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Antitrust Litigation

Japan
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Law and Practice

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Antimonopoly Act

In Japan, there is no US-style class action system and comprehensive discovery system in civil court proceedings. As a result, claimants have faced difficulties in bringing antitrust suits, and the number of antitrust suits has been relatively small over the years. In the early 2000s, damage suits were filed by residents representing local governments which had suffered damages due to bid-riggings by entrepreneurs in violation of the prohibition of "unreasonable restraint of trade" under the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Antimonopoly Act). Following this, the recent trend shows that claims for compensation for damages arising from "unfair trade practice", such as abuse of a superior bargaining position prohibited by the Antimonopoly Act, have been filed with the court more frequently than in the past. As a background to this trend, in 2009, the Japan Fair Trade Commission (JFTC) established a task force to investigate the abuse of a superior bargaining position. It rendered a series of cease-and-desist orders and administrative surcharge payment orders, targeting abuse of superior bargaining position from 2011 through 2013, pursuant to the 2009 amendment to the Antimonopoly Act introducing an administrative surcharge payment order on certain types of unfair trade practices. The JFTC's actions may have led to the trend in antitrust litigation mentioned here. However, most of the disputes involving potential antitrust claims in Japan appear to have been settled by negotiation between the parties prior to bringing the claims to court.

Other notable types of antitrust-related litigation include deliberative lawsuits filed by the shareholders of a company against the directors of the company, who engaged in conduct in violation of the Antimonopoly Act, seeking compensation for damages arising from the company's payment of administrative surcharges due to such violation. Corporate managers should pay particular attention to the risk of being sued by shareholders as a result of violation of the Antimonopoly Act.

2015 Amendment

On 1 April 2015, the amendment to the Antimonopoly Act, abolishing the administrative hearing procedures of the JFTC (2015 Amendment), became effective. Under the new system, JFTC orders are subject to de novo review by judicial courts, without going through the administrative hearing proceedings of the JFTC where the JFTC itself first reviewed the validity of the orders. A defendant entrepreneur who has received the JFTC's cease-and-desist orders or administrative surcharge payment orders is entitled to file a complaint directly with the Tokyo District Court to seek revocation of such JFTC orders. A panel of three or five judges of the Tokyo District Court will examine the JFTC orders, which will be revoked if the court finds that the orders are contrary to the laws.

The "substantial evidence rule" – applied to actions to rescind JFTC orders before the judicial court under the law before the 2015 Amendment – was abolished and the court is no longer bound by the JFTC's fact findings. A defendant entrepreneur is therefore entitled to submit evidence to the court without such restrictions.

In general, the 2015 Amendment is considered to make the procedures for reviewing JFTC orders fairer and more neutral, as compared to the previous system under which the JFTC reviewed the validity of JFTC orders rendered by itself. In terms of the effect on private antitrust enforcement, the 2015 Amendment is expected to enhance judges' expertise in the field of antitrust law and thereby facilitate private antitrust enforcement through court proceedings in Japan.

1.2 Other Developments

Commitment Procedure

On 30 December 2018, the commitment procedure, a system to resolve alleged violations of the Antimonopoly Act voluntarily by consent, was introduced pursuant to a partial amendment to the Antimonopoly Act included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws. Under the commitment procedure, upon receipt of a notice from the JFTC regarding an alleged violation of the Antimonopoly Act, an entrepreneur may devise a plan to take the necessary measures to cease the conduct allegedly violating the Antimonopoly Act and file a petition for approval of such plan with the JFTC. The JFTC then determines whether to approve such plan and, if approved, determines not to render a cease-and-desist order and administrative surcharge payment order against the entrepreneur. A press release will then be issued by the JFTC with a summary of the entrepreneur's conduct allegedly violating the Antimonopoly Act; however, the press release will also stipulate that it does not mean that the JFTC found actual violation of the Antimonopoly Act. Given the foregoing, private antitrust claimants would not be able to use the result of the commitment procedure as evidence for their claim against the entrepreneur.

