Recent Trends in Private Antitrust Litigation in Japan[1]

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Introduction

In the past few years, private antitrust litigation has seen significant growth in Japan. Until recently, there were almost no cases in Japan in which plaintiffs successfully sought damages or injunctive relief from the harm caused by the anti-competitive acts of defendants, although several such private litigation actions were brought each year. However, a seminal case in 1998 dramatically altered the field of private antitrust litigation. In that case, defendants were ordered to pay approximately US $400,000 in damages—an amount equivalent to 5 per cent of the turnover of the cartel-related products—to a local government authority that was the victim of the anti-competitive act. In the years since this case was decided, more than half of all private suits for damages brought in the various courts of Japan have resulted in a judgment for damages in favour of the plaintiffs, with such damage judgments granting awards as high as 20 per cent of the turnover of the cartel-related products.

In this article we will provide an overview of the framework for private antitrust litigation in Japan. This will be followed by a discussion of recent changes in the legislation, recent cases as well as trends in the field of private antitrust litigation in Japan.

Overview of the framework for private antitrust litigation in Japan

Legislative framework for private antitrust litigation

Private antitrust actions are mandated by statute under the Act concerning the Prohibition of Private Monopolization and Maintenance of Fair Trade (Act 54 of 1947), as amended (the Anti-Monopoly Law (AML)), and under general tort law, pursuant to the Civil Code. Private antitrust actions can either be actions for damages or for injunctions. In addition, plaintiffs can seek to nullify agreements that are in breach of the AML, but this will not be treated in depth in this article.[2] We will initially discuss private antitrust actions for damages followed by actions for injunctions.

Actions for damages can either be initiated pursuant to the general rule of tort found at art.709 of the Civil Code or pursuant to arts 25 and 26 of the AML which provide for special rules of tort relating to suits for damages for anti-competitive acts. Article 25 provides that parties which have been found by the Japanese Fair Trade Commission (JFTC) to have engaged in a cartel or other unfair trade practices are liable to indemnify those injured by such practices.

Article 709 of the Civil Code provides the principles for general tort law, stating that those who violate the rights of another must compensate for the damage resulting from their actions. This is recognised to include anti-competitive acts, thereby authorising the bringing of private antitrust actions. Although it is not possible to request an opinion from the JFTC in relation to litigation pursuant to art.709 (such a possibility exists under a statute for litigation pursuant to arts 25 and 26 on the AML), the JFTC has stated that it will provide relevant documents, if requested to do so pursuant to an order to submit documents under the Civil Procedures Code.

A damages action pursuant to arts 25 and 26 of the AML may only be commenced after a final and conclusive decision of the JFTC, confirming the existence of a breach of the AML, has been given in relation to the matter. In the case of litigation based on art.25, plaintiffs are exempted from the requirement of proving wilfulness or negligence as to the violation of the AML, although this is required in the actions based on art.709 of the Civil Code. In addition, the court will de facto presume from the JFTC decision that the defendant violated the AML. In practice, it will be difficult for the defendant to rebut such a presumption except if the JFTC decision was taken without an administrative hearing procedure (*shinpan-tetsuduki*, see below). However, the final and conclusive JFTC decision does not bind the

1 The authors wish to thank Kentaro Hirayama and Daniel Nilsson for their contribution in writing this article.

2 Although the AML does not clearly state that an illegal agreement shall be deemed null and void, according to court precedents, breach of the AML shall be considered as an important factor in determining whether such contract is null and void based on a provision of the Civil Code which states that any act against public policy is void.

court in relation to the evaluation of: (1) the amount of damages; and (2) the existence of a causal relationship between the damages incurred and the illegal conduct.

In relation to actions for damages pursuant to art.25 of the AML, the court may—at its own discretion—ask for the opinion of the JFTC as to the amount of the damages. The JTFC has stated that, in cartel and bid-rigging cases, it produces opinions to the court as to damages based on the difference between the price of the product or service in question: (1) before the commencement of the cartel; and (2) during the cartel period. However, the court is not bound by the JFTC's opinion and there is a precedent in which the court used a calculation method different from that proposed by the JFTC. In addition, the JFTC does not always necessarily have enough information to be able to provide an appropriate opinion as to the likely amount of damages.

