The International Comparative Legal Guide to:

Competition Litigation 2019

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Japan

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

In Japan, the scope of private actions that may be brought for breach of competition law includes (i) claims for compensation of damage arising from breach of competition law, and (ii) petitions for injunction to demand suspension or prevention of actions in breach of completion law.

In addition, an addressee of a cease and desist order or an administrative surcharge payment order rendered by the Japan Fair Trade Commission (the "JFTC") may file a complaint with the Tokyo District Court to challenge such JFTC order. Prior to the amendment to the Antimonopoly Act which became effective as of April 1, 2015 ("2015 Amendment"), complaints to challenge JFTC orders were examined through administrative proceedings presided by the administrative judges appointed and authorised by the chairperson and commissioners of the JFTC.

1.2 What is the legal basis for bringing an action for breach of competition law?

(i) Actions for compensation for damage

Any person who suffered damage by conduct that constitutes a private monopolisation, an unreasonable restraint of trade or an unfair trade practice in violation of the Antimonopoly Act is entitled to bring an action seeking compensation for damage to the court on the grounds of either (i) strict liability under Article 25 of the Antimonopoly Act, or (ii) general tort under Article 709 of the Civil Code. Even indirect purchasers have legal standing to file a lawsuit to claim damages arising from a cartel in violation of the Antimonopoly Act.

A private action to recover unjust enrichment based on Articles 703 and 704 of the Civil Code may be available, depending on the circumstances.

(ii) Actions for injunction

Under Article 24 of the Antimonopoly Act, any person whose interests are infringed or are likely to be infringed by violation of Article 8, Item 5 (i.e., activities by a business association that cause a member entrepreneur to employ unfair trade practices) or Article 19 (i.e., unfair trade practices by an entrepreneur) is entitled to demand suspension or prevention of such infringement from an entrepreneur or a business association if such person suffers or is likely to suffer material damages by such conducts.

In the event that an action for the aforementioned injunction is filed pursuant to Article 24 of the Antimonopoly Act, the court shall send a notice to the JFTC and may request the JFTC to provide its opinion on the application of the Antimonopoly Act and other necessary matters. In order to avoid an abuse of right to injunction, the court may order the plaintiff to furnish an adequate security deposit at the request of the defendant.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is derived from Japanese law in principle.

Under Japanese choice-of-law rules, competition law claims can be brought to Japanese courts based on foreign law if the court determines that the result of the relevant tortious act has occurred in the foreign jurisdiction. However, if facts to which the foreign law should be applied do not constitute a tort under Japanese law, no claim under the foreign law may be made for damages or any other remedies. Even if facts to which the foreign law should be applied constitute a tort both under the foreign law and Japanese law, the victim may make a claim only for damages or any other remedies that may be permitted under Japanese law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

Private actions may be brought in district courts in accordance with the Code of Civil Procedure in principle, while the Tokyo District Court is the court of first instance that has the exclusive jurisdiction on claims for compensation for damage under Article 25 of the Antimonopoly Act. The Tokyo District Court also has the exclusive jurisdiction as the court of first instance over a complaint to challenge a cease and desist order or an administrative surcharge payment order rendered by the JFTC.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

Any person who suffered damages due to a defendant's conduct in violation of the Antimonopoly Act (e.g., competitors and customers) may file a complaint for compensation for damage.

Any person whose interests are infringed or are likely to be infringed by violation of Article 8, Item 5 (i.e., activities by a business association that cause a member entrepreneur to employ unfair trade practices) or Article 19 (i.e., unfair trade practices by an entrepreneur) of the Antimonopoly Act may file a petition for an injunction pursuant to Article 24 of the Antimonopoly Act.