2019 Amendment

On 19 June 2019, a further amendment to the Antimonopoly Act was enacted by the national diet (2019 Amendment) introducing protection of attorney-client privilege to the JFTC's administrative investigation procedures for unreasonable restraint of trade. The 2019 Amendment will become effective on 25 December 2020. However, such protection of attorney-client privilege will apply to the administrative procedures of the JFTC only in order to incentivise the potential leniency applicants to co-operate with the JFTC's investigations. Under

the amended leniency programme, the extent of immunity will be determined according to the extent of each applicant's co-operation with the JFTC's investigations. Accordingly, the protection of attorney-client privilege will not apply to antitrust litigation cases before the Japanese courts, even after the 2019 Amendment becomes effective.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Damages Claims

As the legal basis for a claim for damages for breach of competition law in Japan, a claimant who has suffered damages by conduct that constitutes private monopolisation, unreasonable restraint of trade or unfair trade practice in violation of the Antimonopoly Act is entitled to bring a follow-on claim on the ground of strict reliability under Article 25 of the Antimonopoly Act, or a standalone claim on the ground of general tort under Article 709 of the Civil Code.

Anti-competitive conduct includes cartels and bid-riggings, which are typical examples of unreasonable restraint of trade prohibited under the Antimonopoly Act. Agreements on price fixing, production limitation, and market and customer allocation are typical examples of the behaviour of cartels. Unfair trade practice includes, among others, price discrimination, restrictions on resale pricing, below-cost sales, anti-competitive divisions of territories, concerted refusal of trade, and abuse of superior bargaining position.

Under Article 25 of the Antimonopoly Act, companies and business associations which have been engaged in, or been party to, private monopolisation, unreasonable restriction of trade or other unfair trade practices are liable for compensation for damages suffered by other entities due to such conduct. As a prerequisite of filing a claim under Article 25, the JFTC must render either a cease-and-desist order or an administrative surcharge payment order, and such orders must be irrevocable.

Under Article 709 of the Civil Code, any person who has engaged in conduct violating the rights or legally protected interests of another person must compensate them for the damages arising from such conduct, including anti-competitive conduct described above.

Other Remedies and Actions

Injunction

In addition to damages claims, a claimant whose interests are infringed, or are likely to be infringed, by certain unfair trade practice is entitled to file a petition for injunction under Article 24 of the Antimonopoly Act. Such unfair trade practice includes violation of Article 8, item 5 (ie, activities by a business association that cause a member entrepreneur to employ unfair trade practices) or Article 19 (ie, unfair trade practices by an entrepreneur) of the Antimonopoly Act.

Recovery of unjust enrichment

It may also be possible for a claimant to bring an action to recover unjust enrichment based on Articles 703 and 704 of the Civil Code, depending on the circumstances.

Actions based on the invalidity of contracts violating the Antimonopoly Act

Under Japanese law, agreements or contracts between private parties may be declared void pursuant to Article 90 of the Civil Code if such agreements or contracts include a provision in violation of the Antimonopoly Act. Accordingly, a party to such agreement or contract may file an action to recover the benefits provided to the other party as unjust enrichment, based on the ground that the agreement or contract is void, and restitution shall be made.

Derivative lawsuits under the Companies Act

In the event that the JFTC finds that a company has violated the Antimonopoly Act, qualified shareholders of the company may file a lawsuit against the directors of the company for their wilfulness or negligence in failing to perform their duty of care pursuant to Articles 423 and 847 of the Companies Act, if the company does not initiate a lawsuit against the directors within 60 days of receipt of the shareholders' request to file the lawsuit. In particular, if the JFTC renders an administrative surcharge payment order against the company or the company is found liable for damages under Article 25 of the Antimonopoly Act or Article 709 of the Civil Code, the shareholders may file a derivative lawsuit against the directors of the company.

2.2 Specialist Courts

There are no specialist competition courts and competition judges in Japan. However, the Antimonopoly Act provides that the Tokyo District Court has exclusive jurisdiction in follow-on claims for compensation for damages under Article 25 of the Antimonopoly Act, and such claims are assigned to the 8th Civil Affairs Department (the commercial affairs department) of the Tokyo District Court. The Antimonopoly Act also provides that an action for injunction under Article 24 can be brought in a local district court in a place where a high court is located, namely, Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo and Takamatsu. (If an action for injunction under Article 24 is brought in other local district courts, the case may be transferred to one of the above-mentioned eight district courts.) The Tokyo District Court also has exclusive jurisdiction as the court of first instance over a challenge to a

cease-and-desist order or an administrative surcharge payment order rendered by the JFTC.

