

Private Antitrust Litigation

Consulting editor
Francesca Richmond



2019

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Private Antitrust Litigation 2019

Consulting editor
Francesca Richmond
Baker McKenzie LLP

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Preface

Private Antitrust Litigation 2019

Sixteenth edition

Getting the Deal Through is delighted to publish the sixteenth edition of *Private Antitrust Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Greece and Norway.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the consulting editor, Francesca Richmond of Baker McKenzie LLP, for her continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
July 2018

Japan

Hideto Ishida and Takeshi Suzuki

Anderson Mōri & Tomotsune

Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

In 1998, a dramatic change in the development of private antitrust litigation in Japan took place. Before this, there were almost no cases in Japan in which plaintiffs seeking damages or injunctive relief from the harm caused by the anticompetitive acts of defendants had prevailed in such an action, although several such private litigations were brought each year. However, this seminal case dramatically altered the field of private antitrust litigation.

In that case, defendant manufacturers were ordered to pay approximately US\$400,000 in damages, equivalent to 5 per cent of the turnover of the cartel-related products, to the plaintiffs, who were private residents suing on behalf of a local government authority that was the victim of the anticompetitive 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 plaintiff, with judgments for damages as high as 20 per cent of the turnover of the cartel-related products. More recently, in March 2007, the Tokyo District Court rendered a judgment against three large Japanese corporations and ordered them to pay a total of ¥9.7 billion for damages incurred by the Tokyo metropolitan government as a result of illegal acts occurring between 1994 and 1998; two of the three corporations settled this case in the Tokyo High Court in April 2009, where they agreed to pay approximately ¥7.5 billion to the Tokyo metropolitan government. The Supreme Court also ordered five corporations that engaged in cartel conduct to pay a total amount of ¥5.5 billion for damages incurred by the Yokohama, Kobe and Fukuoka local governments in April 2009. Further, in March 2011, the Tokyo District Court ordered a defendant to cease and desist illegal activities that violated an 'interference against a competitor' under unfair trade practices of the Antimonopoly Law. It is a recent tendency for corporations listed on a stock exchange to seek damages arising from anticompetitive acts before a court, or outside court, in order to avoid the potential risk of a shareholder making a derivative litigation. Likewise, there has recently been more derivative litigation against the directors of companies guilty of cartel behaviour alleging, in particular, that damages were caused against the company by having chosen not to apply for leniency.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Yes. Private antitrust actions are mandated by statute under the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended (the Antimonopoly Law)), and are also possible under general tort law, pursuant to the Civil Code of Japan. The standing to bring a claim is not limited to those directly affected but includes those indirectly affected under both the Antimonopoly Law and the Civil Code.

Also, pursuant to a 2001 amendment to the Antimonopoly Law, a private plaintiff may, in addition to seeking damages, seek an injunction against certain 'unfair trade practices'. The Antimonopoly Law provided for, and the Japanese Fair-Trade Commission (JFTC) has

designated under the authority of the Antimonopoly Law, many unfair trade practices such as exclusive dealing, price discrimination, below-cost sale, tie-in, resale prices maintenance, refusal to deal, division of territories, etc. Among these, private plaintiffs have most commonly sought injunctions for price discrimination, below-cost sales and division of territories. However, private plaintiffs have not prevailed in many injunction cases.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Articles 25 and 26 of the Antimonopoly Law relate to suits for damages for anticompetitive acts. Article 25 provides that parties that have monopolised or engaged in a cartel or other unfair trade practices are liable to indemnify those injured by such practices.

Article 709 of the Civil Code of Japan provides the principles for general tort law, stating that those that violate the rights of another must compensate for damage resulting from their actions. This is recognised to include anticompetitive acts, thereby authorising the bringing of private antitrust actions.

There are two possible ways to bring an action seeking monetary compensation, the distinction between the two being the burden of proof applicable to each. Article 26 of the Antimonopoly Law provides that the right to claim damages under articles 25 and 26 of the Antimonopoly Law may not be asserted in court until a relevant order (such as a cease-and-desist order) by the JFTC has become final and binding (which means that the judgment also needs to become final and binding if a defendant challenges the relevant order by the JFTC at court). However, when such an order exists, the plaintiff in a related private litigation need not prove the existence of intention or negligence of the defendant as to the relevant infringement of the Antimonopoly Law, given that such a determination will already have been made in the prior JFTC decision. However, in article 709 litigation, no such JFTC determination of guilt will exist; therefore, the plaintiff must prove the existence of intention or negligence of the defendant at trial.