Neither collective claims nor class actions are permitted under Japanese law with regard to the violation of the Antimonopoly Act. Under the Code of Civil Procedure, if rights or obligations, which are the subject matter of the lawsuits, are common to two or more persons or are based on the same factual or statutory cause, these persons may sue as co-plaintiffs. The same shall apply where rights or obligations, which are the subject matter of the lawsuits, are of the same kind and based on the same kind of factual or statutory causes. These schemes can be used by multiple claimants in bringing competition law claims before the civil court proceedings.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Code of Civil Procedure provides the basic jurisdictional rules. For instance, a court having jurisdiction over the location of a defendant's principal office/domicile has jurisdiction over claims brought against the defendant. A court having jurisdiction over the place of violation of the Antimonopoly Act also has jurisdiction over claims based on such violation. Furthermore, the Antimonopoly Act provides that if an action for injunction under Article 24 thereof is brought in a local district court, the case may be transferred to the Tokyo District Court or one of the other seven major district courts, and that the Tokyo District Court has the exclusive jurisdiction on claims for compensation for damage under Article 25 of the Antimonopoly Act. If more than one court has jurisdiction, the claimant may choose the court where the claims are heard, in principle.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

We are of the view that Japan does not have a system that attracts claimants or defendant applications to seize jurisdiction over civil cases. First, Japanese law does not provide claimants with a favourable judicial system such as class actions, discovery, treble damages or exemplary damages against defendant(s) who violated the Antimonopoly Act. Secondly, while the Code of Civil Procedure regulates the jurisdiction of Japanese courts over cases with foreign elements, it does not tend to provide broad jurisdiction, in that the law relatively strictly requires a close relationship between the venue (i.e., Japan) and the key factor(s) involved in each case (such as the domicile of the defendant or the place where the tort is committed) in order for the case to be covered by the jurisdiction of Japanese courts. Furthermore, a Japanese court can deny its jurisdiction over cases with foreign elements if it considers, taking into account the nature of the case, the defendant's burden of responding to the complaint and location of the evidence, that there are special circumstances which impede fairness of the parties' or fair and prompt hearing procedures. The foregoing circumstances do not allow Japanese courts to attract claimants and defendant applications to seize jurisdiction.

Having said that, there are certain provisions under the Antimonopoly Act that assist plaintiffs in their civil actions seeking the recovery of damages or injunction and plaintiffs may consider using such assistance. For instance, the JFTC provides its opinion regarding the amount of damage to the court that handles damage claims based on Article 25 of the Antimonopoly Act, and also provides its opinion with respect to the application of the Antimonopoly Act and other necessary matters if a lawsuit for an injunction has been filed under Article 24 of the Antimonopoly Act.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial for civil actions for compensation for damages or injunctive relief. The court judges will hold hearings where both parties attend and submit their factual and legal arguments and evidence supporting the arguments before the court. While the facts admitted by the opposing party require no evidence and shall bind the court and both parties, the facts denied by the opposing party must be proved by evidence submitted by the parties. The court then holds examination of witnesses where, in general, witnesses are subject to direct examination plus cross-examination in relation to the matters raised during direct examination. After concluding the examination of witnesses, the court closes the hearing procedures and then moves to rendition of judgment.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

A claimant may file with a competent district court a petition for preliminary injunction to suspend or prevent the conducts that violate or are likely to violate the Antimonopoly Act pursuant to the Civil Code and the Civil Preservation Act.

In addition, when an addressee of a cease and desist order or an administrative surcharge payment order rendered by the JFTC files a complaint to challenge such JFTC order, the addressee may file a petition to suspend the enforcement of the JFTC order in accordance with the Administrative Case Litigation Act.

2.2 What interim remedies are available and under what conditions will a court grant them?

As mentioned in question 2.1, preliminary injunction is a possible interim remedy for competition law claims. Generally, a petitioner must show that (i) there is a "necessity" for the preliminary injunction, in addition to that (ii) there are causes of actions for the claims to be protected, based on *prima facie* evidence. Furthermore, the court will require that the petitioner furnish a security deposit in advance of the rendition of an order of preliminary injunction.