2.3 Decisions of National Competition Authorities

In the event that a plaintiff files a follow-on damages claim based on Article 25 of the Antimonopoly Act, which may be filed only after the JFTC's cease-and-desist order or an administrative surcharge payment order becomes irrevocable, the defendants are not allowed to deny their wilfulness or negligence for the violation of the Antimonopoly Act found by those JFTC orders.

In addition, it is generally considered that the findings of violation of the Antimonopoly Act set forth in 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 the decisions of NCAs in other jurisdictions could be taken into account, to some extent, by the court in charge of private antitrust cases in determining whether the Antimonopoly Act was violated, particularly when the facts and evidence are common to both cases.

There is no mechanism for the JFTC to intervene in damages actions in court.

2.4 Burden and Standard of Proof

Burden of Proof

Damages claims

In seeking compensation for damages through Japanese civil court proceedings, the plaintiff alleging the defendant's violation of the Antimonopoly Act bears the burden of proof to demonstrate:

- the illegal conduct of the defendant;
- damages;
- a causal relationship between the damages and the violation; and
- the negligence or wilfulness of the defendant.

In a damages action under Article 25 of the Antimonopoly Act, the plaintiff does not need to prove the defendant's negligence or wilfulness.

With regard to the "illegal conduct of the defendant", it is generally considered that findings of violation of the Antimonopoly Act by JFTC orders which have become irrevocable through administrative hearing procedures or civil court proceedings, create a rebuttable presumption that the Antimonopoly Act was violated.

With regard to the defendant's "negligence or wilfulness", the burden of proof does not have a serious impact in practice even on damages claims under Article 709 of the Civil Code, since the defendant's conduct in violation of the Antimonopoly Act normally demonstrates that the defendant was negligent in being involved in such conduct.

Injunction

In claims for injunction based on Article 24 of the Antimonopoly Act, a plaintiff must prove that:

- the defendant's conduct falls under certain types of unfair trade practices in violation of Article 8, item 5, or Article 19 of the Antimonopoly Act;
- the plaintiff's interests are infringed or are likely to be infringed;
- the plaintiff suffered or is likely to suffer "material" damages by such conduct; and
- there is a causal relationship between the material damages and the defendant's conduct.

The plaintiff does not need to prove the defendant's negligence or wilfulness in engaging in the conduct at issue.

Recovery of unjust enrichment

For an action to recover unjust enrichment based on Articles 703 and 704 of the Civil Code, the plaintiff must prove that the defendant received benefit without any legal cause and thereby caused loss to the plaintiff.

Actions based on the invalidity of contracts violating the Antimonopoly Act

For an action based on the invalidity of contracts violating the Antimonopoly Act, the plaintiff will need to prove the relevant facts indicating the invalidity of the contract under Article 90 of the Civil Code.

Derivative lawsuits under the Companies Act

In a derivative lawsuit under the Companies Act, the plaintiff shareholders need to prove the negligence or wilfulness of the defendant directors, the amount of damage and the causal relationship between the defendants' conduct and the damage.

Burden of Proof Regarding Pass-on Defence

When a defendant argues that the plaintiff's loss has been reduced by having passed on to its consumer any overcharge arising from the defendant's violation of the Antimonopoly Act, the plaintiff (ie, a direct purchaser) will be required to prove the actual amount of damage by taking into account the passing-on value (ie, the amount that the direct purchaser has collected from indirect purchasers).

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

2.5 Direct and Indirect Purchasers
Claims can be brought not only by direct purchasers but also by indirect purchasers, based on the defendant's cartel conduct in violation of the Antimonopoly Act.

2.6 Timetable
Expediting Trials
The Law on Expediting Trials provides that a period of two years is a target period for the completion of the first instance of civil court proceedings. However, the duration of court proceedings may well depend on various circumstances, including the complexity of each case. Although a minimum of one year is required for the court to render judgment for the first instance in typical civil cases, private antitrust litigation could last for more than two years because the judges, who are not necessarily familiar with the antitrust laws and regulations, need to examine relatively complicated issues, including those of calculation of damages.