As stated in question 2, a private plaintiff may, in addition to seeking damages, seek an injunction against certain unfair trade practices (article 24 of the Antimonopoly Law).

The Antimonopoly Law was amended in December 2013 and the new Antimonopoly Law was put into force in April 2015. In this regard, the court of first instance for private actions brought pursuant to articles 25 and 26 of the Antimonopoly Law was changed from the Tokyo High Court to the Tokyo District Court. However, a plaintiff must still bring private actions pursuant to articles 25 and 26 of the Antimonopoly Law before the Tokyo High Court when the action is based on a JFTC order that became final and binding on or before 31 March 2015. The Tokyo District Court decisions may only be appealed to the Tokyo High Court, and the decision on appeal may be further appealed to the Supreme Court of Japan, similar to actions brought under general tort, although the court of first instance for general tort actions is not limited to the Tokyo District Court and the district decision may be appealed to the relevant high court. High courts must accept an appeal on both the factual determinations and the interpretations of law by the lower court. As above, the decision on appeal may be further appealed to the Supreme Court. The Supreme Court rarely agrees to revisit the factual determinations of the lower court, although it has the discretion to do so if it chooses. Injunction litigations are initially brought in district

courts. The amendment to the Antimonopoly Law does not change the timing that a plaintiff can bring an action under articles 25 and 26 of the Antimonopoly Law, which means that a relevant order by the JFTC must become final and binding for damage claims under articles 25 and 26 of the Antimonopoly Law.

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Redress for damages caused by all types of antitrust violations may be sought in a private litigation. However, under article 24 of the Antimonopoly Law, a private action seeking an injunction is limited solely to claims of unfair trade practices on the part of the defendant, as stated in question 2. A finding of infringement by the JFTC is not required to initiate a private antitrust action.

In principle, a civil court is not bound by any determination of the JFTC regarding misconduct by a defendant. However, if a JFTC order has become final and binding, it is, as a matter of practice, likely that the facts determined by the JFTC will be given some weight in a private litigation. In addition, as explained in question 3, when such an order exists, a plaintiff can assert the right to claim damages under articles 25 and 26 of the Antimonopoly Law, under which the plaintiff in a related private litigation need not prove the existence of intention or negligence of the defendant as to the relevant infringement of the Antimonopoly Law, given that such a determination will already have been made in the prior JFTC decision. Without a final and binding JFTC order, a plaintiff claiming damages must choose article 709 of the Civil Code as its legal basis and must prove the existence of intention or negligence of the defendant as to the relevant infringement. Having said that, since the presumption of fact based upon the JFTC's findings may be accepted to some extent, in practice, past claims are mainly based on the findings of infringement by the JFTC.

As explained in question 12, some cases are referred by the JFTC to public prosecutors for criminal prosecution. A plaintiff in a private action may rely on findings in criminal proceedings concerning the relevant infringement. Although a civil court is not bound by the findings in criminal proceedings, it would be difficult for the defendant to rebut the findings unless new and definite evidence is submitted in the private litigation.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

With regard to actions in Japan as a whole, the nexus for bringing a private action is that the anticompetitive 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 to bring an action before a court in Japan. If a claim for damages is based on the Antimonopoly Law, it must be brought solely in the Tokyo District Court and, if a claim is based on general tort, it must be brought in a district court pursuant to the general rule of jurisdiction under the Civil Procedures Law. If a plaintiff would like to bring an action for damages to a district court other than the Tokyo District Court, the plaintiff must choose article 709 of the Civil Code as its legal basis.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes. Provided that such actions have an impact on the Japanese market.

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

Litigation may be funded by third parties and contingency fees are available. In fact, most cases of private antitrust litigation are on a contingency basis. The number of corporations, in particular, public corporations, that have brought such cases for damages is increasing as stated in question 1, in which a time-charge basis may be used by such public corporations.