In order to obtain the court order of suspension of enforcement of the JFTC order under the Administrative Case Litigation Act, the petitioner is required to demonstrate that there is an urgent necessity to avoid grave damage to be caused by the enforcement of the JFTC order. However, it is considered practically difficult to obtain such order, since the aforementioned requirement of "urgent necessity" would hardly be fulfilled.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

The final remedies available for private claimants are compensation

for damage and injunction. In order to obtain a final judgment in favour, private claimants must at least prove the facts consisting of the causes of action. It is not necessary to prove the facts which have been admitted by the defendant.

For damage claims based on the violation of the Antimonopoly Act, plaintiffs must prove: (i) the illegality of the defendant's conduct; (ii) damages; (iii) causal relationship between the damage and the illegal conduct; and (iv) negligence or wilfulness of the defendant. It is not necessary to prove negligence or wilfulness of the defendant when claiming damages based on Article 25 of the Antimonopoly Act.

For claims for injunction based on Article 24 of the Antimonopoly Act, plaintiffs must prove that: (i) the defendant's conduct falls under certain types of unfair trade practices in violation of Article 8, Item 5 or Article 19; (ii) the plaintiffs' interests are infringed or are likely to be infringed; and (iii) the plaintiffs suffer or are likely to suffer "material" damages by such conduct.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

In general, the court determines the amount of award based on the amount of actual damage suffered by a plaintiff. Neither treble damages nor exemplary damages are available under Japanese law.

With respect to the amount of damage arising from cartel conducts, the Supreme Court decision of December 8, 1989 held that the damages shall be the difference between the actual sales price and the sales price that would have been formed but for the cartel in question ("expected sales price") and that the sales price immediately before the cartel can be presumed to be the expected sales price unless significant changes in economic factors such as economic conditions and market structures occur between the time of the cartel and the time when customers purchase the goods at issue.

The Supreme Court decision also held that plaintiffs must prove that there is no such significant change and, if such proof is not possible, the presumption shall not be available and plaintiffs (indirect purchasers) must prove the expected sales price based on factors of price formation such as specific features of formation of sales price. The decision was sharply criticised in that plaintiffs must bear the burden of almost impossible proof.

Article 248 of the Code of Civil Procedure, which came into force in 1998, allows the court to determine a reasonable amount of damage if it is extremely difficult to prove the amount thereof from the nature of the damage, and such provision plays an important role in damage claims in general. Under Article 248, recent court decisions tend to find that the amount of damage shall be equivalent to 5 to 10 per cent of the actual contract price in bid-rigging cases.

One of the recent Tokyo High Court decisions held that the amount of damage caused by bid-rigging shall be the difference between the actual contract price and the expected contract price and that the expected contract price shall be presumed to be the aggregate amount of (i) one-fifth of the contract price immediately after the end of the bid-rigging, and (ii) four-fifths of the total amount of manufacturing cost and expenses as well as expected profits.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Neither the administrative surcharges imposed by the JFTC nor criminal fines imposed by the criminal court are to be considered by the courts in calculating the amount of the award. Under Japanese law, there is no special redress scheme offered to those harmed by the infringement.

4 Evidence

4.1 What is the standard of proof?

As to the standard of proof, the party with the burden of proof must prove that the alleged facts are "highly probable" in order to obtain a court judgment in favour through the civil court proceedings.

4.2 Who bears the evidential burden of proof?

As is the case with other tort cases, the plaintiff alleging the defendant's violation of the Antimonopoly Act bears the burden of proof to demonstrate: (i) the illegal conduct of the defendant; (ii) damages; (iii) a causal relationship between the damages and the violation; and (iv) negligence or wilfulness of the defendant.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

The Antimonopoly Act does not provide presumptions of loss in cartel cases. Article 248 of the Code of Civil Procedure allows the court to determine a reasonable amount of damage if it is extremely difficult to prove the precise amount thereof due to the nature of the damage. Please see question 3.2.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Evidence must be submitted by the parties to the court and no evidence that is not submitted to the hearing procedures may be the basis of the judgment to be rendered by the court. Authenticity of documentary evidence must be attested in order for the evidence to be admissible as the basis of the judgment. There are no particular limitations on the forms of evidence that may be admissible, and no hearsay rules are applied to evidence in Japanese civil proceedings.

