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I. INTRODUCTION

The Japanese Antimonopoly Law (hereafter referred to as "JAML") was enacted in 1947 as part of the Economic Democratization Policy introduced into Japan by the Occupation Forces. Originally it was based on U.S. antitrust laws but, after more than 60 years of enforcement, JAML has acquired features unique to Japan such as the control of dominant position designed to protect small enterprises such as subcontractors and small dealers vis-à-vis large producers and dealers which tend to abuse their superior bargaining positions to the disadvantage of the smaller entities. The major pillars of JAML are the prohibition of: (a) of monopolization, (b) cartels and (c) unfair business practices and, in addition, (d) the control of mergers and acquisitions.

Private monopolization is roughly similar to monopolization under Section 2 of the Sherman Act in the United States and abuse of dominant positions in the European Union. Cartels are generally prohibited in Japan just like in the United States, European Union, and elsewhere. The control of mergers and acquisitions is similar to the counterparts in other major jurisdictions.

Unfair business practices (or unfair trade practices) are a category unique to JAML. It is provided for in Article 2:9 of JAML. According to this article, unfair business practices are those conducts which tend to impede fair competition and include: (1) boycott (collective refusals to supply which include primary and secondary refusals); (2) price discrimination (unreasonable discrimination in supplying commodities and services); (3) below-cost selling (predatory pricing); (4) resale price maintenance; (5) abuse of dominant positions; and (6) other conducts which are designated by JFTC: unreasonable discrimination, transaction with unreasonable prices, unreasonable inducement or coercion of competitors' customers, transactions with unreasonable restrictions, unreasonable use of one's advantageous positions in transactions and unreasonable interference into transactions between competitors and their customers, and inducement of corporate executives and employees of competitors to cause disadvantages to their companies.

Categories (1)-(5) are subject to administrative surcharges of differing amounts according to the category in question as well as cease-and-desist orders imposed the Japan Fair Trade Commission ("JFTC"), the enforcement agency. Category (6) is subject to cease-and-desist orders of JFTC but not subject to administrative surcharge.

One of the constituent elements of unfair business practices is that a conduct tends to impede fair competition and is "without good cause" or "unreasonable" as the case may be. "Without good cause" is used with Categories (1), (3), and (4) and is interpreted to mean

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unlawful in principle, e.g., a conduct amounting to this category is presumed to be unlawful when the existence of the conduct is established and this presumption can be overturned if the defendant successfully rebuts this presumption.

"Unreasonable" is used with all other categories. This concept is similar to "rule of reason" in U.S. antitrust laws and it is up to JFTC or a private plaintiff to adduce evidence and argument proving the illegality of the conduct.

As mentioned earlier, one of the constituent elements of unfair business practice is that a conduct "tends to impede fair competition" as contrasted with the constituent elements of private monopolization or unreasonable restraint of trade. In cases of private monopolization and unreasonable restraint of trade, it is necessary that a conduct in question "substantially restrains competition" which means making a heavier impact on the market than a mere "tending to impede fair competition." The prohibition of unfair business practices is a precautionary measure in relation to the prohibition of private monopolization and unfair business practices.

II. ENFORCEMENT AGENCY AND PROCEDURE

JAML is enforced by JFTC, composed of a Chairperson, four commissioners, and the secretariat. The major task of JFTC is to investigate violations JAML provisions and, after a brief hearing and notice to the parties, to issue cease-and-desist orders as well as orders to pay administrative surcharges if the conduct in question belongs to the categories to which administrative surcharge apply. Parties to which an order is issued can request JFTC initiate an administrative hearing in which they can claim that investigative attorney's finding of facts is unfounded and its legal interpretation wrong. JFTC can uphold, modify, or reverse the order. If JFTC upholds the order, the party can bring a suit against JFTC to Tokyo High Court and then to the Supreme Court for judicial review. Criminal penalties apply to private monopolization and cartels but not to unfair business practices. (In fact, criminal penalties apply only to enterprises and individuals involved in a cartel.)