Parallel Investigations
The civil court proceedings involving private antitrust claims, such as damages claims based on general tort under the Civil Code, or injunction claims, are not suspended during a parallel investigation by the JFTC. Parties cannot apply for an order to stay the civil court proceedings based on the ground that the JFTC's parallel investigation is ongoing.

3. Class/Collective Actions

3.1 Availability
Class/collective actions are not available under Japanese law, although there were discussions recently as to whether the amendments to the Antimonopoly Act should include the introduction of collective actions for damages claims under Article 25, and actions for injunction under Article 24 of the Antimonopoly Act. However, such collective actions have not been included in the amendments. This is because if consumers as prospective plaintiffs took such collective actions they would not be able to use the scheme effectively due to their burden of proof and, under the current civil court proceedings, multiple claimants are already entitled to bring claims as co-plaintiffs.

Code of Civil Procedure
Under the Code of Civil Procedure, two or more persons may file an action as co-plaintiffs if they have:

- common rights or obligations based on the same factual or statutory cause; or
- rights or obligations of the same kind, based on the same kind of factual or statutory causes, as the subject matter of the lawsuits.

In addition, the Code of Civil Procedure provides the appointed party system under which each plaintiff or defendant may appoint another plaintiff or defendant as a representative of each plaintiff/defendant. Multiple claimants may use these schemes in bringing competition law claims before civil court proceedings in Japan.

Consumer Contract Act
Plus, qualified consumer organisations are entitled to file an action for injunction for lawsuits under the Consumer Contract Act, as well as injunctions under Article 10 of the Act Against Unjustifiable Premiums and Misleading Representations. Furthermore, in 2016, the relevant law introduced a new system for consumer organisations qualified by the Japanese government to file a lawsuit seeking compensation for damages under consumer contracts. In such actions, the plaintiffs may assert the defendants' violation of the Antimonopoly Act.

3.2 Procedure
Class actions are not available under Japanese law. See **3.1 Availability**.

3.3 Settlement
In general, Japanese courts tend to seek an opportunity for amicable settlement of disputes before the court (judicial settlement) during the course of civil court proceedings. Parties are asked by the court whether there is any chance of judicial settlement immediately before moving to witness examinations or immediately after completing witness examinations. In a lawsuit involving a number of plaintiffs as co-plaintiffs, the court is more inclined to recommend judicial settlement in order to resolve the dispute promptly and effectively, before moving on to time-consuming witness examinations where a number of plaintiffs may need to testify before the court and before preparing for a judgment.

In the judicial settlement procedure, the judge has discussions with plaintiffs and defendants respectively, persuading the parties to make concessions to reach terms and conditions that are agreeable to the parties. An agreement between the parties is put into the court record and the record has the same effect as a final and binding judgment.

4. Challenging a Claim at an Early Stage

4.1 Strikeout/Summary Judgment

Strikeout/summary judgment is not available in Japanese civil court proceedings.

In order to seek early resolution of a case, a defendant may, however, request the court to dismiss the claims due to reasons other than those of merit, such as lack of jurisdiction and lack of standing.

4.2 Jurisdiction/Applicable Law

Rules on Jurisdiction

The Code of Civil Procedure provides the basic jurisdictional rules for private antitrust litigation and damages actions. For instance, a local district court having jurisdiction over the location of a defendant's principal office/domicile has jurisdiction over claims brought against the defendant. A local district court having jurisdiction over the place of violation of the Antimonopoly Act also has jurisdiction over claims based on such violation. If more than one court has jurisdiction over the claim at issue, the claimant may, in principle, choose the court where the claims are to be heard.

As special jurisdictional rules for antitrust litigation, the Antimonopoly Act provides that the Tokyo District Court has exclusive jurisdiction in follow-on claims for compensation for damages under Article 25 of the Act, and exclusive jurisdiction over a challenge to a cease-and-desist order or an administrative surcharge payment order rendered by the JFTC. The Antimonopoly Act also provides that an action for injunction under Article 24 of the Act can be filed with a local district court in the place where a high court is located, namely, Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo and Takamatsu.

A defendant may request the court to dismiss the claims due to lack of jurisdiction. If a defendant wishes to request the court to dismiss the claims due to lack of jurisdiction, the defendant must submit such defence at the same time as, or prior to, submitting its defence on the merits.