In art.709 litigations, it is not necessary for such a determination of guilt by the JFTC to exist. Without such determination the de facto presumption of illegal conduct does not exist and the plaintiff must prove the liability of the defendant at the trial. In practice, proving an infringement of the AML without the existence of a JFTC order is quite difficult so that very few plaintiffs have succeeded in such actions. The reason for this could be the lack of discovery procedures in Japan.

However, if a JFTC decision exists, the de facto presumption from that decision is the same as in litigation under art.25. Generally speaking, proving negligence as to the violation of the AML is usually not very difficult. In many art.709 litigation cases, once the infringement is proved, the court finds that the defendant infringed negligently the AML.

Private actions brought pursuant to arts 25 and 26 of the AML must be brought solely before the Tokyo High Court, which has a special division, consisting of five judges, that deals only with litigation with regard to the AML, acting as the court of first instance. These decisions may only be appealed to the Supreme Court. The Supreme Court rarely consents to revisit the factual determinations of the lower court, although it has the discretion to do so if it chooses. Actions brought under general tort are brought before the district courts, whose decisions may be appealed to the relevant high court. High courts must accept an appeal on both the factual determinations as well as to the interpretation of legal points by the lower courts. Such decisions may be further appealed before the Supreme Court.

Under Japanese law, injunctions are not generally available to plaintiffs. An injunction is only available: (1) if the law so prescribes; or (2) for torts which infringe certain kinds of interest (specified in case law). A private plaintiff may—in addition to seeking damages—seek an injunction against certain "unfair trade practices" (art.24 of the AML). Of the various "unfair trade practices" defined in the AML and additionally specified by the JFTC or in the AML,[3] the most commonly sought injunctions for "unfair trade practices" relate to price discrimination, below-cost sales and division of territories. When an art.24 of the AML suit has been filed, the court shall file a notice to the JFTC to that effect, in order for it to commence its own investigation into the same case. In addition, the court may, at its own discretion, ask for the opinion of the JFTC as to the application of the AML and other issues (art.83-3 of the AML).

As of January 2010, private plaintiffs have not prevailed in any of the 44 reported injunction cases.

Redress for damages caused by all types of antitrust violations may be sought in a private litigation action. A private action seeking an injunction, however, is limited under art.24 of the AML solely to claims of unfair trade practices on the part of the defendant.

Jurisdiction and procedures

With regard to actions in Japan as a whole, the nexus for bringing a private action is that the anti-competitive act or agreement by the defendant must have had some impact on the Japanese market. If the Japanese market has been affected by the act of agreement, conspiracy, etc. it is possible for those who suffer or are likely to suffer from such an act to bring an action before a court in Japan.

Japan has multiple courts, the relevant courts of general jurisdiction being the district courts located throughout the country. As stated above, private actions brought pursuant to arts 25 and 26 of the AML must be brought solely in the Tokyo High Court, acting as the court of first instance. Actions brought pursuant to art.709 of the Civil Code should be brought in the relevant district court. An appropriate nexus for the choice of a district court in a tort litigation is generally the court in the place where the conspiracy or act occurred (including where the damage of the tort occurred), or the place where the headquarters of the defendant are located. It is only possible to bring an action in one jurisdiction with regard to any single claim.

3 By the 2009 amendment (effective as of January 1, 2010), part of unfair trade practices are now specified in the AML and the rest of them remains specified in the JFTC ordinance.

Injunction litigations (including ones pursuant to art.24 of the AML) are initially brought in district courts.

In the past 10 years, the form of discovery system in the Japanese legal system was changed to extend its scope on a general basis based on the amendment to the Civil Procedures Code in 1996. Under this system, a plaintiff or defendant may request a court to order the other side to produce certain evidence to the court. If the court makes such an order, the party must comply and produce the evidence. In case of noncompliance, the court can determine that the allegation of the requesting party as to the contents of the relevant document is true. Although this discovery system is now utilised in some cases, it is limited in scope in comparison with the discovery procedures of the United States and some other legal systems.

Generally speaking in civil actions in Japan all evidence, including documentary or testimonial, is admissible before the court. There are limited exceptions, such as if the evidence was obtained by illegal activity (for example through illegal wiretapping). Nevertheless, the court would accept the evidence obtained by illegal activity, if: (1) that evidence is important; and (2) the illegality is not so significant.

The judge determines the weight or value to be ascribed to the evidence, which can include a conclusion that certain evidence has no weight or value. Each party to the litigation produces its own evidence, which is in general limited to evidence which the party either possesses or can obtain through independent means although it is possible for a party to request the court to order another party or a third party to produce information.

