The Legal 500 Country Comparative Guides

Japan: Competition Litigation

This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in Japan.

For a full list of jurisdictional Q&As visit here

Contributing Firm

Atsumi & Sakai

Authors

Setsuko Yufu
Partner
The Legal 500
Setsuko.yufu@aplaw.jp

Hisashi Miyatsuka
Partner
The Legal 500
hisashi.miyatsuka@aplaw.jp

Saori Hanada
Partner
The Legal 500
saori.hanada@aplaw.jp

Kohei Murakawa
Partner
The Legal 500
kohei.murakawa@aplaw.jp

1. **What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?**

Damages claims

In principle, a party that has suffered damage due to a violation of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (so called as the "**Antimonopoly Act**") ("**AMA**") may file a damages claim against the violating party based on either (1) Article 709 of the Civil Code ("**Type A claims**") and/or (2) Article 25 of the AMA ("**Type B claims**"). Both types of claim are based on tort liability. The main differences lie in that Type B claims are so-called "follow-on" claims with strict liability (see Question 2) and how the statute of limitations is calculated (see Question 5).

Unjust enrichment

In addition, an aggrieved party may file a claim of unjust enrichment (Articles 703 and 704 of the Civil Code), which performs a function similar to that of a competition damages claim, when a contract has been concluded based on bid-rigging, abuse of superior bargaining position, etc. and therefore was held to be void due to public policy. An unjust enrichment claim is advantageous because (i) the limitation period is a period of 10 years (Article 167 of the Civil Code) and (ii) the burden of proof of damage can be shifted to the defendant. For Type A and B claims, the limitation periods are shorter (see Question 5) and the aggrieved party assumes the burden of proving damage.

Injunction

At the same time, in relation to violations or potential violations of Article 8(v) or Article 19 of AMA (unfair trade practices), an aggrieved party who is suffering or likely to suffer extreme damage is entitled to seek an injunction to suspend or prevent the infringements (Article 24 of the AMA).

2. **What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?**

Type A claims (Article 709 of the Civil Code)

Type A claims are general tort claims. Not only direct purchasers but also indirect purchasers may commence lawsuits for such claims by the filing of complaints with a competent district court. A claimant must prove (i) existence of intention or negligence; (ii) violation of rights or legally protected interests; (iii) occurrence and amount of damage; and (iv) legally sufficient causation between the violation and the damage.

Type B claims (Article 25 of the AMA)

Type B claims may only be made after either a cease and desist order or a surcharge payment order by the Japan Fair Trade Commission ("**JFTC**") has become final and binding regarding, among other things, private monopolization, unreasonable restraint of trade or unfair trade practices (follow-on claims, Article 25(1) and Article 26(1) of the AMA).

While these claims are under strict liability, Type B claims are not considered to be advantageous for the claimant because, with regard to most violations of the AMA, (i) intention or negligence and (ii) the violation under Type A claims are, as a matter of practice, presumed. On the contrary, those claims are disadvantageous in that (i) claimants may only assert a compensation claim for damage arising from violating actions stated in the cease and desist order or surcharge payment order; and (ii) no claim may be made against persons other than those to whom the cease and desist order or surcharge payment order is addressed. In this regard, a successful leniency applicant that is exempt from the relevant order (surcharge payment order and/or cease and desist order) is not liable for damages under Type B claims (whereas, in contrast, they will still be liable for damages under Type A claims).

3. **What remedies are available to claimants in competition damages claims?**

Monetary damages for the amount of damage the aggrieved party actually suffered are available remedies under both Type A and Type B claims (for the method of calculating damages, see Question 17). It is also possible to demand an injunction (see Question 1).

4. **What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?**

See Question 17 for the measure of damages.

If more than one person has inflicted damage on others by their joint tortious acts, each of them shall be jointly and severally liable for compensation for such damage (Article 719(1) of the Civil Code). Since violators involved in a price-fixing cartel or bid-rigging are jointly inflicting damage, each of the violators assumes joint and several liability and therefore is independently liable for damages for the entire amount of damage. A violator that has provided compensation to claimants may demand compensation from the other violators according to the degree that each of the other violators has contributed to the total damage to the claimants.