Rules on Applicable Law

Since private antitrust claims for damages are considered as tort claims under Japanese law, the choice-of-law rules on tort claims govern the applicable law for private antitrust claims. Under Japanese choice-of-law rules, the law governing tort claims is the law of the place where the result of the relevant tortious act has occurred. Accordingly, the law of the place where the result of the relevant violation of the Antimonopoly Act has occurred shall govern the relevant antitrust claims for damages.

In the event that foreign law governs the claims, but the facts to which the foreign law applies do not constitute a tort under Japanese law, no claim for damages or any other remedies under the foreign law will be accepted by the Japanese court. Even if the facts to which the foreign law applies constitute a tort under both the foreign law and Japanese law, the victim may only make a claim for damages or any other remedies permitted under Japanese law.

4.3 Limitation Periods

Claimants must initiate damages claims within whichever of the following two periods elapses earlier:

- 20 years from the date on which the alleged violation of the Antimonopoly Act first occurred; or
- three years from the date on which the claimant first became aware of the alleged violation.

Claimants must initiate damages claims under Article 25 of the Antimonopoly Act within three years from the date on which the relevant cease-and-desist order or administrative surcharge payment order rendered by the JFTC became irrevocable.

Under Article 166, paragraph 1 of the Civil Code, a claim for recovery of unjust enrichment pursuant to Articles 703 and 704 of the same, must be brought within ten years of the date of the conduct at issue and within five years of the date on which the claimant first became aware of the alleged violation.

There is no limitation period for an injunction pursuant to Article 24 of the Antimonopoly Act.

Under Japanese law, limitations are considered as part of substantive law. Even after the expiration of any of the limitation periods described above, the court may uphold the claims if the defendant does not bring the defence of limitation.

The running of the limitation period can be suspended upon, among others:

- filing of a lawsuit on the merits based on the subject claim with the court;
- filing of a petition for attachment, provisional seizure, or provisional disposition based on the subject claim with the court;
- entering into an agreement to engage in negotiations; or
- any acknowledgement of the subject claim by the defendant.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

There is no procedure for comprehensive disclosure of documents, or discovery procedure, under Japanese law. However, the following disclosure schemes may be available for private antitrust claimants.

Court Order of Document Production under the Code of Civil Procedure

Under the Code of Civil Procedure, a party may request the court to order the other party or a third party to produce particular documents while the civil court proceedings are pending, with certain limitations. For instance, under the Code of Civil Procedure, there is no obligation to disclose the following:

- a document relating to matters for which the holder or a certain related person is likely to be subject to criminal prosecution or conviction;
- a document concerning a secret in relation to a public officer's duties which, if submitted, is likely to harm the public interest or substantially hinder the performance of public duties;
- a document containing any fact which certain professionals (eg, a doctor, an attorney at law, a registered foreign lawyer) have learnt in the course of their duties and which should be kept secret;
- a document containing matters relating to technical or professional secrets; or
- a document prepared exclusively for use by the holder.

To render an order of document production against a third party, the court must seek such third party's opinion in advance of rendering such order.

Access to the JFTC's Administrative Hearing Procedures

As victims of alleged violation of the Antimonopoly Act, plaintiffs may request reproduction and review 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 a 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.

Access to the Case Record of Civil Court Proceedings

Any person is entitled to review the case record of civil court proceedings where the validity of the JFTC's cease-and-desist orders and administrative surcharge payment orders are challenged by entrepreneurs. Any person who has legal "interests" is entitled to obtain a copy of the case record, including briefs and evidence submitted by the JFTC, which may include documents the JFTC collected during its investigations. Plaintiffs or potential plaintiffs for private antitrust claims are likely to be included as such person who has legal "interests" and may have access to such documents.

While an entrepreneur, as a party to the said civil court proceedings, is entitled to file a petition requesting the court not to disclose any documents to third parties, the scope of documents subject to such petition is limited to personal information and trade secrets.

Court Request to the JFTC for Provision of Documents

In the event that a damages claim is filed with the court, the court may, upon petition by the claimant, request the JFTC to provide plaintiffs with access to certain documents collected by the JFTC, including those collected from third parties during their investigations, except for certain information such as trade secrets and privacy information.

