

► Agricultural, Forestry and Fisheries Law Practice Team Newsletter

Atsumi & Sakai's Agricultural, Forestry and Fisheries Law Practice Team (AFFL Team) consists of four lawyers and one advisor, each of whom has different strengths and provides a wide variety of high quality legal services in the areas of agriculture, forestry, and fisheries ("AFF") ranging from support for overseas transactions and overseas expansion (or closure), drafting and reviewing agreements for complex purchase and sale transactions, licensing and other intellectual property rights, communications with authorities (such as the Fair Trade Commission), and dispute resolution.

Legal Framework for Protection of Livestock Genetic Resources (Act on Prevention of Unfair Competition Regarding Livestock Genetic Resources, Act for Amendment of the Act on Improvement and Increased Production of Livestock)

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Amendment of laws affecting the livestock industry in the 2020 ordinary Diet session

1. Bill enacted in the 201st session of the Diet

At the time of writing of this newsletter, the 202nd (extraordinary) Diet session had just closed^[1]. In the 201st (ordinary) Diet session, the following three bills (outlined in (1) - (3) below) affecting the livestock industry were enacted. This newsletter will provide a brief explanation of bills (1) and (2).

(1) Act on Prevention of Unfair Competition regarding Livestock Genetic Resources^[2]

As the value of livestock genetic resources as an asset has increased following improvements made over several years, the Act aims to protect such resources as intellectual property and prevent the wrongful acquisition of livestock genetic resources by prohibiting acts of unfair competition and by introducing civil injunctions. Measures to restore credibility, as well as criminal penalties, were introduced.

(2) Act for Partial Amendment of the Act on Improvement and Increased Production of Livestock

In addition to the protection of intellectual property described in (1) above, this Act established new rules for the distribution of semen and fertilized eggs for artificial insemination of livestock from the viewpoint of protection of livestock genetic resources, and introduced administrative dispositions and criminal penalties for violations of the new rules.

(3) Act for Partial Revision of the Act on Domestic Animal Infectious Diseases Control

In response to the detection of swine fever (hog cholera) in Japan, the Act establishes legal measures to prevent African swine fever (ASF), which is currently spreading in East Asia, from entering Japan.

2. Background of the amendments

There are several famous Japanese beef breeds, which were developed through many years of breeding and improvements by people engaged in breed improvements. The act of developing livestock with certain characteristics through repeated breeding is an intellectual activity,

and even though there is a significant need to protect the outcome, the livestock could easily be distributed in a manner different from the intention of the developer.^[3] Recently, there have been reports of cases where semen from brand beef cattle was transported to China in straws^[4] and the limitations of the protection available under the existing legal framework have been highlighted, and so the Act on Prevention of Unfair Competition regarding Livestock Genetic Resources was enacted, and the Unfair Competition Prevention Act^[5] and the Act on Improvement and Increased Production of Livestock were amended^[6].

[1] In terms of laws concerning the agriculture, forestry and fisheries industries, the recent extraordinary Diet session enacted the Plant Variety Protection and Seed Act, which had been a pending issue, as well as the Improvement of Domestic Trade of Specific Marine Animals and Plants Act.

[2] The effective date of the Act on Prevention of Unfair Competition regarding Livestock Genetic Resources is October 1, 2020 (Cabinet Order Specifying the Effective Date of the Act on Prevention of Unfair Competition regarding Livestock Genetic Resources (Cabinet Order No. 289 of 2020)).

[3] If the relationship is limited to being between the developer of the breed and the transferee, it is possible to contractually agree on measures to prevent the outflow of the breed to external third parties.

[4] By 1998, 247 live cattle and 13,000 straws of semen had been exported from Japan to the United States, where they were raised and then exported to Australia. Overseas production of Japanese beef similar to authentic Japanese beef is possible by backcrossing.