When a JFTC cease-and-desist order or surcharge order becomes final, or a decision of the Tokyo High Court or the Supreme Court has upheld the decision and order of JFTC, a private party injured by the conduct in question can bring a damage action against the malefactor under Articles 25/26 of JAML in which case the defendant cannot claim that its conduct was not intentional or lacks negligence (strict liability). As stated earlier, a private suit under Articles 25/26 of JAML is based on a decision or order of JFTC or a decision of court approving it. If there is no prior JFTC order or decision, or a court decision, the private plaintiff can bring a tort claim under Article 709 of the Civil Code in which it is the responsibility of the plaintiff to prove malicious intention or negligence on the part of the defendant in order to prevail. Any suit under Articles 25/26 of JAML can be brought to the Tokyo High Court while other suits for damages under Article 709 of the Civil Code must be brought to the district court in charge of that case, according to the Civil Procedure Code.

III. INJUNCTIVE RELIEF UNDER THE JAPANESE ANTITRUST LAWS

A.Injunction: An Overview

Article 24 of the JAML explicitly provides the right to seek an injunction. To seek such injunction is possible only against the unfair trade practices (defined in Art. 2.9 of the JAML), and is not allowed in respect to a private monopolization (defined in Article 2. 5 of the JAML) or an unreasonable restraint of trade (a cartel defined in Article 2. 6 of the JAML). The legislative records show that the legislators intended to provide for the right for injunction only for victims of unfair business practices because it is easier for the victim to prove a violation amounting to unfair business practices than to prove private monopolization and unreasonable restraint of trade.

However, a conduct can fall under more than one category. For example, a conduct amounting to an unfair business practice can, at the same time, fall under the category of private monopolization. Then it is possible to seek an injunction for such conduct. Price discrimination and below-cost selling are examples. When price discrimination is still at an early stage and its impact on market is not yet strong, it is regarded as merely tending to impede fair competition and is regarded as an unfair business practice. When this price discrimination grows into a monopolistic conduct and makes a big impact on the market, it is regarded as substantially restraining competition and thus a private monopolization. The difference between unfair business practice and private monopolization is that of degree and not of kind.

Although not all unfair business practices have similar features as private monopolization, some unfair business practices belong to the same category as unfair business practices as far as the form is concerned. For example, price discrimination, below-cost selling, exclusive dealing, tie-in clauses, and other restrictive provisions in contracts are regarded as unfair business practices at an early stage when their impact on the market has not reached the level of substantial restraint of competition. When their impact has grown into substantial restraints of competition, they turn into private monopolization. However, even in this situation, those conducts have the features of unfair business practices.

Therefore, such conducts can be subject to injunction as unfair business practices. In this way, some conducts which are regarded as private monopolization can be subject to injunctive relief as unfair business practices. With respect to certain kinds of unfair business practices, the relationship between unfair business practices and private monopolization is that of two concentric circles: one being a smaller circle (private monopolization) positioned within another larger circle (unfair business practices). Thus, a conduct falling under the category of private monopolization can be regarded as an unfair business practice at the same time. So, although Article 24 of JAML stipulates that injunctions run only against unfair business practices, an injunction can be issued for a conduct that is both a private monopolization as well as an unfair business practice.

The right to seek an injunction was introduced to the JAML in 2001. It has been more than ten years since its introduction, but the number of cases where the court has issued injunctions has been relatively small.

B. Standing to Seek an Injunction

Pursuant to Article 24 of the JAML, only a person whose interests have been infringed or are likely to be infringed by an act amounting to an unfair business practice can bring a case against the defendant before the court.