See Question 2 and 16 for leniency applications.

What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

Type A claims (Article 709 of the Civil Code)

A Type A claim is extinguished after 3 years from the time that the aggrieved party comes to know of the damage and the identity of the violator, or 20 years from the time of the tortious act, whichever comes first (Article 724 of the Civil Code). In practice, the damage and the violator usually become known to the aggrieved party when a cease and desist order or a surcharge payment order is issued by the JFTC, and the limitation period of 3 years starts to run at that time.

Type B claims (Article 25 of the AMA)

A Type B claim is extinguished after 3 years from the date that a cease and desist order or surcharge payment order becomes final and binding (Article 26(2) of the AMA). The 3-year limitation period for a Type A or Type B claim is suspended upon (i) filing of a complaint with the court, (ii) filing of an attachment, provisional seizure, or provisional disposition, or (iii) acknowledgment of the claim by the obligor.

6. **Which local courts and/or tribunals deal with competition damages claims?**

Type A and Type B claims are both handled by the competent district court.

7. **How does the court determine whether it has jurisdiction over a competition damages claim?**

For a Type A claim, the court follows the provision on jurisdiction in the relevant contract (e.g., a purchase and sale agreement between the claimant and defendant for the products affected by a price-fixing cartel). If there is no such provision, the claimant may submit its complaint to the district court having jurisdiction over (i) the principal office or business office of a defendant company; or (ii) the location where the tort was committed or where the damage occurred.

For a Type B claim, the Tokyo District Court has exclusive jurisdiction.

8. **How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?**

Applicable law

5. For both Type A and Type B claims, if the claim is obviously closely connected to a certain place, the law of such place shall apply (Article 20 of the Act on General Rules for Application

of Laws (“AGRAL”). Otherwise, in principle, the applicable law shall be that of the place where the result of the infringement of the AMA occurred. If the occurrence of the result at that place was ordinarily unforeseeable, the law of the place where the act of infringement was committed shall govern (Article 17 of AGRAL).

Standard of proof

As in other types of civil litigation, a high probability is the standard of proof for competition damages claims, where the causes of action needs to be proven to the extent that an average person would not have doubt.

9. **To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?**

The courts are not legally bound by the infringement decisions issued by domestic or foreign competition authorities. However, in practice, final and binding cease and desist orders or surcharge payment orders by the JFTC would be recognized as strong evidence that presumes the existence of the violating conduct of the AMA. It is generally difficult to overturn such presumptions, although the court examines other evidence and determines the existence of the violating conduct based on its own findings.

We expect that final and binding infringement decisions by foreign competition authorities would have the same evidential value as the ones by the JFTC.

10. **To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?**

Litigation of Type A claims can proceed while the public enforcement action is pending. There is no statutory provision which enables the enforcers to stay the Type A private action. Even while the public enforcement action is still pending, the court may render a final judgment if it reaches the stage to do so. However, in light of our experience, it is possible that the private litigation proceedings may be stayed in effect at the court’s discretion if the court becomes cautious about recognizing the existence of the violation of the AMA.

In contrast, Type B claims may only be made after either a cease and desist order or a surcharge payment order has become final and binding (See Question 2).

11. **What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?**

In Japan, there are mechanisms called group action (*Shohisya Dantai Sosyo*) and appointed

party (*Sentei Tojisya*).

Group action

Group actions can only be used for limited situations, as provided in the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers. Compared to the well-known U.S. class action, the characteristics of the Japanese group action are that (i) only specified qualified consumer organizations authorized by the government can serve as claimants (i.e. individuals cannot be claimants); (ii) the subject claims are limited to those arising from contracts between a consumer and a company; (iii) it is an opt-in type proceeding where only those who opt to participate in the group action proceeding may benefit from the judgment; and (iv) that the judge of a group action may only determine whether the company is liable for damages and the amount thereof cannot be fixed (each consumer needs to file a separate proceeding to establish the amount of damages).