It should be further noted that an interested party can access, read and copy the final and conclusive criminal judgment record of an AML matter and of the JFTC decision record.

The criminal cases prosecuted by the public prosecutors are clearly distinguished from the civil cases against the defendant. Most cases in which there has been a criminal prosecution have been followed by private litigation against the relevant defendant, particularly in the past ten years during which plaintiffs have now had a good chance of prevailing at trial. However, in practice only a few criminal cases are brought to the courts in Japan with regard to AML violations (perhaps only one case every year). In contrast, administrative decisions of the JFTC regarding anti-competitive acts are common, with recent years seeing 20 to 30 JFTC decisions (cease-and-desist orders) a year. Such decisions allow for arts 25 and 26 private litigations and general tort litigation actions to be brought, and hence are a much more common connective source of private antitrust litigation in Japan. Private actions may rely on the judgment or decision rendered or evidence presented in a criminal proceeding or JFTC administrative proceeding.

Pursuant to art.26 para.2 of the AML, private actions brought pursuant to arts 25 and 26 must be brought within three years of the date of the relevant JFTC decision in the matter (i.e. the limitation period starts to run from the time the relevant JFTC decision becomes final and in case the administrative hearing procedure (*shinpan-tetsuduki)* does not commence, the cease and desist order becomes final 60 days after the issuance of the cease and desist order). Actions brought under general tort law pursuant to art.709 of the Civil Code must be brought either within three years of the date the victim or plaintiff became aware of the damages and of the identity of the perpetrator, or within 20 years of the date of the conspiracy or damaging act, whichever is earlier.

Remedies

Damages are limited to actual loss only, and only those that have a reasonable causation link to the harmful act or conspiracy. However, unlike in some other jurisdictions, damages can in principle be claimed by both direct and indirect purchasers, as long as they can show that they suffered loss because of the original harmful act or conspiracy.

In Japan, some of the largest damages are awarded in bid-rigging (*dango*) cases, in particular to local governments or public corporations that have suffered damage as a result of an agreement among bidding participants to agree in advance upon the successful bidder and the amount of the successful bid. Because of this, there has been a trend in recent times for local governments and public corporations to insert a clause in the project contract specifying a pre-agreed amount of damages to be paid if it is subsequently discovered that the successful bidder had participated in bid-rigging. Typically, the amount specified in such contracts is between 6 and 20 per cent of the contract value. The Tokyo Metropolitan Government and the Ministry of Land, Infrastructure, Transport and Tourism, for example, has been reported to stipulate a damages clause amounting to 10 per cent of the contract value, and many other local governments have followed such 10 per cent stipulation. Such pre-agreed amounts of damages seem to be based on the court judgments in general tort

litigations, in which the court found, in general, 5 to 10 per cent (and in rare cases, 20 per cent) of the contract value amounted to damages, using art.248 of the Civil Procedures Code which states the following:

> "Where it is found that any damage has occurred, if it is extremely difficult, from the nature of the damage, to prove the amount thereof, the court, based on the entire import of the oral argument and the result of the examination of evidence, may determine a reasonable amount of damage."[4]

Article 24 of the AML permits a person, whose interests are infringed or likely to be infringed by unfair trade practices and who is thereby suffering or likely to suffer serious damages to seek an injunction suspending or preventing such business from engaging in such infringements. When it comes to the interpretation of "serious" damages there exists some case law (high court judgments) however it is still not settled. This is partly because the judgments differ and partly due to the fact that an official of the JFTC stated at the Diet that this means that the quality and volume of damage is substantive. Both provisional and permanent injunctions are available.

Furthermore, restitution is rarely granted as a remedy, although restitution, at least in part, may be granted through an injunction to restore the injured party to the position it held prior to the commencement of the violation.

Fines (administrative surcharges) imposed by the JFTC are calculated as a percentage of the violator's turnover during the relevant period of time, multiplied (up to a maximum of three years) of the violation. The JFTC does not have any discretion as to the calculation of the amount of fines. The maximum percentage of the surcharges is currently 10 per cent and is considered to be a reasonable estimate of the profit margin among large manufacturers. Fines paid by violators are contributed to the Japanese national treasury and are not distributed to private parties injured by the violator's conduct.