C. Extreme Damages

Article 24 of the JAML provides that a person entitled to seek an injunction must prove that it is liable to "suffer or likely to suffer extreme damages" by the conduct in question. In order to conclude that the plaintiff suffered "extreme damages" and is entitled to an injunction, the court requires a higher degree of illegality compared to the degree of illegality required for awarding damages claims[2] (e.g. the newspaper sales in the *Kansai International Airport* case).

Therefore, in litigation brought under Article 24 of the JAML, not only the existence of unfair trade practice but also that of "extreme damages" have to be established. For this reason, it is said that an injunction under the JAML is difficult to be granted.

In the past, (i) there are a few cases where the court denied granting injunction due to failures in proving "extreme damages" although it found an unfair business practice, and (ii) there are other cases where the court denied "extreme damages" and the existence of unfair business practice.

D. Details of Injunction

Article 24 of the JAML provides that "[the plaintiff] is entitled to seek the suspension or prevention of such infringements." When a court decides whether or not to grant an injunction, it takes into consideration the extent, based upon the details and facts of each case, to which it is necessary and sufficient to give a sufficient remedy to the plaintiff.

E. Document Production Order and Protective Order

The plaintiff needs to provide sufficient evidence to the court to prove the violation amounts to an unfair business practice. However, it is common that the defendant who is engaged in infringing the rights of the plaintiff is holding most of the evidence and consequently it is difficult for the plaintiff to succeed in proving a violation of the JAML.

In order to address this situation, and facilitate proof of the violation, the provisions for document production order and protective order were introduced in 2009 (Article 83-4 of JAML) following examples in similar orders in intellectual property regulations in Japan (Article 105 of the Patent Act, Act No. 121 of 1959, as amended, and Article 39 of the Trademark Act, Act No. 127 of 1959, as amended).

F. Preliminary Injunction

The plaintiff may file a petition for a preliminary injunction[3] pursuant to the Civil Provisional Remedies Act (Act No.91 of 1989, as amended), concurrently with or prior to filing a suit for injunction. A preliminary injunction is granted only if it is "necessary in order to avoid

[2] Osaka High Court, Judgment, July 5, 2005; Hanrei Taimuzu(Court Cases Reporter) :(1192)86[2006].

[3] The preliminary injunction can be filed and awarded as an order of provisional disposition that determines a provisional status (*kari-no-chii-wo-sadameru-karisyobun*)" under the Civil Provisional Remedies Act.

any substantial detriment or imminent danger that would occur to the obligee with regard to the relationship of rights in dispute" under Article 23, paragraph 2 of the Civil Provisional Remedies Act.

The *Dry Ice* case[4] described below is a recent case where the court granted preliminary injunction:

X (plaintiff) purchased block dry ice from Y (defendant), processed it, and sold it to X's customers. While continuing the business with Y, X also conducted a similar business with Z (third party). Then, Y, claiming that X's business relationship with Z constituted a breach of non-competition obligations, terminated its sales contract with X as well as notified X's customers and Z that X had breached the non-competition obligations. X filed for a preliminary injunction against Y's action, arguing that such conduct constituted an unfair trade practice. On March 30, 2011, the Tokyo District Court upheld X's claims and granted the injunction order as follows:

1. Y shall not obstruct trades between X and X's customers relating to dry ice sales business by informing X's customers of any of the following:
   a. X is in breach of non-competition obligation under the contract between X and Y;
   b. X will soon be unable to provide dry ices to its customers; or
   c. X will soon become insolvent.
2. Y shall not obstruct trades between X and Z by informing Z of any of the following:
   a. X is in breach of non-competition obligation under the agreement between X and Y; or
   b. The dry ice trade between X and Z conflicts with X's non-competition obligation under the agreement between X and Y; therefore such trade is not permitted.

X's claim for injunction (not preliminary injunction) is still in dispute in the Tokyo District Court and therefore, as of March 2013, not yet final and binding. Although this *Dry Ice* case is still at the stage of provisional remedy, this case is attracting attention as a case where the court granted injunction pursuant to Article 24 of the JAML.