8 Are jury trials available?

No. Jury trials are not available in private antitrust litigation. A lay judge system was introduced in May 2009, but it is used for serious criminal cases only.

9 What pretrial discovery procedures are available?

During the past 10 years and more, the Japanese legal system's form of discovery has been changed in order to generally extend its scope under the Civil Procedures Law. Under the system, a plaintiff or defendant may request that the court orders the other side to submit certain evidence to the court. If the court so orders, the party must comply and submit the evidence. While this discovery system is utilised in some cases, it is limited in scope under articles 132-4 and 220 of the Civil Procedures Law in comparison with the discovery procedures of the US and some other systems. There have also been amendments made to the Antimonopoly Law since January 2010, which state that only a plaintiff seeking an injunction may request the court to order the defendant to produce relevant evidence that assists in establishing illegal activities (article 80 of the Antimonopoly Law).

10 What evidence is admissible?

In civil actions in Japan, in general, all evidence, including documentary or testimonial evidence, will be admissible. There are limited exceptions, such as if the evidence was obtained by illegal activity. The judge determines the weight or value to be ascribed to the evidence, which can include a conclusion that certain submitted evidence has no weight or value. Each party to the litigation submits its own evidence, which is in general limited to evidence that the party either possesses or can obtain through independent means; although, as mentioned in question 9, it is possible for a party to request the court to order another party to produce information. An 'e-discovery' system is not common in Japanese court or even in JFTC procedures.

11 What evidence is protected by legal privilege?

In seeking damages, there is no generally applicable rule regarding attorney-client privilege and attorney-work products in Japan. However, in civil litigation procedures relating to testimony and submission of documents, legal counsel (including in-house counsel) can refuse to testify or submit a document regarding facts that have come to their knowledge during the course of performing their duties and that should be kept secret. In seeking an injunction, trade secrets are protected to some extent under article 81 of the Antimonopoly Law.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

Yes. The JFTC transfers criminal cases to public prosecutors for prosecution. In such cases, private litigation may still proceed, as civil cases are clearly distinguished from criminal proceedings in Japan. We further note that in most cases in which there has been a criminal prosecution followed by private litigation against the relevant defendant, plaintiffs have had a good chance of prevailing at trial.

However, it must be noted that in practice, few criminal cases are brought in Japan with regard to antimonopoly violations (perhaps only one case every two years). In contrast, administrative decisions of the JFTC regarding anticompetitive acts are common, and recently there have been 10 to 20 JFTC orders each year. As noted, orders that have become final and binding allow for article 25 and 26 private litigations to be brought, and hence are a much more common connective source of private antitrust litigation in Japan.

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Evidence and findings in criminal proceedings can be relied on by plaintiffs in parallel private actions. Private actions may rely on the judgment or decision rendered or evidence presented in a criminal proceeding (even including JFTC administrative proceeding). Applicants for leniency are not protected from follow-on litigation. In most private actions, leniency applicants were defendants.

Update and trends

For the past eight or nine years, individual executives in large corporations have often lost cases in derivative litigation where shareholders sought from them damages incurred by the corporations for participation in cartels owing to the executives' misconduct, alleging that the executives failed to prevent a cartel or to use the leniency system. Executives, as individuals, paid ¥88 million, ¥230 million, ¥160 million and ¥140 million in 2010 and ¥520 million 2014 in settlement monies in courts to their corporations, in addition to the arrangement of more efficient compliance programmes. These examples show that pressure from shareholders in public corporations in relation to illegal cartels is significantly increasing in Japan.

A bill including the introduction of the commitment system, under which suspicion of violation of the Antimonopoly Law is voluntarily resolved by an agreement between the suspected undertaking and the JFTC, was passed at the national Diet in December 2016. The commitment system is more or less same as the one under the EU competition regime. Once it has been introduced, it is predicted that many unilateral conducts will be resolved through the commitment system. If so, there will be a few cases where the JFTC issues orders in which illegal conducts are determined, on which plaintiffs currently rely for their private actions; in particular, articles 25 and 26 private litigation. However, since the bill including the introduction of the commitment system is related to Trans-Pacific Strategic Economic Partnership Agreement (TPP), it must be passed at the national Diet with some amendments owing to the US President Trump's decision to withdraw US participation in TPP. The Japanese government aims to pass another bill for introduction of the commitment system at the national Diet this year.