Court Order of Preservation of Evidence under the Code of Civil Procedure

Under the Code of Civil Procedure, a potential plaintiff may file a petition for a court order of preservation of evidence prior to filing a lawsuit if there are circumstances where it will become difficult to use the evidence, unless such evidence is reviewed in advance. This order essentially serves as an order of pre-action disclosure of evidence.

Access to Case Record of Criminal Court Proceedings

As the victim of a crime under the Antimonopoly Act, a plaintiff may 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, a plaintiff does not have access to the documents within the files of public prosecutors obtained and created during the course of criminal investigations.

5.2 Legal Professional Privilege

Under civil court proceedings in Japan, documents cannot be withheld from disclosure on the basis that they are privileged. Unlike in common law jurisdictions, there is no concept of attorney-client privilege or other privilege to protect attorney-client communication or attorney materials under the civil court proceedings. Attorneys have the right to refuse to give testimony concerning their communication with their client and they are not obliged to produce documents exchanged with their clients and regarded as "a document containing any fact which certain professionals have learnt in the course of their duties and which should be kept secret" or "a document containing matters

regarding technical or professional secrets" under the Code of Civil Procedure. However, clients have no right to protect their communications with their attorneys on the basis that they are privileged in civil court proceedings.

It is noteworthy that the 2019 Amendment will introduce the protection of attorney-client privilege to the JFTC's administrative investigation procedures for unreasonable restraint of trade; however, such protection will not apply to antitrust litigation cases before the Japanese courts.

5.3 Leniency Materials/Settlement Agreements

Regarding leniency materials, 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 plaintiffs' requests for reproduction and review 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 collected through the JFTC investigations.

Under the newly introduced commitment procedure, the JFTC has a policy that it may use the materials submitted by the petitioner during the course of the commitment procedures for further investigations to be conducted by the JFTC when the JFTC disapproves of the petitioner's plan to take the necessary measures to cease the entrepreneur's conduct allegedly violating the Antimonopoly Act. To what extent the materials submitted to the commitment procedures are protected from disclosure in future antitrust private litigation proceedings will be a significant issue in this field.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Witnesses of fact are relied on in civil court proceedings in Japan. A party to a lawsuit may make a request to the court for the examination of a witness of fact and the court will determine whether such witness examination is necessary for the purpose of finding the relevant facts. Upon such request, a party is usually asked to submit a written statement of the witness to the court in order for the court to consider whether to call the witness. In general, witnesses of fact are subject to cross-examination in relation to the matters raised during direct examination. Judges may also ask the witnesses supplementary questions after examination by the parties.

In civil court proceedings in Japan, the court may order a subpoena of witnesses who do not voluntarily appear before the court, without justifiable reason, so that such witnesses can 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 unusual in civil proceedings for the court to order a subpoena or impose penalties even if a witness does not appear.

6.2 Expert Evidence

Depending on the nature of the issues involved in each case, the court will rely on expert witnesses. A party to the lawsuit may submit to the court, as documentary evidence, a report prepared by an expert appointed by such party. In order to examine the credibility of such report, the opposing party may request the court to conduct cross-examination of the expert. Parties do not require the permission of the court to adduce expert evidence; provided, however, that a party may request the court to appoint an independent expert to provide an expert opinion and the court then determines whether it is necessary to appoint such expert. Once an expert is appointed by the court, such expert is obliged to give their opinion in the relevant field in which they have expertise.

Under Japanese civil court proceedings, there are no particular rules regarding concurrent expert evidence, including whether experts are requested to produce joint statements indicating the areas in which they agree/disagree in advance, or whether to adopt alternative methods of hearing expert evidence.

7. Damages

7.1 Assessment of Damages

One of the main methods to calculate damages in cartel cases is to calculate the difference between:

- the price of the relevant product immediately before the alleged cartel activity; and
- the price of the relevant product actually applied in the transaction at issue.

Passing on value – namely, the amount that direct purchasers have collected from indirect purchasers – may be taken into account when calculating the amount of damage suffered by the direct purchasers. In cases involving both direct and indirect purchasers, it tends to be practically difficult to prove the amount of damage, as well as any causal relationship between the violation at issue and the alleged damages.