IV. DAMAGES CLAIMS

A. Article 25 of the JAML and Article 709 of the Civil Code

In Japan, there are two ways of claiming damages caused by a violation of antitrust regulations: (i) damages claims pursuant to Article 25 of the JAML (the "Article 25 Claim") and (ii) damages claims pursuant to Article 709 of the Civil Code (Act No. 89 of 1896, as amended) (the "Article 709 Claim"). These claims are separate and independent, and it is possible to both file both claims if requirements for both claims are all met as well as to file both claims concurrently in these courts. Generally a plaintiff presumably will prefer to file both claims if requirements for both claims are met.

[4] Tokyo District Court, Order, March 30, 2011, Jurist (Legal Journal): (1447)103[2012].

B. Damages Claims Pursuant to Article 25 of the Act

In accordance with Article 26 of the JAML, it is possible to file damages claims pursuant to Article 25 of the JAML only after a cease-and-desist order or surcharge order has become final and binding. The Article 25 claim can be filed only with the Tokyo High Court (Article 85 of the JAML), regardless of the plaintiff's domicile or the place where the damages arose, and can be appealed only to the Supreme Court. The plaintiff is not required to argue or prove the defendant's intentional misconduct or negligence for the Article 25 Claim, whereas the plaintiff is required to argue and prove either one of them for an Article 709 Claim. However, this difference is not significant, because it is difficult to imagine that an entrepreneur would violate antitrust regulations without intentional misconduct or negligence. In an Article 25 Claim, the court can "ask for the opinion of the Fair Trade Commission with respect to the amount of damages caused by such violations" pursuant to Article 84. 1 of the JAML; the JFTC then submits its report to the court.

In order to prove a violation of antitrust regulations, the plaintiff must produce evidence proving how the defendant's conduct has adversely affected the market. Such a burden of proof is quite heavy for plaintiffs (especially in a case where the plaintiff is a natural person). Because the Article 25 Claim is a claim which should be brought after a cease and desist order by the JFTC, the JFTC usually retains valuable evidence regarding the defendant's violation on antitrust regulations. Therefore, it would be useful for the plaintiff if the court could make use of the documents held by the JFTC. The plaintiff may submit the documents to the court by requesting for the document submission order (Article 220 of the Code of Civil Procedures, Act No. 109 of 1996, as amended) or the document submission commission (Article 226 of the Code of Civil Procedures) to allow the court to examine the documents held by the JFTC. The JFTC will generally accept a request for document submission by the courts in relation to the Article 25 Claim and send those documents with which the JFTC decided to issue the cease and desist order.

However, the plaintiff and the JFTC may have different views of the scope of documents that the JFTC should submit to the court. The plaintiff usually wants a scope of documents as wide as possible to promote the proof of the defendant's violation. On the other hand, the JFTC may want to limit the scope of documents it submits to courts because, if the JFTC sends all or substantial part of the documents that the JFTC holds, it may be difficult for the JFTC to seek for cooperation from the parties involved in a violation in inducing a non-compulsory submission of documents or interview relevant personnel in future cases of antitrust violation that the JFTC may investigate. There was a case where the plaintiff and the JFTC did not agree on the scope of documents that the JFTC should submit.[5]

In order to file an Article 25 Claim, a cease-and-desist order or surcharge order is required to become final and binding (the cease-and-desist order will be final and binding if no appeal to the hearing procedures is made within sixty days from the date on which an original of the order is served to the addressee (i.e. the defendant) (Article 49.6 & 7 of the JAML)). It is not certain that a court automatically acknowledges the defendant's violation of antitrust regulations

[5] Tokyo District Court, Order, September 1, 2006; The Financial and Business Law Precedents(1250)14[2006]

just because of the preceding cease-and-desist order or surcharge order in the Article 25 Claim. The court may take into consideration that an entrepreneur who received such a cease and desist order chose not to appeal the hearing procedures (in such case, such cease-and-desist order or surcharge order becomes final and binding) in order to avoid loss of time and money due to the hearing and litigation procedures following the request for the hearing procedures. Therefore, the importance of a cease-and-desist order or surcharge order for the purpose of proving the defendant's violation of antitrust regulations varies from case to case.

