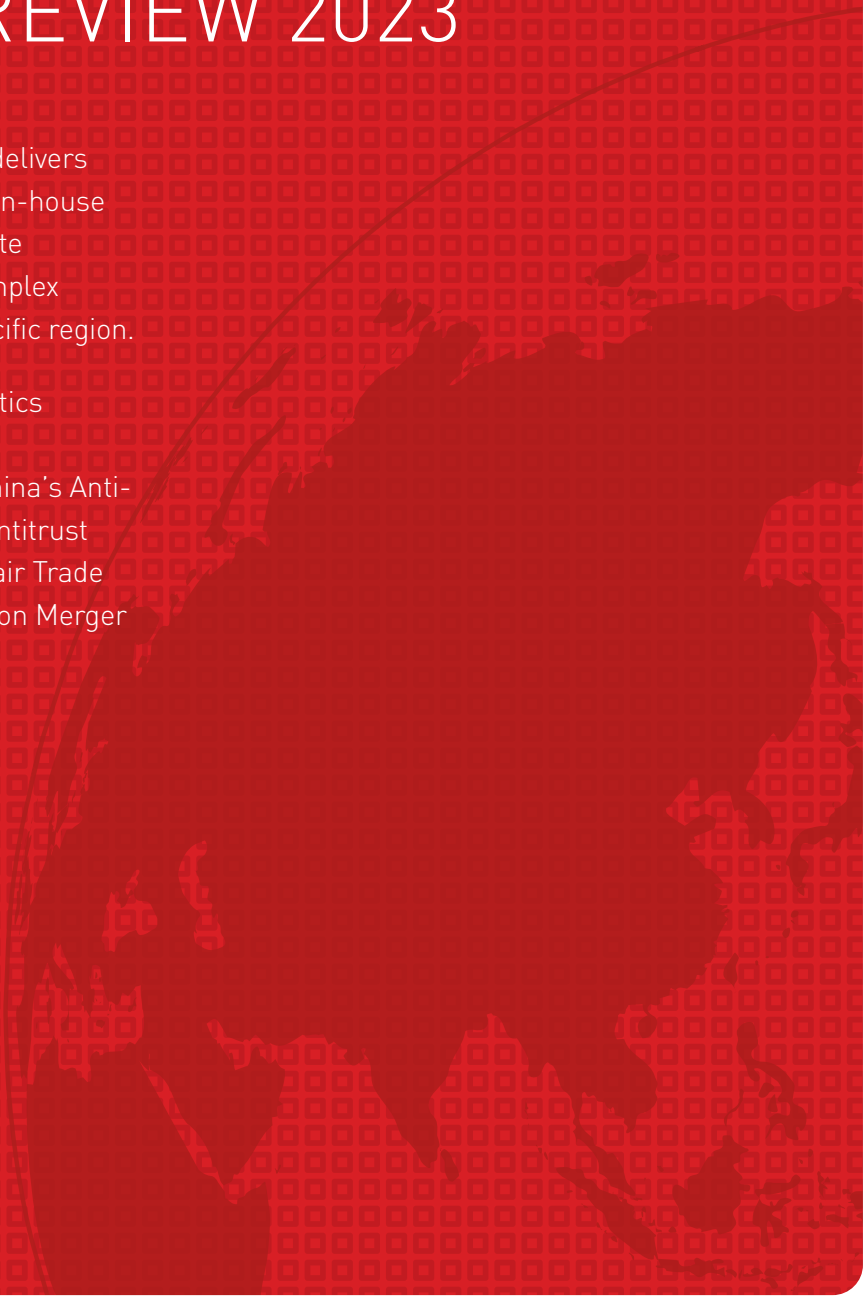
GCR

ASIA-PACIFIC
ANTITRUST REVIEW 2023

GCR's *Asia-Pacific Antitrust Review 2023* delivers specialist intelligence to help readers – in-house counsel, government agencies and private practitioners – navigate increasingly complex competition regimes across the Asia-Pacific region.