The Supreme Court decision of 8 December 1989 held that the damages arising from cartel activity is the difference between the actual sales price and the sales price that would have been used if not for the cartel in question (expected sales price). This presumes that the sales price immediately before the cartel was

formed is the expected sales price unless significant changes in economic conditions and market structures occurred, eg, between the time of the cartel's activity and the time when customers purchased the merchandise at issue. The Supreme Court decision also held that plaintiffs must prove that no such significant change in economic factors took place and, if such proof is not possible, the presumption shall not be available and the plaintiffs (indirect purchasers) must prove the expected sales price based on factors of price formation. However, the court's decision was harshly criticised by scholars and practitioners, in that plaintiffs must bear the burden of almost impossible proof pursuant to the decision.

In calculating the amount of damages claimed based on Article 25 of the Antimonopoly Act, the court may seek the JFTC's opinion. Article 248 of the Code of Civil Procedure allows the court to determine a reasonable amount of damages if it is extremely difficult for the parties to prove the precise amount due to the nature of the damages. The court may determine the amount of damages arising from the violation of the Antimonopoly Act with the assistance of these schemes.

Under Japanese law, collection of exemplary or punitive damages is not permitted in civil proceedings since such remedies are contrary to public policy in this country.

In calculating the amount of damages sought by private antitrust claims, neither administrative surcharges imposed by the JFTC, nor criminal fines imposed by the criminal court, are taken into consideration by the court.

7.2 "Passing-on" Defences

A defendant may argue that the loss suffered by the plaintiff (ie, the direct purchaser) has been reduced by having passed on to its consumer any overcharge arising from the defendant's violation of the Antimonopoly Act. The plaintiff will then be required to prove the actual amount of damages by taking into account the passing-on value (ie, the amount that the direct purchaser has collected from indirect purchasers).

The "passing-on defence" under Japanese law is therefore discussed in the context of the scope of damages, as opposed to in the context of the standing. If a direct purchaser passed on the amount of loss to its customers, it would be difficult to prove that the direct purchaser suffered actual loss and, as a result, the amount of damages would be reduced accordingly.

7.3 Interest

Interest, or a delinquency charge, is payable on damages arising from a tortious act, including a violation of the Antimonopoly Act, at a rate of 5% per annum under the former Civil Code. Under the amended Civil Code effective as of 1 April 2020, the statutory rate has changed from 5% per annum to 3% per annum, subject to change once in a three-year period.

In court judgments, the interest or delinquency charge is usually imposed on damages until these are paid in full and thus includes both pre-judgment interest and post-judgment interest.

8. Liability and Contribution

8.1 Joint and Several Liability

Private claimants can bring a claim against multiple defendants who have committed, among others, unfair restraint of trade or joint refusal to deal under the Antimonopoly Act, based on the theory of joint and several liability.

Since immunity applicants in the JFTC's administrative investigations or criminal investigations are not entitled to receive any beneficial treatment in follow-on private antitrust cases, there are no limitations on the liability of immunity applicants to their direct purchasers.

8.2 Contribution

A defendant can bring a claim for "contribution" against a third party who assumes joint and several liability. In the event that the court renders a judgment in favour of the plaintiff through a civil court proceeding, the defendant may initiate another civil court proceeding to bring a claim for contribution against a third party such as a joint tortfeasor.

It is possible, under the Code of Civil Procedure, for a defendant to give notice of a lawsuit to a third party who has a legal interest in the result of the lawsuit, in that the defendant could pass on liability to, or share its liability with, such third party. The third party receiving the notice may join the lawsuit as an assisting intervener. Once a third party receives notice of a lawsuit, such third party will not be able to dispute certain facts in a subsequent lawsuit with the defendant.

9. Other Remedies

9.1 Injunctions

Injunctive relief is available under Article 24 of the Antimonopoly Act.

Petition for an Injunction under Article 24

A claimant whose interests are infringed, or are likely to be infringed, by violation of Article 8, item 5 (ie, activities by a business association that cause a member entrepreneur to employ unfair trade practices) or Article 19 (ie, unfair trade practices by

an entrepreneur) of the Antimonopoly Act, is entitled to file a petition for injunction under Article 24. In such action, a claimant may demand suspension or prevention of infringement by an entrepreneur or a business association if such person has suffered or is likely to suffer material damages by such conduct. The action cannot be initiated based on unreasonable restriction of trade, which includes cartels and bid-rigging, and private monopolisation, while some unfair trade practices overlap with unreasonable restriction of trade or private monopolisation. A claimant may file a lawsuit for formal injunction or a petition for preliminary injunction.