C. Damages Claims Pursuant to Article 709 of the Civil Code

A plaintiff of the Article 709 Claims is required to follow the general rules of civil proceedings in Japan: the plaintiff is required to bring its claim to the District Court or Summary Court authorized to exercise jurisdiction over the claim,[6] and the judgment can be appealed to the High Court and then to the Supreme Court (appeal is permitted twice). The Article 709 of the Civil Code is the general provision of tort claims and the plaintiff is required to prove: (i) a violation of the plaintiff's rights or interests by the defendant, (ii) an intentional misconduct or negligence of the defendant, (iii) the amount of damages, and (iv) reasonable causation between them.

Because there is no restriction such as Article 26 of the Act (which allows claims only when the JFTC's order or court's order has become final in relation to the case claim), any party can file an Article 709 Claim before a cease and desist order has become final and binding or without the cease and desist order at all. Therefore, a plaintiff can bring an Article 709 Claim based upon its own facts and interpretation without any JFTC investigation. However, if the JFTC did not investigate the case or facts, the plaintiff cannot procure any documents held by the JFTC as is the case in an Article 25 claim. Therefore, the plaintiff has to prove the facts and illegality out of its own resources.

D. Prescription (Statute of Limitation)

According to Article 26.2 of the Act, an Article 25 claim "shall become extinct by prescription after a lapse of three years from the date on which the cease and desist order or the payment order or the decision set forth in the said paragraph became final and binding." On the other hand, according to Article 724 of the Civil Code, the Article 709 Claim "shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative within three years from the time when he/she comes to know of the damages and the identity of the perpetrator," or if "twenty years have elapsed from the time of the tortious act." The questions here concern the time when the victim came to know both the damages and the identity of the perpetrator (i.e. an entrepreneur who violated the antitrust regulations), and the decision of this matter depends on the circumstances of the individual case. There was a bid-rigging case where the court found that the Article 709 claim had been extinguished pursuant to Article 724 of the Civil Code although it admitted that it was difficult for the plaintiff to prove the tort in the case.[7]

[6] The jurisdiction of court is based on the domicile of the plaintiff (i.e. victim of a tort) or the place where a tort is committed.

[7] Niigata District Court, Judgment, December 28, 2010; Hanrei Jiho(2127)71[2011].

In sum, it would be advisable for the victims of antitrust violations to act and file their claims without delay in order to avoid the extinguishment of their damages reclaim rights by prescription.

E. Proof of Damages

Both in an Article 25 claim and an Article 709 claim, it is very important to prove the amount of damages. The plaintiff has the burden of proof, but it is common that the plaintiff is unable to prove strictly the amount of damages in individual cases.

According to Article 248 of the Code of Civil Procedure:

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

This provision can be applied both in Article 25 claim and an Article 709 claim.

In most bid-rigging cases, the courts determine the amount of damages as X percent of the value of the contract for bidding (the "Contract Value"), pursuant to Article 248 of the Code of Civil Procedure. In past cases, the court usually determined the amount within the range of 5 percent to 8 percent of the Contact Value, but there is also a case that the court determined the amount of damages as 20 percent of the Contract Value. The court's judgments widely vary concerning the amount of damages.