By contrast, private rights of action under art.25 of the AML or art.709 of the Civil Code seek compensation for actual injury suffered. This may in some cases approximate the profit that the violator received from the injured party as a result of the illegal conduct. However, in civil actions, the focus is on the damage to the injured party and not on the gain by the wrongdoer. The purpose of monetary compensation under the Civil Code is to recover the loss suffered (i.e. to return the suffered party to its original state).

There is an issue under Japanese law as to whether the payment of both a fine and private compensation amounts to a double penalty, which is prohibited by Japan's Constitution. Although no case has decided this issue with respect to the current 10 per cent maximum fine, the Supreme Court held that no double penalty existed with respect to a 6 per cent fine under the previous version of the AML.

In general, each party must bear its own legal costs. However, to some extent legal costs are recoverable in cases brought under arts 25 and 26 of the AML and general tort under art.709 of the Civil Code. Generally, 10 per cent of the amount of the damages determined by the court is ordered by the court as recovery of legal costs.

If there are several defendants, in the event that one defendant is required to pay an entire damage award, that defendant may seek indemnification from the co-defendants and demand a contribution equivalent to their respective proportion of the damages. Such contribution is commonly sought in these cases. Naturally, the difficulty in such matters is distinguishing the degree of fault of the respective tortfeasors in determining their contribution.

Recent and forthcoming changes in the legislation regarding private antitrust litigation

The bill for the amendments of the AML passed the Japanese Diet in 2009 and it came into effect partly on July 10, 2009 and partly on January 1, 2010. The amendments relevant to private competition litigation include the following, all effective as of July 10, 2009:

> (1) Special rules for document production in private civil injunction suits are introduced under the new AML. In private litigation (including injunction suits) "trade secrets" and documents prepared exclusively for use by the holder thereof are generally exempt from the scope of the submission obligation pursuant to the Code of Civil Procedure. As a result, if the person/enterprise seeking an injunction to stop unfair trade practices requests submission of a document of the defendant (such as financial records and material contracts), the court may not issue such an order if the document includes "trade secrets" or documents prepared exclusively for use by the holder thereof pursuant to

4 Civil Procedures Code art.248.

the Code of Civil Procedure. The injunction regime has not worked well as it is difficult to seek an injunction to restrain unfair trade without an order for the submission of such documents. Thus, under the new AML, the court is able to issue an order to submit documents containing "trade secrets" or documents prepared exclusively for use by the holder thereof unless there is a justifiable reason for refusing the production. Note however: (i) that such document submission order is available only in art.24 litigation (i.e. not in damage compensation litigation); (2) that the purpose of proof by the targeted document is only "infringement" (i.e. not for the amount of damage); and (3) that such document submission order can be issued only against the party to the litigation (whereas third parties are subject to a submission obligation pursuant the Code of Civil Procedure). Whether or not there is "justifiable reason" is determined by weighing the demerits for the disclosing party of disclosure against those for the requesting party of non-disclosure. Simultaneously, under the new AML, provisions that allow the judge to issue a confidentiality order in relation to litigants who have access to "trade secrets" are also introduced. Similar to the penalties for IP laws, those who violate the confidentiality order may be punished by imprisonment (for not more than five years) or by a fine (of not more than JPY 5,000,000) or by both.
(2) Under the AML, interested parties (including the victims of the infringement which is subject to that case) may access or copy case records of the administrative hearing (*shinpan-tetsuduki*) (e.g. briefs, signed statements and other evidence produced by JFTC investigators and the addressee of the order) pertaining to decisions adopted by the JFTC. According to the case law the JFTC cannot limit the access unless there is a provision which allows such limitation. To protect personal information and commercial secrets, statutory provisions were introduced under the new AML, which allow the JFTC to restrict interested parties' access to case records if there is a justifiable reason for such restriction, in particular where the granting of such access would be detrimental to a third party. The JFTC may, when allowing the request, impose appropriate conditions such as restricting the purpose of utilisation of that copy. An example of "appropriate conditions" in an international cartel case would be that the JFTC would prohibit copies of orally submitted statements made by leniency applicants (JFTC investigators take note of such oral reports and will submit them at the administrative hearing (*shinpan-tetsuduki*)). Without such protection, copies of documents taken could be utilised as supporting evidence in civil litigation action conducted outside Japan.