Evolving legislation and enforcement tactics continue to transform the landscape, as highlighted by recent amendments to China's Anti-monopoly Law and an uptick in private antitrust cases in Japan; meanwhile, the Korea Fair Trade Commission has updated its Guidelines on Merger Filing to expedite the review process.

Visit globalcompetitionreview.com
Follow @GCR_alerts on Twitter
Find us on LinkedIn



Japan: Rise in private antitrust cases yields judgments with international ramifications

Kentaro Hirayama

Hirayama Law Offices

In summary

The number of private antitrust cases has been increasing recently in terms of both damages suits and injunctions, but recent court judgments have dismissed plaintiffs' damage claims due to parties' agreements on exclusive jurisdictions of foreign courts. Foreign companies should keep an eye on future developments in this jurisdictional issue.

Discussion points

- Overview of private antitrust litigation activity
- Legislative framework for private antitrust enforcement
- Discovery
- Calculation of damages
- Settlement
- Extraterritoriality

Referenced in this article

- *Marine Hose Investigation*, 20 February 2008
- *Can System v USEN*, 10 December 2008
- *Kyocera v Hemlock*, 25 October 2017
- *Shimano v Apple*, 4 September 2019
- *ELECOM v Brother Industries*, 30 September 2021

Overview

The number of private antitrust cases has been increasing recently, in terms of both damages suits and injunctions, with several cases pending at judicial courts.

Among several types of private litigation, damages suits in bid-rigging cases have long been the most prevalent in Japan. Recent notable cases include the damages suit brought by the Tokyo metropolitan government in relation to the bid rigging of waste incinerators, in which the Tokyo District Court ordered the defendants to pay ¥9.7 billion,[1] and the damages suit brought in relation to the bid rigging of iron bridges, in which the Tokyo High Court ordered the defendants to pay ¥80 million.[2] Both of these cases were brought after the Japan Fair Trade Commission (JFTC), the sole administrative regulator for competition in Japan, had issued a cease-and-desist order and required the payment of administrative fines (surcharges) against defendants.

In addition to these notable damages suits, injunctive relief against unfair trade practices (eg, predatory pricing, unilateral refusal of trade, obstruction to competitors' trading and resale price maintenance, all of which are prohibited under article 19 of the Anti-monopoly Act[3] (AMA)) was introduced in 2001. There were two cases in 2011 in which district courts granted provisional and permanent injunctive orders based on defendants' unfair trade practices.

Amendments to the AMA introduced in 2009 implemented a special rule dealing with court orders to produce documents in court proceedings concerning injunctive relief. The 2009 amendments also changed the system regarding courts seeking the JFTC's opinion on calculation of damages in damages suits.

Legislative framework for private antitrust enforcement

Damages claims under article 25 of the AMA

Under article 25 of the AMA, parties found by the JFTC to be engaged in private monopolisation, unreasonable restriction of trade[4] (cartels and bid rigging) or unfair trade practices are liable to indemnify those injured by such parties.

The plaintiff need not prove the defendant's intent or negligence as to the harmful acts in an article 25 action; the relevant court will instead rely on the JFTC's findings from the order and the defendants cannot challenge these facts. A cease-and-desist order or order to pay administrative fines needs to be finalised before the plaintiff takes action under article 25 of the AMA, while

1 Tokyo District Court, 20 March 2007.
2 Tokyo High Court, 30 August 2011.
3 Act No. 54 of 1947, as amended.
4 Defined in article 3 of the AMA.

plaintiffs can also file damages suits as a general tort claim under article 709 of the Civil Code (see below) even before any relevant JFTC orders become final.

In an article 25 action, plaintiffs still need to prove the amount of damages and the reasonable causation between the defendant's conduct and the damages. However, article 84 of the AMA allows the court to request an opinion from the JFTC on the scope and calculation of damages in an article 25 action, reducing the burden of proof.

General tort claims under the Civil Code

Under article 709 of the Civil Code, persons who violate another person's rights must pay the damages resulting from their actions. An article 709 action is available in competition law cases. Plaintiffs can choose to file either an article 25 or an article 709 action, if both measures are available.