[5] "Interim Report" by the Expert Committee on Strengthening the Protection of the Intellectual Property Value of Japanese Beef Genetic Resources (January 28, 2020) (https://www.maff.go.jp/j/press/seisan/c_sinko/200128.html)

[6] "Expert Committee on Strengthening the Protection of the Intellectual Property Value of Japanese Beef Genetic Resources" interim report (January 28, 2020) (https://www.maff.go.jp/j/study/wagyu_iden/wagyu_iden.html)

3. Contents of the Act on Prevention of Unfair Competition regarding Livestock Genetic Resources

While registration-type rights such as patent rights and trademark rights are not suitable for livestock due to variations in the abilities among individuals belonging to a specific breed and the offspring they produce, improved breeds have accumulated useful genetic information through the livestock improvement process, which is why a framework was adopted to regulate and prohibit certain acts as illegal acts, modeled after the regulations on unauthorized use of results under the Unfair Competition Prevention Act.^[7] At the time of writing of this newsletter, livestock genetic resources protected by said Act were (i) the Japanese Black, (ii) the Japanese Brown, (iii) the Japanese Shorthorn, (iv) the Japanese Polled, (v) hybrids between (i) - (iv), and (vi) semen for artificial insemination of livestock and fertilized eggs of livestock of breeds (i) - (v) and hybrids of (v).^[8]

Under said Act, if the operating profit of a "Livestock Genetic Resource Producer" is infringed or is likely to be infringed by "unfair competition", such producer may demand the suspension or prevention of infringement (the right to demand an injunction; Article 3, paragraph 1 of the Act). In addition, in the case where a party infringes the operating profit of another party by "unfair competition" as defined in said Act (Article 4 of the Act), it is possible to claim compensation for damage suffered as the result of such infringement. These concepts are outlined below.

(1) "Livestock genetic resources" subject to protection

"Livestock genetic resources" refers to semen, etc. for specific livestock artificial insemination that is transferred or delivered for business by livestock genetic resource producers, for which restrictions on the scope of users or the purpose of use are clearly indicated through certain acts such as contracts (Article 2, paragraph 1 of the Act).^[9]

"Restrictions on the scope of users or the purpose of use" must be clearly indicated by contract or other acts stipulated in the Ordinance for Enforcement of the Act, where the three following methods are specified in addition to contracts.

- (A) Preparing provisions to be used as the content of contracts for the purpose of transferring or delivering, the semen, etc. for artificial insemination of specific livestock (including individual provisions of standard terms and conditions as provided in the Civil Code) for business and publicizing such restrictions on the internet or by other appropriate methods.
- (B) Indicating restrictions on a certificate of semen for artificial insemination of livestock, certificate of internal fertilized egg of livestock, or certificate of external fertilized egg of livestock based on the new/amended Act on Improvement and Increased Production of Livestock.
- (C) Indicating restrictions with letters, figures or symbols, or a combination thereof (hereinafter referred to as an "Abbreviation") widely recognized as an indication that there are restrictions, on containers containing semen, etc. for artificial insemination of specific livestock.

In relation to A above, the Ministry of Agriculture, Forestry and Fisheries has published a notice on the Internet that includes very simple standard terms and conditions for the transfer of semen, etc. for artificial insemination of livestock^[10]. It is expected that the requirements of A will be fulfilled by publishing these standard terms and conditions online and providing that users of semen, etc. for artificial insemination of livestock or fertilized eggs of livestock agree to comply with said terms and conditions^[11]. In addition, it has been announced on the Ministry of Agriculture, Forestry and Fisheries website that the indication "(R)" is sufficient for the Abbreviation.^[12]

- (2) Acts of "Unfair Competition" subject to claim for injunction or compensation for damage

The following acts (i) through (xiii) fall under "Unfair Competition".

In simple terms, and broadly speaking "unfair competition" is the act of illegally acquiring or using (meaning use, transfer, delivery or export) livestock genetic resources in a manner that exceeds contractual limits. Furthermore, unfair competition also is defined to include the use of livestock produced with livestock genetic resources to produce further livestock or semen or fertilized eggs.



- [7] There are no international conventions (such as the UPOV Convention for seeds and seedlings) to protect the genetic resources of livestock.
- [8] The four breeds in (i)-(iv) are breeds improved in Japan exclusively for their meat.
- [9] Livestock genetic resource producers are business operators engaged in the production of livestock genetic resources (Article 2, paragraph (2) of the Act).
- [10] "Examples of terms and conditions of a transfer agreement for semen for livestock artificial insemination (contract template)" https://www.maff.go.jp/j/chikusan/kikaku/attach/pdf/kachiku_iden-30.pdf
- [11] The standard terms and conditions prepared and published by the Ministry of Agriculture, Forestry and Fisheries are simple. However, careful consideration seems to be necessary in terms of whether the standard terms and conditions are intended to disallow amendments to the standard provisions as necessary in so-called business-to-business relationships.
- [12] "Clarification of Restrictions by Means Other than Contracts" (https://www.maff.go.jp/j/chikusan/kikaku/attach/pdf/kachiku_iden-35.pdf)