Expert opinions are sometimes used in private competition litigation in order to prove the amount of damage arising from price cartels and bid-rigging. For instance, plaintiffs sometimes choose economists or economic consultants as experts and obtain their opinions providing analysis on how and to what extent the cartel or bid-rigging had an impact on the price of the relevant product so that they can submit such opinion to the court as evidence. Experts can testify before the court.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Unlike common law jurisdictions, there is no comprehensive discovery scheme available under Japanese law.

(i) Pre-action disclosure of evidence

Under the Code of Civil Procedure, a potential plaintiff may obtain

a court order of preservation of evidence before filing a lawsuit if there are circumstances in which it would become difficult to use evidence unless such evidence is reviewed in advance, such order essentially serves as an order of pre-action disclosure of evidence.

(ii) Petition for order of document production

While the civil court proceedings are pending, a party may request the court to order the other party or a third party to produce particular documents, with certain limitations. For instance, under the Code of Civil Procedure, there is no obligation to disclose (i) a document relating to matters for which the holder or a certain related person is likely to be subject to criminal prosecution or conviction, (ii) a document concerning a secret in relation to a public officer's duties, which is, if submitted, likely to harm the public interest or substantially hinder the performance of public duties, (iii) a document containing any fact which certain professionals (e.g., a doctor, an attorney at law, a registered foreign lawyer) have learnt in the course of their duties and which should be kept secret, (iv) a document containing matters concerning technical or professional secrets, or (v) a document prepared exclusively for use by the holder.

In an action for injunction under Article 24 of the Antimonopoly Act, a plaintiff may request the court to order the defendant to produce documents even including trade secrets for the purpose of proving the infringement unless there is any justifiable reason to refuse such production. On the other hand, a party may request the court to render an order of protection of trade secrets in the aforementioned proceedings.

(iii) Petition for perusal of case record of JFTC administrative hearing procedures

Under the Antimonopoly Act, plaintiffs, as victims of alleged violation of the Antimonopoly Act, may request the JFTC for a review and reproduction of the documents submitted to the JFTC's administrative hearing procedures where an entrepreneur disputes the validity of a cease and desist order and/or an administrative surcharge payment order. Such documents include legal briefs and evidentiary documents submitted by the JFTC administrative investigator as well as the entrepreneur, but do not include documents within the files of JFTC investigators which were obtained or created during the course of their investigations. Having said that, the JFTC may provide plaintiffs with access to certain collected documents, including those collected from third parties, during their investigations, through a request by the court if a damage claim is filed in the court, except for certain information such as trade secrets and privacy information. Even attorney-client privileged documents, which would be subject to protection in other jurisdictions but are not protected in Japan, may be produced for judicial review.

(iv) Petition for perusal of case record of civil court proceedings

Furthermore, any person is allowed to review the case record of the civil court proceedings where the validity of the JFTC's cease and desist orders and administrative surcharge payment orders are challenged by entrepreneurs and any person who has legal "interests" is allowed to obtain copy of the case record including briefs and evidence submitted by the JFTC, which may include documents that the JFTC collected during their investigations. Plaintiffs or potential plaintiffs for private competition claims are likely to be included in such person who has legal interests and may have access to the documents collected during the JFTC's investigations. While the entrepreneur, as a party to the said civil court proceedings, is entitled to file a petition requesting the court not to disclose the documents to the third parties, the scope of documents subject to such petition is limited to personal information and trade secrets.