Appointed party

The "appointed party" is a mechanism where persons with a common interest may appoint one or more persons from among themselves to stand as the claimant on behalf of all (Article 30 of the Code of Civil Procedure ("**CCP**")). This mechanism has actually been used in a competition damages litigation in relation to a violation of the AMA. Appointed parties do not need to be lawyers but they must have a common interest with the other parties.

Assignment of claims

While it is theoretically possible for each claimant to assign its claims to a specific person, in Japan, it is not common for such a person to file a lawsuit for the assigned claims. This is because it is prohibited by Article 10 of the Trust Act to create a trust for the primary purpose of having another person initiate legal action and the aforementioned lawsuit has a risk to violate this provision.

12. **Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?**

The concept of passing-on defence *per se* has not been introduced into Japanese competition law. However, if a defendant (cartelist) is successful in proving the fact that some or all of the overcharges were passed on to down-stream companies or consumers, the defendant may argue that the amount of damages should be reduced accordingly.

In addition, in the cases of bid-rigging at the initiative of public officers, the court allows the amount of damages to be reduced by taking into account the negligence of the public officers

(contributory negligence, Article 722 of the Civil Code).

13. **Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?**

Expert report

In competition litigation related to a price-fixing cartel or bid-rigging, a party sometimes submits an expert report to prove the amount of damage suffered. The expert in these sorts of cases is privately retained by the party. Given the wide discretion in determining the amount of damage, the court has not been faced with the necessity of relying on a specific economic methodology to quantify the amount of damage, although economic analysis of the amount of damage is becoming more common (See Question 17).

Expert testimony and technical advisers

In addition, there is the system of expert testimony (Article 212 of the CCP) and the procedure to hear an explanation from a technical adviser based on the adviser's expert knowledge (Article 92-2 of the CCP). Although the technical adviser system was introduced in 2003, it has not been used frequently in practice.

An expert is appointed by the court at the request of a party to the litigation. A technical adviser, in contrast, is appointed by the court after hearing the opinions of the parties to the litigation.

Experts assume the obligation to provide an expert opinion in good faith according to the dictates of conscience. Technical advisers must perform their services faithfully in accordance with their professional duties. A technical adviser will be dismissed if he/she violates the foregoing obligation or is determined to have engaged in any conduct that is not suitable as a technical adviser.

14. **Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?**

Unlike trials in the United States, there is no discovery or jury trial system and therefore the judge is the decision maker.

For both Type A and Type B claims referred to in Question 1, the claimant files an action by submitting a written complaint to the court and, in response thereto, the named defendant submits a written answer. The court designates dates for oral proceedings and the parties make written submissions and offer relevant evidence at a number of these oral proceedings. Evidence includes documentary evidence, testimony of one or more witnesses or expert witnesses and observation (by the judge, based on the judge's five senses). The court has

wide discretion regarding the types of evidence to be adopted and the assessment of adopted evidence, and finds facts entirely at its discretion (Principle of the Free Evaluation of Evidence, Article 247 of CCP).

When legal and factual issues have been sufficiently identified, the court conducts examinations of witnesses, which need to be conducted in as focused a manner as possible. The court has discretion to decide the case without examination of witnesses. In the cross-examination, it is prohibited to ask about any matters other than those matters that were raised in the direct examination, matters related thereto, and matters regarding the reliability of testimony. In the cross-examination, it is also prohibited to ask questions seeking statements on facts which the witness has not experienced directly.

15. **How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?**

In our experience, where public entities seek damages in bid-rigging cases, after the filing of the complaint, it usually takes around 1 year to reach witness examinations and 1.5 years to a final judgment. On the other hand, where purchasers of products subject to a price-fixing cartel file damages lawsuits against cartelists, it may be expected to take around 3 to 4 years to render a final judgment as legal and factual issues in dispute tend to be complicated.

A party dissatisfied with a judgment by the district court may file an appeal (*Kouso*), which is handled by a high court. A party dissatisfied with a judgment by the high court may file a final appeal with the Supreme Court (*Jokoku*).

