consumers, competition law enforcement of those categories of conduct logically protects end consumers.

¹⁵² Cabinet Office Ordinance on Virtual Currency Exchanges, Cabinet Office Ordinance No 7 of 2017.

¹⁵³ W Suberg, 'Japan Tops Bitcoin Trading Volume Again', Cointelegraph.com, 7 August 2017.

¹⁵⁴ In general see S Vande Walle and T Shiraishi, 'Competition Law in Japan' in J Duns, A Duke and B Sweeney (eds), *Comparative Competition Law* (Cheltenham: Edward Elgar, 2015) 415–42.

¹⁵⁵ Act No 54 of 1947.

The Antimonopoly Act also covers abuse of a superior bargaining position (ASBP). It is logically an equivalent of the exploitative abuse prohibition in EU competition law.¹⁵⁶ The ASBP prohibition by Article 2(9)(v) of the Antimonopoly Act could be applied to abusive conduct against end consumers because there is no statutory restriction in the provision. Even offensive behaviour regarding personal data, such as the alleged conduct by Facebook under probe by the *Bundeskartellamt* (German Federal Cartel Office), could be prohibited under the Article 2(9)(v). However, there is no precedent in which the Japan Fair Trade Commission (JFTC) applied the ASBP prohibition to abusive conduct against end consumers. It is arguably because the JFTC has enforced the ASBP prohibition following political pressures in favour of small and medium enterprises. Moreover, after the 2009 Amendment of the Antimonopoly Act, the ASBP prohibition has been equipped with a nondiscretionary fine, which the JFTC is obliged to impose when it issues cease-and-desist orders. This introduction of a tight obligation has arguably reduced the incentive of the JFTC to apply the statute to end consumer abuse cases. The JFTC created guidelines in 2019 to incorporate the idea above concerning application of the ASBP prohibition to personal data abuse, apparently inspired by the German case above. Still, actual enforcement is to be seen as of December 2021.

C. The Misrepresentation and Premium Act

The Japan Fair Trade Commission used to also prohibit misrepresentations and excessive premiums under the Misrepresentation and Premium Act.¹⁵⁷ In 2009, when the Japanese Government established the Consumer Affairs Agency (CAA), the JFTC transferred the relevant division to this newly created Agency. Article 1 of the Misrepresentation and Premium Act used to identify its purpose as the maintenance of fair competition. However, it was just an expedient to justify the JFTC's jurisdiction in the Act. In 2009, Article 1 was amended to identify its purpose as consumer protection, which had been the hidden purpose of the Act even before 2009. The Misrepresentation and Premium Act does not regulate unfair trade practices other than misrepresentations and excessive premiums. However, the Act has now become one of the core statutes for administrative regulation of consumer protection. It covers misleading representations which involve: (i) quality or content; (ii) price or other conditions; or (iii) other matters (for example, country of origin) designated by the Prime Minister. The Consumer Affairs Agency can issue cease and desist orders (Article 7). A Qualified Consumer Organisation can seek an injunction at courts to stop illegal conduct by the defendant (Article 30). The November 2016 Amendment has enabled the CAA to impose administrative fines, the amount of which is equivalent to three per cent of the relevant turnover (Article 8).

¹⁵⁶ T Shiraishi, 'The Exploitative Abuse Prohibition: Activated by Modern Issues' (2017) 62 *Antitrust Bulletin* 737, at 743–48.

¹⁵⁷ Act No 134 of 1962.

In addition to this prohibitive, negative control, the CAA can now exercise more positive and disclosure-enhancing control pursuant to other statutes such as the Food Labeling Act which provides a pre-contractual mandatory disclosure of the essential facts listed by the administrative 'standard' (Articles 4 and 5) and the Household Goods Quality Labeling Act which sets also the mandatory labelling standards (for example, components, performance, usage, and storage conditions) for the specified products of daily use (for example, textile goods, plastic goods, electrical appliances and apparatuses, and other goods specified by Cabinet Order). Such obligations have enabled consumers to obtain adequate information that could be hard to get without the regulations.