(v) Petition for perusal of case record of criminal court proceedings

In addition, plaintiffs, as victims of crimes for violation of the Antimonopoly Act, could also have access to the documents submitted to the pending criminal proceedings if certain requirements are fulfilled. Any person may access the documents submitted to the criminal proceedings once the proceedings are finalised. However, they do not have access to the documents within the files of public prosecutors that were obtained and created during the course of their investigations.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

In Japanese civil court proceedings, the court may order a subpoena of witnesses who do not voluntarily appear before the court, without justifiable reason, by which such witnesses would be forcibly taken before the court. Penalties may also be imposed on witnesses who have failed, or refused, to appear before the court, although such penalties are not severe. In practice, however, it is not common in the civil proceedings that the court orders a subpoena or imposes penalties even if a witness does not appear.

In general, witnesses are subject to cross-examination in relation to the matters raised during questioning in the examination. Even judges may supplementarily examine witnesses.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

In cases where a plaintiff brings a damage claim based on Article 25 of the Antimonopoly Act, which may only be filed after the JFTC's cease and desist order or an administrative surcharge payment order becomes irrevocable, the Antimonopoly Act does not allow the defendant to deny their wilfulness or negligence for the violation of the Antimonopoly Act found by those JFTC orders or the court judgment affirming such orders.

Furthermore, it is generally considered that the findings of violation of the Antimonopoly Act by the JFTC orders which became irrevocable through administrative hearing procedures or civil court proceedings create a rebuttable presumption that the Antimonopoly Act was violated.

As a matter of practice, even foreign enforcers' decisions could be taken into account by the court in charge of private competition cases to some extent in determining whether the Antimonopoly Act was violated, particularly when the facts and evidence are common to both the foreign case and the Japanese case. Private claimants may use decisions by sector-specific regulators in order to support their arguments.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As discussed in question 4.5, certain types of confidential document are excluded from the documents subject to the court order to produce documents under the Code of Civil Procedure.

Furthermore, while any person is allowed to review the case record of the civil proceedings, including the documents (briefs and evidence) submitted by the parties, the parties are entitled to file a petition requesting the court not to disclose personal information and trade secrets to any third party. Under such scheme, in a case where documents including personal information or trade secrets of third parties collected during the course of investigations are submitted by the JFTC to the civil court proceedings where the

validity of the JFTC's cease and desist orders and administrative surcharge payment orders are challenged by entrepreneurs, the parties to such proceedings are entitled to file a petition requesting the court not to disclose the personal information and trade secrets to any third parties.

The JFTC restricts access to documents that include trade secrets or privacy information in response to the plaintiffs' request for review and reproduction of documents submitted to the JFTC administrative hearing procedures and the court's request for access to the documents as explained in question 4.5. Furthermore, the JFTC may also impose conditions that are deemed proper in response to a plaintiff's request for review and reproduction of documents submitted to the JFTC administrative hearing procedures. For instance, the JFTC blacks out confidential information to the extent necessary before disclosure of the documents.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

There is no explicit provision under the Antimonopoly Act by which the JFTC is obligated to make its findings and analysis for a particular case public. However, the Antimonopoly Act provides that the JFTC may make the matters public to the extent necessary for the operation of the Antimonopoly Act (excluding business secrets), and the JFTC usually makes a public announcement of the conclusion of its investigation. Specifically, the JFTC makes public the order, fact findings and application of the Antimonopoly Act for almost all cases for which the JFTC has conducted formal investigations.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

A private monopolisation and an unreasonable restraint of trade prohibited by the Antimonopoly Act may, theoretically, be justified if they are not "contrary to the public interest". While plaintiffs bear the burden of proving such requirement, the court usually find that the "contrary to the public interest" requirement is fulfilled as long as the plaintiff proves that the defendant's acts in question have caused a "substantial restraint of competition".