The JFTC has a general policy to disclose, at its discretion, the documents obtained in its administrative investigation (except leniency procedures) to private claimants.

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Generally, there is no statutory right for a defendant to stay proceedings. If a defendant's petition is made in the court, the court may decide at its discretion whether to grant the stay.

If a plaintiff seeks damages under article 25 of the Antimonopoly Law, such suit is only allowed after the relevant order by the JFTC is finalised, and only when a defendant cannot challenge the existence of the violation of the Antimonopoly Law any further (article 26 of the Antimonopoly Law). Accordingly, if a suit is allowed, the court will be highly likely to deny a defendant's petition for a stay.

On the other hand, if a suit is brought as a general tort under article 709 of the Civil Code, as a matter of general practice, the court is likely to grant the defendant's petition for a stay of proceedings only after the decision by the JFTC has been finalised and completed.

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

Generally, although there is no clear applicable standard of proof, the claimant, whether a direct purchaser or not, has the burden of proof to the extent of the preponderance of the evidence. As to the finding of the amount of damages, in cases where it is determinable that damages have arisen and if it is extremely difficult for the claimant to prove the amount owing to the nature of the damages, the court may determine a proper amount of damages on the basis of the entire import of the oral argument and the result of the examination of evidence under article 248 of the Code of Civil Procedure. In general, there are no rules of thumb or rebuttable presumptions even relating to overcharges of cartels.

As noted above, actions brought pursuant to articles 25 and 26 of the Antimonopoly Law will have the benefit of a determination by the JFTC regarding the existence of intention and negligence of the defendant. Therefore, in these actions the defendants are liable for damages without negligence, provided that other requirements are fulfilled.

In actions brought pursuant to article 709 of the Civil Code, no such JFTC determination exists; therefore, the plaintiff has the burden at trial of proving the existence of intention and negligence of the defendant.

Although a civil court is not bound by any determination of the JFTC regarding misconduct by a defendant, if a JFTC order has become final and binding, it is likely that the facts determined by the JFTC will be given some weight in a private litigation. Since this assumption is not based on any provisions of law, there is no difference in terms of such presumption between actions pursuant to articles 25 and 26 of the Antimonopoly Law or article 709 of the Civil Code.

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

No class proceedings may be brought in Japan. For non-class proceedings, actions brought in a district court typically require a period of between one and two years to resolve. Actions brought in a high court typically require six months to one year to resolve. In general, there is no mechanism for accelerating the proceedings. However, in recent years, the Japanese courts have generally sought to shorten the time required to reach a judgment in a case.

17 What are the relevant limitation periods?

Pursuant to article 26, paragraph 2 of the Antimonopoly Law, private actions brought pursuant to articles 25 and 26 must be brought within three years of the date of the finalisation of the relevant JFTC order in the matter (ie, the limitation period starts to run from the finalised date of the relevant JFTC order). Actions brought under general tort, pursuant to article 709 of the Civil Code, must be brought either within three years of the date on which the victim or plaintiff became aware of the conspiracy or act that caused the damage, or within 20 years of the date of the conspiracy or damaging act, whichever is earlier.

18 What appeals are available? Is appeal available on the facts or on the law?

As mentioned in question 3, actions pursuant to articles 25 and 26 must be brought solely in the Tokyo District Court. The Tokyo District Court decisions may only be appealed to the Tokyo High Court, and the decision on appeal may be further appealed to the Supreme Court of Japan. The Tokyo High Court must accept an appeal on the factual determinations as well as the interpretations of law of the Tokyo District Court. The Supreme Court rarely agrees to revisit the factual determinations of the lower court, although it has the discretion to do so if it chooses. Actions under general tort, as well as actions seeking an injunction under article 24 of the Antimonopoly Law, are brought in district courts, and the decisions of which may be appealed to the relevant high court.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

No. Class proceedings are not available in Japan.