A plaintiff in an article 709 action must prove the defendant's intent or negligence, the amount of damages, and the reasonable causation between the defendant's conduct and the damages. In practice, however, the burden of proof regarding the defendant's intent or negligence is not deemed important as violations of the AMA are usually associated at least with the negligence of the violators.

As an illustrative example, in the *Can System v USEN Corporation* private monopoly case,[5] an article 709 action damages suit was filed by a USEN competitor that operates a cable broadcasting business after the JFTC issued a cease-and-desist order against USEN. The Tokyo District Court partially admitted the plaintiff's claims and finally settled at Tokyo High Court in July 2010 when USEN agreed to pay ¥2 billion to the competitor. In the *ELECOM v Brother Industries* case,[6] a competitor filed a suit under article 709 claiming that it had suffered damages due to Brother's unreasonable obstruction to the competitor's sales of ink toner cartridges. The Tokyo District Court partially accepted the plaintiff's claim and ordered Brother to pay ¥1.5 million in September 2021.

Injunctions under article 24 of the AMA

Under article 24 of the AMA, a plaintiff may seek an injunction (provisional as well as permanent) against certain unfair trade practices such as predatory pricing, unilateral refusal of trade, obstruction to competitors' trading, resale price maintenance and prohibition of parallel imports. Although article 24 does not allow injunctions based on a breach of article 3 (cartels, bid rigging and

5 *Can System v USEN Corporation*, Tokyo District Court judgment on 10 December 2008 (Heisei 17 (Wa) No. 13386 and 15368).

6 *ELECOM v Brother Industries*, Tokyo District Court judgment on 30 September 2021 (Reiwa 1 (Wa) No. 35167).

private monopolisation), some types of article 3 violations can also be deemed unfair trade practices and thus subject to article 24 actions.

An article 24 action must be brought in the district courts, including Tokyo District Court. A district court's decision can be appealed to a high court and a high court decision can further be appealed to the Supreme Court.

For the first 10 years following the introduction of the article 24 action in 2001, there were no successful injunction cases. This was partly because an article 24 action requires the private plaintiff to demonstrate 'extreme damages', which is a somewhat higher standard than the ordinary level of damages for plaintiffs to prove in damages suits.

However, the trend has been gradually changing. In March 2011, the Tokyo District Court issued the first decision in which a private plaintiff prevailed in an article 24 injunction case. In this case, the Tokyo District Court found that the defendant disseminated a falsehood injurious to the plaintiff's business reputation and thereby obstructed businesses of the plaintiff. Utsunomiya District Court issued a permanent injunction in November 2011 against a local bus company that engaged in predatory pricing. Osaka High Court also issued a permanent injunction in October 2014 against a local taxi operator.

Invalidation of contract under article 90 of the Civil Code

Any person can file a civil lawsuit alleging invalidity of contract under article 90 of the Civil Code, which is a general provision invalidating any legal conduct violating public interests. In determining violations of public interests, the fact of a breach of the AMA has been taken into consideration in the courts.

Class actions

Class actions are not available in Japan. Certified consumer groups may act as a 'class' and seek injunctions for certain types of lawsuits, but this scheme is not available in private antitrust litigations.

Limitation period

An article 709 action must be brought to the district courts either within three years of the possible victim or plaintiff becoming aware of the conduct that caused the damage, or within 20 years of the execution of such conduct, whichever is earlier. Damages claims under article 25 of the AMA must be initiated within three years of the date when the JFTC's relevant cease-and-desist order became irrevocable.

Discovery

There is no US-style mandatory document production or extensive discovery system in Japan, except when a court orders a production of documents under the Civil Litigation Code.

Under the Civil Litigation Code, courts can request production of documents not only to the counterparty, but also to third parties. However, the scope of the court order has been expanded in private antitrust litigation; a court has previously ordered production of documents retained by the JFTC, such as interview records prepared by the JFTC and reports produced by the defendant, in reply to the JFTC's requests for information.