16. **Do leniency recipients receive any benefit in the damages litigation context?**

Generally, there is no mechanism to give leniency recipients benefits in competition damages litigation. There are, of course, opinions that such a system should be introduced in order to make leniency more effective but there is no momentum to actually establish such system.

However, in relation to Type B claims, if leniency recipients are exempt from an administrative surcharges order and a cease and desist order, such recipients will not be liable for damages under Type B claims (see Question 2).

17. **How does the court approach the assessment of loss in competition damages cases? Are "umbrella effects" recognised? Is any particular economic methodology favoured by the court? How is interest calculated?**

In competition damages litigation concerning a cartel or bid-rigging, the amount of damage is determined by assessing the monetary difference between the actual price of the products or services and the anticipated price that would have existed were it not for the violation of the AMA. While there is no generally-accepted methodology to determine the anticipated price, if it is possible to identify the price formed immediately before or after the period of violation

and if such price is considered to be formed based on free competition, then, in principle, the court tends to find that such price is the anticipated price.

In cases where the anticipated price cannot be identified in this way, the judge has significant discretion in determining the amount of damage. This is because Article 248 of CCP, which was introduced in 1996, sets forth that when it is extremely difficult to prove the amount of damage, the court may determine an appropriate amount of damage at its discretion. Due to this discretionary power, the court has not been faced with the necessity of relying on a specific economic methodology to quantify the amount of damage, although economic analysis of the amount of damage is becoming more common.

"*Umbrella effects*" have not been recognized by the court although the theories have been introduced to Japan.

As for interest, interest for the period from the date of service of the written complaint until the payment of damages is usually approved.

18. **Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?**

    See Question 4.

19. **In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?**

    In Japan, there is no U.S.-style summary judgment. If an action was not filed in accordance with the law (for example, the party does not have standing or the action violates the prohibition of duplicate actions) and such defect cannot be corrected, the court may render a decision to dismiss the action without trying the merits of the case.

    In addition, before the stage of examination of witnesses, courts often explore the possibility of settlement by the parties. Also, courts may issue a default judgment if the defendant fails to appear.

20. **What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?**

    As discussed in Question 11, while the group action and appointed party mechanisms for aggregating competition damages claims do exist, there is no special procedure in place for collective settlement.

21. **What procedures, if any, are available to protect confidential or proprietary**

information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

Inspection of case records (Both Type A and B claims)

A third party may inspect and read a case record of competition litigation at the court by filing a request with the court clerk (Article 91(1) of CCP). When confidential information, such as a trade secret being kept by a party to the litigation, is recorded in the case record, such party may request that the court issue an order to limit the persons who may request inspection or copying of the parts of the case record containing such trade secret to only the parties to the litigation (Article 92(1)(ii) of the CCP). If the court issues such order, the confidential information will not be disclosed to third parties.

Commission to send documents (Both Type A and B claims)

There is no U.S.-style disclosure in Japan but a claimant in competition litigation may request that the court commission the JFTC to send relevant documents (Article 226 of CCP). In accordance with JFTC's internal policy, if a cease and desist order or surcharge payment order has already become final and biding, the JFTC discloses documents relating to the existence of violating acts, amount of damage, and causation between such act and damage that were prepared or obtained in the course of issuing such order. The JFTC takes appropriate measures, such as redacting some parts of the documents, taking into account trade secrets, knowhow, and privacy of officers or employees.

Order for submission of documents (Both Type A and B claims)

If disclosure by way of commission is insufficient, the claimant may require that the court issue an order for submission of documents (Article 223 of CCP). Unless there are grounds for refusing to submit the documents set forth in Article 220 of CCP, the party possessing such documents may not refuse to submit the same. The main categories of documents subject to the grounds for refusing submission are: (i) documents concerning confidential information in connection with a public officer's duties, which, if submitted, would likely harm the public interest or substantially hinder the performance of a public duty; (ii) documents recording technical or professional secrets which are not released from non-disclosure obligation; and (iii) documents prepared mainly for the use of the persons in possession. Among these grounds, item (iii) above refers to internal documents which are never intended to be disclosed to a third party. While item (iii) might cover documents subject to attorney-client privilege, we are not aware of any statute, ordinance, or court precedent that explicitly states it in relation to the civil litigation system in Japan. In addition, documents created by public officers for organizational use do not fall under (iii).