Recent developments and cases

Cases

On February 17, 2009, the Supreme Court rejected Yamato Transport's appeal against a Tokyo High Court ruling that dismissed its complaint based on art.24 of the AML that Japan Post's service (the parcel delivery service in a tie-up with the convenience store chain Lawson Inc) poses "unfair low price" sales defined as:

> "[W]ithout proper justification, supplying a commodity or service continuously at a price which is excessively below cost incurred in the said supply, or otherwise unjustly supplying a commodity or service at a low price, thereby tending to cause difficulties to the business activities of other entrepreneurs."

The lower courts ruled that "cost" in this context is understood to be the sum of the cost of production or purchase plus general operating expenses (such as selling and administrative expenses) and the Japan Post is not charging prices below "cost".

In June 2009, the JFTC investigated Seven-Eleven's practices and agreements with its franchisees. Under those franchise agreements, the franchisees bear the cost of losses incurred from unsold lunch boxes and other perishables whose date of validity has or is about to expire. In addition, the contracts provide that the franchisees are free to set the prices of those goods. Despite the wording of those agreements, the JFTC's investigation led it to conclude that Seven-Eleven's practice of discouraging discounts constituted a violation of the AML. The JFTC issued a cease and desist order forcing Seven-Eleven to stop the unfair restrictions on franchisee discounts. The legal basis for the order was abuse of dominant bargaining position. Seven-Eleven did not object to the JFTC's decision.

On September 29, 2009, seven franchisees of the major Japanese convenience store Seven-Eleven Japan Co filed a lawsuit with the Tokyo High Court, seeking about JPY 200,000,000 in damages for loss of profits caused by unfair restrictions on discounting. The lawsuit is based on the AML. The seven plaintiffs argued that

they could have sold more bento lunch-boxes and other perishables if they had been allowed to mark them down close to their expiration dates. The practices in question have, according to the plaintiffs, allegedly been going on since approximately 1990. In addition, another franchisee was reported to have filed a lawsuit based on art.709 of the Civil Code.

In December 2008, the Tokyo District Court ruled that USEN Corp (a broadcasting company) has violated the prohibition of Private Monopolization (art.3 of the AML) and thereby deprived consumers of its competitor (CANSYSTEM.CO. Ltd), and ordered it to pay approximately JPY 2,100,000,000 (equivalent to approximately €17 million) to CANSYSTEM, based on art.709 of the Civil Code. Both USEN and CANSYSTEM have appealed to the Tokyo High Court. The finding of facts by the Tokyo District Court was in line with that of by the JFTC in the cease-and-desist order issued against USEN in 2004.

Developments and trends

The key trend in the field of private antitrust litigation in Japan continues to be the increasing ability of plaintiffs to prevail at trial and the larger amounts being awarded as damages in such actions. As mentioned above, until 10 years ago it was rare for a plaintiff to prevail in such litigation. The decisive case of 1998, referred to in the introduction in which the resident plaintiffs prevailed on behalf of their local government, has opened the door for plaintiffs to successfully bring such actions and win them on the merits of the case. As a result, the number of private antitrust actions is increasing in Japan, and this trend can be expected to continue.

Also, certain shareholders of major public companies, who are often members of a not-for-profit organisation named the Shareholder Ombudsman, have been actively pursuing shareholders' derivative actions against directors, etc. of companies who have violated the AML. Recently, shareholders of a leading marine constructor won a settlement in a shareholder derivative action. The antitrust violation case underlying the action is a case in which the JFTC issued an order for the company to pay a surcharge of JPY 74,620,000 (and for four other conspirators to pay JPY 92,510,000) for engaging in bid rigging in relation to the construction of breakwaters ordered by a local government. According to the Shareholder Ombudsman, the settlement terms include that the defendants (the company's directors, etc.) shall pay JPY 88,000,000 to the company, the company shall establish a compliance committee to prevent bid-rigging, which shall include a member who is an ex-official of the JFTC as recommended by the plaintiffs, and the company shall use the settlement money for the promotion of compliance, including the establishment and operation of the committee and a hotline for whistleblowers. In recent derivative actions, courts have ordered the JFTC—upon requests by plaintiffs—to submit signed statements of executives and employees of the defendants. Although the JFTC initially resisted the courts' orders on the basis that these statements had not been submitted to the administrative hearing procedure and thus needed to be kept confidential, the courts finally ordered the submission of almost all of the documents requested by the plaintiffs.