Under the Civil Litigation Code, the relevant party must comply and submit requested materials if the court orders. If the ordered party does not submit the relevant evidence, the other party and the court are generally entitled to deem such other party's allegations related to the content of such evidence to be accurate. There are several exceptions, such as documents subject to public servants' obligation of confidentiality, documents created exclusively for self-use and documents relating to the right to remain silent under criminal procedure.

The 2009 amendments to the AMA introduced a special rule for court orders relating to article 24 actions. The relevant party is entitled to request that the other party submit materials as ordered by the court, except in cases where there is a justifiable reason to reject the requested materials' submission. This rule expands the scope of documents to be disclosed as it targets all documents except for those with a justifiable reason not to be submitted.

Leniency applications

Evidence produced to the Japan FTC by a leniency applicant in cartel cases could theoretically be disclosed to the subsequent court proceedings if courts request the Japan FTC to do so. However, the FTC has a policy under which it will not disclose information submitted by leniency applicants unless they wish otherwise. Therefore, in practice, it is likely that such information will be excluded from the court's request for disclosure.

Disclosure of algorithm

Although there is no extensive discovery system in Japan, court judges sometimes instruct parties in litigation to disclose information and evidence that would be indispensable for the judges to provide final judgments. In the recent *Hanryukan v Kakaku.com* litigation, a Tokyo District Court judge requested the

defendant, a restaurant review platform, to explain the outline of its algorithm for calculating restaurants' rating points. The Tokyo District Court accepted the plaintiff's claim and ordered Kakaku.com to pay ¥38 million in June 2022, which has been appealed and is pending at the Tokyo High Court as at January 2023.

Calculation of damages

In both article 25 and article 709 actions, damages are limited to those cases where causal links between damages and violation have been successfully demonstrated. Under Japanese law, treble damages are not available.

'Before and after' theory

Concerning how damages awards are determined, the 'before and after' theory is often used as a method of calculating damages in private antitrust litigation. Under this theory, the actual price of the relevant product or service before the cartel's commencement is compared with that within the cartel period, and the difference will be deemed the amount of relevant damages. This calculation method is often used in practice and the JFTC also uses this method to form its opinion when requested by the courts.

If the scope of the damages is uncertain and the 'before and after' theory is not available or is inappropriate, the court may determine the amount of damages at its discretion, which is allowed under article 248 of the Civil Litigation Code. For example, in recent bid-rigging cases, courts found that relevant damages should be approximately 5 to 10 per cent of the relevant products' turnover within the operation period of the cartel.

In addition, the central government, local governments and public corporations have inserted clauses for penalty charges into contracts in a tender, which specify an agreed amount of damages to be paid if the JFTC subsequently finds violations of the AMA (ie, bid rigging). Typically, the amount specified in such provisions is between 10 and 20 per cent of the contract value.

Pass-on defence

The defendant is free to allege that no damages should be granted to the direct-purchaser plaintiff where the plaintiff has already passed on the amount of the damages to its customers. However, the pass-on defence is not regarded as a factor when considering the issue of standing.

Interest and attorneys' fees

When calculating the amount of damages payable on the judgment date, the court will include interest (at an annual rate of 5 per cent) from the date on which the relevant illegal conduct occurred until the date on which the defendant pays such damages.

Attorneys' fees may be partially recoverable if the court finds it appropriate. The courts typically order 10 per cent of awarded damages as recovery of lawyers' fees, without providing any reason therefor.

Settlements

Settlements in civil litigation are available either during the course of court procedures or outside the courts.

In the course of civil litigation at the courts, judges often recommend a settlement to the parties – typically immediately before moving to witness examinations or immediately after completing witness examinations – and the court creates a record of settlement if a settlement is reached. In practice, judicial settlements have resolved many civil antitrust cases.

There are no specific procedures for settlements outside the courts, although sometimes parties make a settlement record at a notary's office because notarised settlement records concerning monetary liabilities are enforceable just as are courts' final judgments.