Since the employees of the competition authority are public officers, whether they have an obligation to submit documents to the parties of competition litigation is determined pursuant to the above criteria. There are several court precedents which ordered the JFTC to disclose written statements of employees.

Special provisions for injunction (Article 24 of the AMA)

With regard to competition litigation seeking an injunction, there is a special rule regarding court orders for submission of documents (Article 80(1) of the AMA). Under this rule, unless there is a justifiable reason, a holder of documents necessary to prove the alleged infringement must submit such documents. In addition to ordering submission of documents, the court may also issue protective orders that trade secrets may not be used for any purpose other than the purpose of conducting the litigation or be disclosed to third parties (Article 81 of the AMA).

22. **Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?**

In principle, court costs are entirely borne by the losing party (Article 61 of CCP). The court costs include filing fees, which are determined based on the value of the subject of litigation, postal charges, transportation costs and daily allowances for witnesses and fees for experts, but do not include attorneys' fees. The amounts for transportation costs and daily allowance are determined pursuant to the rules of the Supreme Court. Fees for expert testimony are determined by the court as it finds reasonable.

Basically, the court does not order a losing party to pay attorneys' fees, but a claimant for Type A or B claims may recover some portion of attorneys' fees from the defendant as part of damages, since obtaining appropriate compensation for damage through litigation is difficult to achieve without retaining lawyers.

23. **Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party's costs? Are lawyers permitted to act on a contingency or conditional fee basis?**

There is no statute or court precedent that expressly and directly bans third-party funding. However, it is still under discussion whether any statutory provisions indirectly prohibit third-party funding. For example, article 72 of the Attorney Act provides that no person other than attorney may, for the purpose of obtaining compensation, engage in the business of providing legal services. A third-party funder would be exposed to the risk of violating this provision if it were to significantly influence a party's actions in competition litigation. For some consumer litigation, there has been a growing use of crowdfunding to raise funds for litigation.

Lawyers are permitted to act on a contingency fee basis, although a 100% contingency fee arrangement risks violating the Code of Conduct of Japanese lawyers.

24. **What, in your opinion, are the main obstacles to litigating competition damages claims?**

Where the AMA is violated in the course of a business transaction, the aggrieved party and perpetrator usually have an ongoing business relationship. In such cases, since the parties wish to maintain a smooth working relationship, it is common for the dispute to be resolved through an out-of-court settlement. Due to this preference for settlement, we do not expect that competition damages litigation will increase in the near future.

Where the aggrieved party is a consumer, as discussed in Question 11, the system for group actions is inadequate, and makes it difficult for consumers to initiate competition damages litigation.

25. **What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?**

The 2019 amendment to the AMA ("Amendment") shall come into force by the end of 2020. The Amendment introduces a new system in which the JFTC may more flexibly reduce the administrative surcharges to be imposed on leniency applicants in accordance with the degree of their cooperation with the investigations. Concurrently, for the purpose of promoting leniency applicants' cooperation with an investigation, a system similar to attorney-client privilege was introduced – investigators will not access documents which include confidential communications between the client and their attorney regarding legal advice ("Treatment"), especially for cases concerning price-fixing cartels and bid-rigging. On June 25, 2020, the JFTC published rules and guidelines necessary to implement the Amendment.

While there have been a number of court cases where public entities have pursued claims for damages against parties that engaged in bid-rigging in connection with public works or procurement in Japan, there have been only a few court cases where companies having ongoing businesses relationships with violators of the AMA initiated competition damages litigation.

As we are not aware, at this time, of any specific movement aimed at promoting competition damages litigation, it does not appear to us that there will be major developments in the field of competition litigation in the coming five years.