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- (i) Acquiring livestock genetic resources by fraud, assault, intimidation, theft or embezzlement in the pursuit of business (hereinafter collectively referred to as "Fraudulent Acquisition");
- (ii) Using, transferring, delivering or exporting livestock genetic resources acquired or obtained by Fraudulent Acquisition;
- (iii) Acquiring livestock genetic resources or using, transferring, delivering or exporting such acquired livestock genetic resources, with the knowledge that a Fraudulent Acquisition has occurred with regard to such livestock genetic resources, or when failing to know the same due to gross negligence;
- (iv) Using, transferring, delivering or exporting livestock genetic resources in a manner exceeding the restrictions on the scope of users or the purpose of use clearly indicated in the contract pertaining to the transfer or delivery of such livestock genetic resources, for the purpose of wrongful gain or causing damage to a livestock genetic resource producer after the transfer or delivery of such livestock genetic resources;
- (v) Acquiring livestock genetic materials by receiving transfer or delivery thereof while knowing that such transfer or delivery falls under the acts listed in (iv) above (limited to transfer or delivery of livestock genetic resources; hereinafter referred to as "Unauthorized Transfer, etc. Outside of Contract"), or while failing to know the same due to gross negligence, acquiring livestock genetic resources while knowing that there has been an Unauthorized Transfer, etc. Outside of Contract with regard to such livestock genetic resources, or while failing to know the same due to gross negligence; and using, transferring, delivering or exporting livestock genetic resources that have been acquired by any of the foregoing acts;
- (vi) Making available, transferring, delivering or exporting livestock produced by the party's own acts which fall under any of those listed in (ii) through (v) (limited to use of livestock genetic resources; hereinafter referred to as "Act of Illegal Use") for the purpose of producing livestock or livestock's semen or fertilized eggs (hereinafter referred to as "Livestock, etc.");
- (vii) Acquiring livestock or making available, transferring, delivering or exporting such acquired livestock for the purpose of production of Livestock, etc. with the knowledge that such livestock is the result of an Act of Illegal Use by another party, or while failing to know the same due to gross negligence;
- (viii) Transferring, delivering or exporting Livestock, etc. produced by the party's own acts which fall under any of those listed in (vi) and (vii) (limited to making livestock available for the production of Livestock, etc.);
- (ix) Acquiring Livestock, etc. or transferring, delivering or exporting such acquired Livestock, etc. with the knowledge that the Livestock, etc. is the result of acts which fall under any of those listed in (vi) or (vii) by another party (limited to making livestock available for the production of Livestock, etc.), or while failing to know the same due to gross negligence;

- (x) Using, transferring, delivering or exporting a fertilized egg produced by the party's own Act of Illegal Use;
- (xi) Acquiring a fertilized egg, or using, transferring, delivering or exporting such acquired fertilized egg with the knowledge that the fertilized egg is the result of an Act of Illegal Use by another party, or while failing to know the same due to gross negligence;
- (xii) Transferring, delivering or exporting livestock that is the result of the party's own acts which fall under any of those listed in (x) or (xi) (limited to using fertilized eggs); and
- (xiii) Acquiring livestock or transferring, delivering or exporting such acquired livestock with the knowledge that the livestock is the result of acts which fall under any of those listed in (x) or (xi) (limited to using fertilized eggs.) by another party, or while failing to know the same due to gross negligence.

(3) Provisions regarding other court proceedings

Provisions regarding other court proceedings equivalent to those of the Unfair Competition Prevention Act were established, including provisions on the presumption of amount of damage (Article 5), presumption of use of livestock genetic resources by persons who have acquired livestock genetic resources (Article 6), and in camera procedures (Article 7).

(4) Criminal penalties

Certain acts, such as the Fraudulent Acquisition of livestock genetic resources to earn wrongful gains, are subject to criminal penalties (imprisonment with work of no more than 10 years or a fine of no more than 10 million yen). In the case of a representative, etc. of a corporation, the corporation may be subject to a fine of no more than 300 million yen.

Criminal penalties may also be applied even if the counterparty uses livestock genetic resources outside Japan, and therefore foreign business operators also need to pay attention to the possibility of extraterritorial application (Article 18, paragraph 1, item 11).