D. Private Enforcement

The Antimonopoly Act and the Misrepresentation and Premium Act could also be enforced by private plaintiffs. Private plaintiffs can rely on Article 709 of the Civil Code by arguing that the conduct by the defendant violated the Antimonopoly Act or the Misrepresentation and Premium Act and constituted an infringement in the meaning of Article 709. Private plaintiffs could also seek injunctions under the Article 24 of the Antimonopoly Act. Those cases could include private lawsuits by end consumers against abusive conduct, which the Japan Fair Trade Commission tends to avoid.¹⁵⁸ Under the Misrepresentation and Premium Act, a Qualified Consumer Organisation could seek injunctions against illegal misrepresentation, while the victim end consumers themselves could seek injunctions under the Article 24 of the Antimonopoly Act. There has been only limited private enforcement in Japan, so far, arguably because of the scarcity of plaintiff lawyers. Private enforcement of the Antimonopoly Act and the Misrepresentation and Premium Act could potentially flourish.

IX. Access to Justice

A. Overview

Based on the Constitutional right of access to the courts,¹⁵⁹ consumers may complain to the district court in case the amount sued for is more than JPY 1.4 million (for example product liability cases) and to the summary court not more than JPY 1.4 million (approximately USD 12,700). The following three special court systems are also open to consumers.

i. Small Claim Action

In 1996 'Small Claim Action', a special procedure before a summary court, was added in case the value of the subject matter of the action is not more than JPY 600,000

¹⁵⁸ Above at s VIII.B.

¹⁵⁹ Constitution of Japan, Art 32.

(approximately USD 5,400).¹⁶⁰ The trial shall be completed on the first date for oral argument and the court shall render a judgment immediately after the conclusion of the argument.¹⁶¹ The examination of evidence shall be limited to what can be examined immediately, and the court may examine a witness even by a telephone.¹⁶² After a judgment is made, only an objection to the same court is allowed, not an appeal to the court of second instance.¹⁶³

As it was foreseeable that this action would be widely used by business money lenders or sellers against their clients (that is, obligors=debtors unable to repay), a limit on the frequent use of this action was provided (maximum 10 times per year).¹⁶⁴ In order to help poor defendants having difficulty in paying immediately the sum required by the judgment, the court may stipulate a provision concerning the period for payment or a provision authorising payment through instalments, both within three years of the judgment.¹⁶⁵ The defendant who pays following such judgment shall have the benefit of exemption from the obligation to pay any delay damages accrued after the filing of the action. About 10,000 cases appear before the small claim courts each year.

Under this system – as well as in other cases handled by the summary courts – parties often proceed themselves, without attorneys.¹⁶⁶ Generally speaking, the burden of attorney's fee makes consumers hesitant to litigate. In Japan a system of payment of the attorney's fee of both sides by the losing party does not exist.¹⁶⁷ There exists a government legal aid, 'Japan Legal Support Center',¹⁶⁸ offering a legal consultation free of charge. In case of litigation, it will advance the attorney's fee on the consumer's behalf. However, the consumer must pay back the cost later.¹⁶⁹ However, systems are in place which may overcome at least partly these financial difficulties of consumers by letting Qualified Consumer Organisations handle their claims.

ii. Injunction Demand by a Qualified Consumer Organisation

In case an enterprise conducts certain improper acts to many unspecified consumers in soliciting a consumer contract, a Qualified Consumer Organisation¹⁷⁰ may demand the said enterprise to stop or to prevent such acts. This injunction system was first created by the reform in 2006 of the Consumer Contract Act.¹⁷¹ The targeted acts of the enterprise are classified into two groups: (1) the enterprise's act of entering into

¹⁶⁰ Code of Civil Procedure, Part VI: Arts 368–81.

¹⁶¹ *ibid*, Art 374(1). 'Principle of Trial on Single Date' (Art 371).

¹⁶² *ibid*, Art 372(3).

¹⁶³ *ibid*, Arts 377, 378(1). When a lawful objection is made, the action shall be restored to the stage before the conclusion of oral argument. In this case, ordinary proceedings shall be applied to the trial (Art 379(1)).

¹⁶⁴ In case of the same plaintiff obligee at the same summary court (Code of Civil Procedure, Art 368(1)).

¹⁶⁵ *ibid*, Art 375 ('Grace of Payment by Judgment').

¹⁶⁶ Not only in summary court proceedings, but in Japanese law suits in general, parties are allowed to take part in the litigation proceedings without being represented by an attorney.