20 Are collective proceedings mandated by legislation?

Not applicable.

21 If collective proceedings are allowed, is there a certification process? What is the test?

Not applicable.

22 Have courts certified collective proceedings in antitrust matters?

Not applicable.

23 Can plaintiffs opt out or opt in?

Not applicable.

24 Do collective settlements require judicial authorisation?

Not applicable.

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable since class or collective proceedings are not available. Japan has multiple courts, with the relevant courts of general jurisdiction being the district courts located throughout the country. Above the district courts are the related high courts. Private actions brought pursuant to articles 25 and 26 of the Antimonopoly Law must be brought solely in the Tokyo District Court, as the court of first instance.

Actions brought pursuant to article 709 of the Civil Code will be brought in the relevant district court. An appropriate nexus for the choice of a district court is generally the court in the locale where the plaintiff's residence or corporate headquarters is located, the place where the conspiracy or act occurred, or the place where the headquarters of the defendant is located. It is only possible to bring an action in one jurisdiction in regard to any claim.

26 Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

Damages are limited to actual loss only, and only the loss that has 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 cases, and 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 recent trend 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. For example, it has been reported that the Tokyo metropolitan government stipulates a damages clause amounting to 10 per cent of the contract value, and many other local governments have followed this 10 per cent stipulation.

28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Article 24 of the Antimonopoly Law permits a person, whose interests are infringed upon or likely to be infringed upon by unfair trade practices, as stated in question 2 and who is thereby suffering or is likely to suffer serious damages, to seek an injunction suspending or preventing the party from engaging in such infringements. Both provisional

(interim) and permanent injunctions are available although the burden of proof is less in provisional dispositions than in permanent injunctions.

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

29 Are punitive or exemplary damages available?

No.

30 Is there provision for interest on damages awards and from when does it accrue?

Yes. The court must award interest at the rate of 5 per cent per year from the time of the damaging act or conspiracy until the defendant makes the payment.

31 Are the fines imposed by competition authorities taken into account when setting damages?

No. Fines (administrative surcharges) imposed by competition authorities are calculated as a percentage of the violator's turnover of related product or products during the relevant period up to three years. The percentages are different in manufacturers, wholesalers, retailers and type of violations. The highest percentage is 10 per cent to manufacturers that participated in a cartel. Fines paid by violators are contributed to the Japanese national treasury and are not distributed to private parties injured by the violator's conduct. Therefore, the court does not take into account the fines imposed by the JFTC at all.

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

In general, each party must bear its own legal costs.

33 Is liability imposed on a joint and several basis?

Yes. Tortfeasors are generally liable for actual damages on a joint and several basis.

34 Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Yes. If there are several defendants, in the event that one defendant is required to pay an entire damages award, that defendant may seek indemnification from the co-defendants and demand a contribution equivalent to their respective proportion of the damages. Such a contribution is commonly sought in these cases.

A defendant who paid the whole or a part of damages can seek indemnification from the co-defendants in or out of court, provided that, in order for the defendant to assert such claims, the amount paid by the defendant to a victim or plaintiff must exceed the amount for which the defendant is liable. The claim for indemnification from the co-defendants is brought in separate proceedings from the principal claim and normally pursued after a judgment or settlement of the principal claim.

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35 Is the 'passing on' defence allowed?

The passing-on defence may be taken into account, although not by that name. In Japanese civil litigation, an award of damages must compensate for the injury actually suffered by the plaintiff. This stems from the underlying principle that the purpose of private actions is to compensate for a loss, not to act as a deterrent. Based on this, if a direct purchaser passes an overcharge down the supply chain, it may still have difficulty showing the non-existence of an injury.

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

No.

37 Is alternative dispute resolution available?

In theory, private claims for violation of the Japanese Antimonopoly Law may be resolved by agreement through arbitration. Although any such arbitration that has occurred under confidential conditions would not be publicly reported, we believe that there has been almost no such arbitration or alternative dispute resolution used in Japan for Antimonopoly Law claims. This is because the Antimonopoly Law is a 'national and public law' in Japan and any matters arising under it are, as a matter of practice, generally submitted to the JFTC regardless of whether such private claims are settled through arbitration.

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