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

While the "passing on defence" itself is not recognised in Japan, passing on value (i.e., the amount that direct purchasers have collected from indirect purchasers) will theoretically be taken into account when calculating the amount of damage suffered by direct purchasers. Even indirect purchasers have legal standing to file a lawsuit to claim civil damages arising from a violation of the Antimonopoly Act. However, in cases involving both direct and indirect purchaser(s), it will not be easy in practice to prove the amount of damages as well as any causal relationship between the violation at issue and the alleged damages. Article 248 of the Code of Civil Procedure could be of assistance in overcoming the practical obstacle involved in determining the amount of damage, as it allows the court to determine a reasonable amount of damage if it is extremely difficult to prove the amount thereof due to the nature of the damage.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Under the Code of Civil Procedure, a person who has legal interests in the result of a lawsuit is allowed to intervene in such lawsuit in order to assist one of the parties thereof. Under such scheme, the court judgment on the merits in the lawsuit will not directly apply to the intervener, but the intervener is not allowed to raise objections to the facts found by the judgment in a potential subsequent lawsuit between the defendant and the intervener. It would theoretically be possible for a cartel participant to join a lawsuit involving other cartel participants as an intervener, as opposed to a co-defendant, under the aforementioned scheme. However, in most cases, there are no advantages for a cartel participant to intervene in such lawsuit and we do not see any specific case where such intervention occurred in cartel cases.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Damage claims for breach of competition law must be initiated within (i) 20 years from the date on which the alleged violation first occurred, or (ii) three years from the date when the plaintiff first became aware of the alleged violation, whichever period elapses earlier. Even after the expiration of the three-year period, the court may uphold damage claims if the defendant does not bring the defence of such expiration.

Damage claims under Article 25 of the Antimonopoly Act must be initiated within three years from the date when the relevant cease and desist order or administrative surcharge payment order became irrevocable.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

While the Law on Expediting Trials provides that a period of two years is a target period for the completion of the first instance of the judicial proceedings, the duration of any given court proceeding may well depend on the complexity of each case. While a minimum of one year is usually required for the court to render the judgment for the first instance in ordinary civil cases, private competition cases could last for more than two years because the judges are not necessarily familiar with the competition laws/regulations and the issues to be examined by the court, including the issue of damages, tend to be complicated.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Permission of the court is not required to discontinue claims based on breach of competition law. It is possible for a plaintiff

to withdraw the claims until the judgment becomes final. When the defendant already submitted a response to the claims on the merits, it is necessary to obtain consent from the defendant in order to withdraw the claims. As such, if a settlement is reached between the parties outside the civil court proceedings, a plaintiff usually agrees to withdraw the claim with the consent of the defendant.

As an additional note, during the course of civil court proceedings, Japanese courts tend to seek an opportunity to recommend amicable settlement of disputes before the court (judicial settlement). It is common for the court to confirm with the parties whether there is any chance of judicial settlement immediately before moving to witness examinations or immediately after completing witness examinations (i.e., before concluding the proceedings to start preparing a judgment). Once the court considers that there is a chance of reaching judicial settlement, the judge tends to have a discussion with a plaintiff and a defendant respectively, and make an attempt to form terms and conditions agreeable by both plaintiff and defendant, persuading the parties to make concessions. When an agreement is reached, it is put into the court record and the record has the same effect as a final and binding judgment. Many civil cases are resolved by judicial settlements in Japan.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

No collective claims, class actions and representative actions are permitted in Japan.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In general, a successful party can recover the court costs, which include filing fees, fees and travel expenses paid to witnesses and interpreters, from the unsuccessful party.

As to attorneys' fees, Japanese courts do not grant successful parties a right to recover such fee, in principle. However, in cases where compensation for damage is sought based on tort, the court tends to allow a successful party to recover 10 per cent of the attorneys' fees as part of the damages. Also, there is a scholarly discussion that attorneys' fees should be recovered by successful parties even in injunction cases.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers are permitted to act for claimants on a contingency fee basis in Japan. Although 100 per cent of contingency arrangements are not specifically prohibited under Japanese law, the rules of ethics for lawyers may be interpreted to prevent such arrangements from being adopted and such arrangements are rarely used in Japanese practice.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

There is no legislation prohibiting or specifically restricting third party funding in Japan. As such, a plaintiff may file a competition law claim with third party funding; however, it will be considered as a violation of the Attorneys Act if the third party provides legal advice to the plaintiff and takes a share of any proceeds from the lawsuit. We are not aware whether or not the arrangement has been used to date.