A recent example of a settlement is the *Can System v USEN Corporation* private monopoly case, where a competitor filed an article 709 action against USEN and settlement was reached in July 2010, with USEN agreeing to pay ¥2 billion to a competitor.[7]

Extraterritoriality

Effects doctrine

Provided that a violation of the AMA has a substantial effect on the Japanese market, the AMA can apply to conduct in a foreign country or by a foreign party (the effects doctrine). The term 'Japanese market' encompasses consumers located in Japan.

7 See footnote 5.

In terms of administrative and criminal proceedings, if there is a conflict of jurisdiction, the Japanese government will respect international comity. An interesting example of extraterritoriality of the AMA is the 2008 *Marine Hose Investigation* international cartel case, in which the JFTC issued a cease-and-desist order for the first time to parties involved in an international cartel.[8] In this case, relevant parties included foreign parties and cartel activities were carried out in foreign countries.

Jurisdiction by civil courts

In the sphere of private antitrust litigation, the effects doctrine will likely be applied in the same manner as the JFTC's administrative investigations, although there is no specific statute regarding extraterritoriality (or jurisdiction) of the AMA to be applied in private lawsuits. Therefore, it is possible that foreign companies will face private lawsuits from Japanese consumers for violations of the AMA that take place outside Japan.

However, a recent Tokyo District Court judgment in *Shimano v Apple*,[9] where Shimano argued that Apple's requests to the supplier fell within 'unfair abuse of superior bargaining position', stated that parties of transactions could effectively escape from review by Japanese courts by entering into agreements for the exclusive jurisdiction of foreign courts (in this case, Californian courts). The Tokyo High Court dismissed another damages claim in *Kyocera v Hemlock*[10] based on the exclusive jurisdiction of foreign courts (in this case, Michigan courts), which was expressly stated in a supply agreement.

8 *Marine Hose Investigation*, JFTC cease-and-desist order on 20 February 2008.
9 *Shimano v Apple*, Tokyo District Court judgment on 4 September 2019 (Heisei 26 (Wa) No. 19860).
10 *Kyocera v Hemlock*, Tokyo High Court judgment on 25 October 2017 (Heisei 28 (Ne) No. 5514).

Kentaro Hirayama

Hirayama Law Offices

Kentaro Hirayama's practice focuses on competition law. He has counselled clients in a number of domestic and international cartels; unfair trade practices such as most-favoured-nation clauses, predatory pricing and abuse of standard essential patents; and merger filings, including high-profile Phase II cases.

His skill and experience in competition and antitrust law are widely recognised. In 2016, he was the only Japanese attorney named in GCR's 40 under 40 list of the world's leading antitrust lawyers under the age of 40. His firm is introduced in GCR 100 as one of the recommended domestic Japanese competition law firms.

Mr Hirayama worked for the Japan Fair Trade Commission from July 2007 to June 2010. During that time, he was a case manager in the *Marine Hose Investigation* case, among other high-profile international cartel cases, and led an abuse of dominance case. During these worldwide parallel investigations, he collaborated with foreign competition authorities in information exchanges and the coordination of simultaneous dawn raids, among other engagements. Following his return to private practice, he serves as an associate professor at the University of Tsukuba, one of Japan's oldest national universities. He is a member of the Japan Bar Association's antitrust committee.

Hirayama Law Offices is a boutique antitrust and competition law firm that advises clients on a wide range of antitrust matters, including transactions and agency investigations. The firm's clients include a wide range of domestic companies – often industry leaders – as well as Japanese subsidiaries of top-tier global companies. Hirayama Law Offices is introduced in GCR 100 as one of the recommended Japanese competition law firms.

Tokyo Tatemono Yaesu Building, 3rd Floor
1-4-16 Yaesu Chuo-ku
Tokyo 103-0028
Japan
Tel: +81 3 6823 5318

Kentaro Hirayama
info@hirayamalaw.com

www.hirayamalawoffices.com