Formal Injunction
In the case of a formal injunction, the procedure constitutes a formal lawsuit on the merits and the court must hold hearings attended by both parties, at which they need to submit briefs and evidence. Witness examinations may be held during the course of the proceedings. It generally takes more than a year to complete the proceedings. 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.

Preliminary Injunction
When seeking preliminary injunction, the court adopts expeditious procedures under the Civil Preservation Act. However, it is still necessary for the court to hold hearings where the other party may submit its opinion and it may take several months to obtain a preliminary injunction order. A petitioner must demonstrate that there is a "necessity" for the preliminary injunction, in addition to the claims to be protected, based on prima facie evidence. A petitioner will also be required to furnish a security deposit before obtaining a preliminary injunction order. If a petitioner who obtained a preliminary injunction order fails in the subsequent formal lawsuit, the respondent/defendant may file a claim for compensation for damages arising from the illegal execution of the preliminary injunction order.

The JFTC 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.

9.2 Alternative Dispute Resolution
Methods of alternative dispute resolution are available in Japan, but no mandated methods are applicable to private antitrust claims.

For instance, mediations, particularly civil mediation proceedings before the court, are frequently used as a method of alternative dispute resolution in Japan and could be used for antitrust claims as well. Mediation committee members, as opposed to professional judges, are in charge of handling civil mediation proceedings and facilitating settlement discussions between the parties. Both parties may terminate the proceedings at any time. Once the parties agree to the settlement terms, such terms have the same effect as a final and binding judgment rendered by a court through a formal lawsuit.

Under the Arbitration Act of Japan, a civil dispute that may be resolved by settlement between the parties is arbitrable. A private antitrust dispute is also arbitrable under such law. Japanese courts are expected to enforce an arbitration agreement even for an antitrust dispute. No legislation or court precedents provide exceptions to such enforcement.

10. Funding and Costs

10.1 Litigation Funding
In Japan, there is no legislation prohibiting or specifically restricting litigation funding. Accordingly, a plaintiff may file a private antitrust claim with third-party funding. However, it may be considered as a violation of the Attorneys Act if, in providing litigation funding, the third party who is not qualified as a Japanese attorney (*bengoshi*) provides legal advice to the plaintiff and takes a share of any proceeds from the lawsuit. The Attorneys Act also prohibits a person from acting as an intermediary between clients and attorneys for the purpose of obtaining remuneration from such conduct.

10.2 Costs
Costs are awarded on a limited basis in court judgments. In general, a prevailing party can recover the court costs, which include filing fees and travel expenses and/or a per diem paid to witnesses and interpreters. As to attorneys' fees, Japanese courts do not, in principle, grant prevailing parties a right to recover their attorney's fee. However, in cases where a claimant is seeking compensation for damages based on a tortious act, the court is inclined to award approximately 10% of their attorney's fee as part of the damages. If it is difficult to determine which party is prevailing, the court may order both parties to bear the court costs.

Under Japanese civil proceedings, it is not possible for a party to apply to the court for an order granting security for its costs.

11. Appeals

11.1 Basis of Appeal
A claimant has the right to file an appeal against a district court judgment with a high court having jurisdiction over the case (*koso* appeal). It is also possible to file an appeal against a high court judgment with the Supreme Court (*jokoku* appeal). A

jokoku appeal to the Supreme Court can be made on limited grounds as stipulated under the Code of Civil Procedure.

The Code of Civil Procedure provides no specific grounds for an appeal to a high court (*koso* appeal) but the grounds could include errors in fact-finding as well as in the application of the 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 some of the procedures in the lower court were material illegalities as 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 if it deems that the case involves an important issue.

Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan. It has over 450 lawyers and is one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes offices in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, and associated local law firms in Jakarta and Beijing, with the firm's lawyers on site. The firm has extensive corporate and litigation capabilities spanning key commercial areas, including antitrust and competition. The team has antitrust lawyers with in-depth expertise in, and highly specialised knowledge of, the antitrust and competition laws of Japan as well as overseas jurisdictions, with specialists capable of handling complex antitrust litigation, including follow-on damage claims and derivative suits against the management of defendant companies.

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