9 Appeal

9.1 Can decisions of the court be appealed?

A claimant has a right to file an appeal against a district court judgment with a high court having jurisdiction over the case (*koso* appeal), and it is possible to further file an appeal against a high court judgment with the Supreme Court (*jokoku* appeal). A *jokoku* appeal to the Supreme Court can be made for limited reasons under the Code of Civil Procedure.

No specific grounds for an appeal to a high court (*koso* appeal) are provided under the Code of Civil Procedure and the grounds include error in fact-findings and application of law in the judgment. An appeal to the Supreme Court (*jokoku* appeal) can be made on the ground that the high court judgment contains a violation of the Constitution or on the ground that the procedures in the lower court contains any of the material illegalities set forth in the Code of Civil Procedure. In addition, parties may file a "petition for admission of a *jokoku* appeal" and the Supreme Court may accept the petition as a *jokoku* appeal if it deems that the case involves an important issue.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency is offered by the JFTC for its cartel investigations for administrative surcharge payment orders pursuant to the relevant provisions of the Antimonopoly Act. The first in may enjoy 100 per cent immunity, the second in may enjoy a 50 per cent reduction of the administrative surcharges and the third through the fifth in may enjoy a 30 per cent reduction thereof. The 2010 Amendment to the Antimonopoly Act increased the number of leniency applicants up to five applicants: (i) up to five applicants before a dawn raid; and (ii) up to three applicants after a dawn raid if there are fewer than five applicants before the dawn raid. The leniency applicants must provide the information and evidence valuable to the JFTC.

Regardless of whether successful or unsuccessful, leniency applicants in cartel investigations are not entitled to receive immunity from civil claims or any other beneficial treatment in follow-on private competition cases.

While the recent amendment to the Code of Criminal Procedure will introduce the immunity application programme for criminal violation of the Antimonopoly Act, immunity applicants will not be entitled to receive any beneficial treatment in follow-on private competition cases.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Evidence disclosed to the JFTC by a leniency applicant could be

disclosed to the subsequent court proceedings through the procedures discussed in question 4.5. However, the JFTC has a policy under which it will not disclose information submitted by leniency applicants unless the applicant wishes to disclose such information. Such information may be excluded from the information subject to the plaintiffs' request for review and reproduction of documents submitted to JFTC administrative hearing procedures and may also be excluded from the information subject to the court's request for access to the documents explained in question 4.5.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

We do not anticipate any direct impact of the Directive on competition litigation in Japan.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

This is not applicable in Japan.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This is not applicable in Japan.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

The commitment procedure, which is a system to resolve alleged violations of the Antimonopoly Act voluntarily by consent, will be introduced pursuant to a partial amendment to the Antimonopoly Act included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws, which was passed into a law on December 9 and promulgated on December 16, 2016. The effective date was set on the day when the Trans-Pacific Partnership agreement will come into effect in Japan. The government established related laws and regulations including the Rules on the Commitment Procedure of the JFTC. Under the commitment procedure, an entrepreneur that received a notice from the JFTC regarding alleged violation of the Antimonopoly Act may devise a plan to take necessary measures to cease the conduct allegedly violating the Antimonopoly Act and file a petition for approval of such plan with the JFTC. In response to such petition, the JFTC determines whether to approve such plan and, if such plan is approved, determines not to render a cease and desist order and administrative surcharge payment order against the petitioner.

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Mr. Yanagisawa joined Nagashima Ohno & Tsunematsu in 2001. He earned his LL.B. in 2000 from the University of Tokyo, and his LL.M. in 2007 from Columbia Law School, where he was a Harlan Fiske Stone Scholar. He worked as a visiting attorney at Debevoise & Plimpton LLP in New York City from 2007 to 2008.

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