(5) Jurisdiction

As Article 6-2 (Jurisdiction over an Action Involving a Design Right) of the Code of Civil Procedure is applicable, the Tokyo District Court is recognized to have jurisdiction if a district court in eastern Japan has jurisdiction, and the Osaka District Court is recognized to have jurisdiction if a district court in western Japan has jurisdiction, on a case-by-case basis.

4. Act for Amendment of the Act on Improvement and Increased Production of Livestock

As mentioned above, a new law has been introduced to protect livestock genetic resources as intellectual property, yet it must be said that it would be difficult to take action after livestock genetic resources have been transported to a foreign country due to the significant hurdles to conducting court proceedings overseas. Therefore, the Act on Improvement and Increased Production of Livestock was amended to strengthen the distribution management of livestock genetic resources. Important amendments include the following:

- (A) Prohibition of transfer of livestock genetic resources from entities other than livestock artificial insemination facilities, etc.^[13]

As a result of this amendment, it was stipulated that semen for artificial insemination of livestock and fertilized eggs of livestock not preserved in a livestock artificial insemination facility, etc. shall not be transferred to others, and the transfer of semen etc. from a farmer who has not obtained permission to establish a livestock artificial insemination facility to another farmer was prohibited (Article 14, paragraph 3 of the Act on Improvement and Increased Production of Livestock).

- (B) Labeling on containers containing semen or eggs for artificial insemination of specific livestock

Containers of semen for artificial insemination of livestock shall have an indication of (a) the name etc. of the male livestock from which it was collected and (b) the date of collection, and containers of fertilized livestock eggs shall have an indication of (c) the record number of the livestock artificial insemination facility that collected or produced the semen, etc. for artificial insemination of livestock, (d) the names or the individual identification numbers of the egg providing cattle and breeding stock pertaining to the livestock fertilized eggs, and (e) the date of production (note that (d) and (e) can be substituted with the number of the certificate of internal fertilized egg of livestock or the certificate of external fertilized egg of livestock) (Article 32-4 of the Act on Improvement and Increased Production of Livestock).

- (C) Matters to be stated in the transfer, etc. register

The transfer, etc. register shall be prepared in the form prescribed by the Ministry of Agriculture, Forestry and Fisheries and preserved for 10 years, and must contain descriptions of the date of transfer, receipt, disposal or loss, matters concerning the other party, the amount of semen or eggs for livestock artificial insemination that was transferred, etc., and the certificate number, etc. of semen or eggs for livestock artificial insemination that was transferred, etc. (Article 32-5 of the Act on Improvement and Increased Production of Livestock).

- (D) Annual reports to prefectural governors by livestock artificial insemination facilities

Any person who establishes a livestock artificial insemination facility must submit annual reports of the details of their operations, etc. to prefectural governors. The reports must include the volume of semen for the artificial insemination of specific livestock received, transferred, and stored (Article 34, paragraph 3 of the Act on Improvement and Increased Production of Livestock). The content of the report will be notified to the Ministry of Agriculture, Forestry and Fisheries (paragraph 5 of the same Article).

5. Conclusion

Since the amount of genetic resources of Japanese beef that has already been transported to foreign countries is not small, preventing any future outflow is thought to be a meaningful endeavor. At the same time, there are hopes that the fundamental perception of the genetic resources of Japanese beef as intellectual property (rather than perceiving semen in a straw as a mere tangible object) will expand.

- [13] Livestock artificial insemination facilities, livestock hygiene facilities, and other facilities established by the National Livestock Breeding Center or prefectures for the purpose of performing livestock artificial inseminations or the transplantation of livestock fertilized eggs (Article 12, paragraph 1 of the Act on Improvement and Increased Production of Livestock).



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Atsumi & Sakai has established an office in London operating as Atsumi & Sakai Europe Limited (a company incorporated in England and Wales (No: 09389892); sole director Naoki Kanehisa, a lawyer admitted in Japan), and has established an office in New York operating as Atsumi & Sakai New York LLP (a limited liability partnership established in New York; managing partner Bonnie L. Dixon, a lawyer admitted in New York and a Registered Foreign Lawyer in Japan). We also have an office in Frankfurt operating as Atsumi Sakai Janssen Rechtsanwalts- und Steuerberatungsgesellschaft mbH, a German legal and tax advisory professional corporation (local managing directors: Frank Becker, a lawyer, and Miyuki Hanaoka a tax advisor, both admitted in the Federal Republic of Germany).

2. Legal Advice

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