There are many bid-rigging cases whether damages were claimed. For example, Nagoya District Court determined the amount of damages as 5 percent of the actual price of the contract in one of its judgments.[8] The reason of the judgment is as below:

> Although the Plaintiff actually incurred the damage which is the difference between the estimated price and the actual contact price, such estimated price did not actually exist and is extremely difficult to determine the price based upon various factors such as the type, size, place, details of the work (i.e. work to be performed under a contract based upon biddings), the number of bidders for the work, economic and financial situation of bidders at the time of bidding, terms and conditions, price and amount of other works in bidding at the same time, and the regional locality relating to the bid. Therefore, in this case, the court can recognize the plaintiff suffering some damage but it is extremely difficult, from the nature of the damage, to prove the amount thereof. Therefore the court determines a reasonable amount of damages based on the entire import of the oral argument and the result of the examination of evidence, pursuant to Article 248 of the Code of Civil Procedure.

Presumably, the court applies Article 248 of the Code of Civil Procedure in bid-rigging cases because it is extremely difficult for the plaintiff to prove, with evidence, the price it presumes that would have formed if there had been no bid-rigging, although it is clear that some damage incur. Even though the court would apply Article 248 of the Code of Civil Procedure in bid-rigging cases, the plaintiff is required to actively argue the facts and produce evidence regarding what price would have been formed if there were no bid-rigging.

[8] Nagoya District Court, Judgment, December 11, 2009; Hanrei Jiho(2072)88[2010].

Currently, the court does not frequently apply Article 248 of the Code of Civil Procedure in cases other than those of bid-rigging. However, if the number of filed antitrust violation damages claims increases, the court might begin to apply Article 248 of the Code of Civil Procedure in cases other than bid-rigging.

F. Access to Records of the Hearing Procedure (Request for Inspection and Copy of Documents)

In accordance with Article 70-15 of the JAML, a person who incurred damages "may, after the hearing procedures have been commenced, request the Fair Trade Commission for inspection or copy of the records of the case in question, or for delivery of a transcript of the written cease and desist order, the written payment order for surcharge, the written decision of commencement of the hearing, or the written decision, or an extract thereof" with certain qualifications and conditions. The records of the case in question mean documents and materials adopted in the hearing procedure.

Because it is possible to have access to the case records of the hearing procedures after the hearing procedures have commenced (even before the conclusion of the hearing procedures), the plaintiff can take advantage of this right to access the case records in order to find evidence supporting its claims and arguments. On the other hand, the entrepreneur—the defendant who received a cease and desist order from the JFTC—can appeal the hearing procedures pursuant to Article 49, paragraph 6, but must be aware of the risk of potential access by the plaintiff to the case records of the hearing procedures.

V. LEGAL VALIDITY OF THE BREACH OF ANTITRUST REGULATIONS AND ILLEGALITY IN PRIVATE LAWS

There is no explicit provision regarding the legal validity of the breach of antitrust regulations. The court cases are divided.

Under the Civil Code of Japan, a juristic act ("houritsu-koui" including contracts) that is against public order and morals is void. Therefore, the question should be whether the juristic act in violation of antitrust regulation also falls under the act against public order and morals.

The Supreme Court has said[9] that a contract that violates antitrust regulations will not automatically be judged as null and void except in a case where such violation is clearly against public order and morals. However, although this rule by the Supreme Court is regarded as *obiter dictum,* and the lower courts frequently follow this rule that a violation of antitrust regulation does not automatically nullify the juristic act in breach of private law, there have been many cases where the court concluded that acts in breach of antitrust regulations are null and void because they are also against public order and morals given the aims, methods, and ways of such acts.

VI. CONCLUSION

Although private actions have not been actively used in Japan as compared with, for example, the United States, there is generally a trend toward increasing private actions based on the JAML and Article 709 of the Civil Code in which antitrust issues are involved. The

[9] The Supreme Court, Judgment, June 20,1977, Saikou Saibansho Minji Hanreishu (Supreme Court Civil Cases Reporter): 31 (4)449.

importance of JAML has increased tremendously in recent years and more lawyers are involved in litigations with regard to the JAML. There is strong interest on antitrust issues among the business and legal community in Japan. This trend, in turn, will be reflected in an increase of antitrust private suits in Japan.