¹⁶⁷ In case of tort law suits exceptionally, the plaintiff (consumer side) can in essence recover the attorney's fee by way of including the cost into the amount of damage.

¹⁶⁸ Comprehensive Legal Support Act, Act No 74 of 2004.

¹⁶⁹ Only exceptionally such poor people as welfare recipients can be excused from paying the attorney's fee.

¹⁷⁰ At present 22 Qualified Consumer Organisations have been certified by the Prime Minister.

¹⁷¹ Consumer Contract Act, Arts 12 et seq. See above at s II.A.ii.b.

a contract which contains an unfair clause:¹⁷² the clause is not only void but is also a subject of this injunction;¹⁷³ (2) the enterprise's act inducing mistake¹⁷⁴ or duress¹⁷⁵ of a consumer:¹⁷⁶ the act is not only a cause of rescission by the consumer but is also a subject of this injunction.¹⁷⁷

In 2009, as part of the reforms of the Act on Specified Commercial Transactions¹⁷⁸ and the Misrepresentation and Premium Act,¹⁷⁹ and in 2013 with the promulgation of the Food Labeling Act,¹⁸⁰ similar systems of injunction by a Qualified Consumer Organisation were also institutionalised. Thus, Qualified Consumer Organisations have come to play a semi-governmental role of ensuring public security under the indirect control by the government (for example, through certification, supervision or revocation by the Consumer Affairs Agency), but they are having a difficult time to manage without financial support from the government. These developments are achievements under the new regime of the Consumer Affairs Agency but the strengthening and support of the activities of these Consumer Organisations would be a new problem to overcome.

*iii. Special Collective Court Proceedings for Consumers (Japanese Class Action)*¹⁸¹

The injunction system above does not help recover damages already caused to the consumers. Special measures for the collective recovery of damages for harm that commonly affected a considerable number of consumers became necessary. In 2013, a two-stage litigation procedure similar to the French system was introduced. In the first-stage proceedings, a Specified Qualified Consumer Organisation¹⁸² files an action seeking to obtain a declaratory judgment on whether a 'common obligation' of the defendant enterprise exists concerning consumer contracts.¹⁸³ In case the Specified Qualified Consumer Organisation wins the first-stage, the common obligation of the enterprise having been affirmed, the second-stage proceedings for determining the

¹⁷² *ibid*, Arts 8–10 et seq. See above, at s IV.A.

¹⁷³ Only those Qualified Consumer Organisations certified by the Prime Minister can process this injunction.

¹⁷⁴ Art 4(1)–(4) of the Consumer Contract Act. See above at s II.A.ii.b.

¹⁷⁵ *ibid*, Art 4(3). See above at s II.A.ii.b.

¹⁷⁶ *ibid*, Art 4.

¹⁷⁷ This might be fairly unique. However, for a victimised consumer, no longer the injunction but rather the recovery of the damage seems more important.

¹⁷⁸ Above at s II.

¹⁷⁹ Above at s VIII.C.

¹⁸⁰ Act No 70 of 2013.

¹⁸¹ Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers' (Act No 96 of 2013) entering into force in 2016.

¹⁸² Specified Qualified Consumer Organisations are Qualified Consumer Organisations specially certified by the Prime Minister as those capable of proper performance of the court proceedings for consumer damage recovery (Act on Special Measures, Arts 65 et seq.). There exist four at present.

¹⁸³ This action is possible with regard to monetary payment obligations borne by an enterprise against a consumer which pertain to the following claims concerning consumer contracts: (1) a claim for performance of a contractual obligation; (2) a claim pertaining to unjust enrichment; (3) a claim for damages for non-performance of a contractual obligation; (4) a claim for damages based on a warranty against defects; and (5) a claim for damages based on the tort provisions of the Civil Code.

target (damages) claim commences. Each consumer now subscribes to the proceedings and delegates their power to the Specified Qualified Consumer Organisation, authorising it to bring an action for the consumer's claim. The Organisation then files these claims and if the defendant enterprise neither approves the claims, nor arrives at a mutual settlement, the court issues a simple determination order. This system tries to adjust to a common feature of the present-day consumer transactions that take place repeatedly with uniform products and services. For example, when a defect in a manufactured product causes damage, it often takes place in other products of the same type as well and tends to cause similar damages to many consumers, as far as their property damages are concerned – in contrast, damages as to personal injury resulting from the same product defect would vary significantly according to each case so that these human injury cases are exempted from application of this collective procedure. This is the reason why this procedure limits the target obligations narrowly and why the Act makes it necessary to check the existence of a 'common obligation' at the first stage. However, consumers would be reluctant to use the action whose successful result would only compensate the common damage among litigants but not the actual individual damage. The Government, faced with the fact that the mechanism is rarely used, has started to consider its reform.

B. Alternative Dispute Resolution¹⁸⁴

Japan has three types of alternative dispute resolution (ADR) which are available to consumers: judicial, executive and private. Here we focus on the successful executive type ADR, comprising national ADR and local ADR.

i. National ADR: Consumer ADR Committee of the National Consumer Affairs Center of Japan

The National Consumer Affairs Center of Japan (NCAC)¹⁸⁵ handles consumer issues in collaboration with the government and local consumer centres located throughout Japan. The NCAC not only provides advice to consumer counsellors working in local consumer centres and cooperates to resolve their cases, but since 2009, it has conducted ADR of its own, establishing the ADR Committee which has an independent authority to carry out mediation and arbitration to resolve important consumer conflict cases that are necessary to be solved on a nationwide scale. The summary of the outcomes of the mediation and arbitration procedures is released as necessary in order to prevent the occurrence of similar problems and to hold back the expansion of the existing problems.¹⁸⁶ The NCAC also inaugurated in 2015 the Cross-border Consumer Center

¹⁸⁴ S Kakiuchi, 'Die Förderung der außergesetzlichen Konfliktlösung in Japan' (2014) 37 *Zeitschrift für japanisches Recht* 3.

¹⁸⁵ See n 10.

¹⁸⁶ For a map showing the flow of the procedure up to the decision by the Consumer ADR Committee in National Consumer Affairs Center (NCAC), see www.kokusen.go.jp/e-hello/about_ncac/data/ncac_adr.html; www.kokusen.go.jp/adr/pdf/adr_1.pdf.

Japan (CCJ) for the purpose of handling increasing troubles between consumers in Japan and businesses outside Japan (Cross-border Consumer Troubles).¹⁸⁷

ii. Local ADR

The Basic Consumer Act provides that local governments shall endeavour to engage in such activities as the mediation of complaint processing between consumers and enterprises so that the complaints are appropriately and promptly dealt with based on expert knowledge.¹⁸⁸ Based on such provisions, Consumer Affairs Centers have been set up by prefectural and municipal governments. In the present, rapidly aging Japanese society and also at a time when the age of majority has been lowered from 20 to 18, the danger of victimisation of the elderly and young adults will be increasing, and the importance of these local consumer centres will grow as well.¹⁸⁹ The actual problems faced by these centres and the voices from consumer consulting practices all over the country will, by way of a National Consumer Affairs Center, become one of the important sources of inspiration for future legislative reforms.

C. Final Comment

Japan seems to have developed a fairly balanced consumer law system, as seen at the beginning of this chapter. In various consumer-related laws, the result of the difficult compromise between business and consumer interest can be observed. The tripartite governmental organs (including the Consumer Affairs Agency) have conspicuously taken on a leadership role since 2009, and the courts have played an important role as well. Nonetheless, significant procedural and practical hurdles remain for consumers and consumer organisations to obtain effective redress. Hence, it could be said that Japan still has a long way to go.

At the same time, one must also acknowledge the limits of what can be achieved through the actions by government organs. Although they can play an enabling role, ultimately, it is the alert, everyday consumer, who will lead the way towards true progress in our global consumer society.

¹⁸⁷ See www.kokusen.go.jp/pdf/n-20150305_2_2.pdf. The NCAC has started in 2018 a hotline, 'Consumer Hotline for Tourists' for foreign visitors to Japan, for dealing with complaints from foreigners about consumer products and services they purchased in Japan.

¹⁸⁸ Basic Consumer Act, Art 19(1). On consumer safety matters, Consumer Safety Act, Art 8(1)(ii)(a), (b) and (2)(i), (ii).

¹⁸⁹ Since 2015, a public telephone service, 'Consumer Hotline' (dial 188), has started which connects a call of any consumer to a local consumer centre nearby.

