Chapter 16

JAPAN

Kozo Kawai, Madoka Shimada and Masahiro Heike[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

i Recent private antitrust litigation activity

In the past, private antitrust litigation activity was not prevalent in Japan; however, in recent years, the number of cases has increased, along with the number of cases in which plaintiffs have successfully sought damages.

Traditionally, bid-rigging cases were the most prevalent in the sphere of Japanese private antitrust litigation. Recent notable cases include the *Waste incinerator* case brought by the Tokyo metropolitan government, in which the Tokyo District Court ordered the defendants to pay ¥9.7 billion[2] and the *Iron bridge* case brought by the entities succeeding the Japan Highway Public Corporation, in which the Tokyo High Court ordered the defendants to pay ¥80 million.[3]

There has been a recent shift towards the filing of private monopolisation (Article 3 of the Antimonopoly Law of Japan, 'the AML')[4] cases.[5] In contrast, with respect to

1 Kozo Kawai is a senior partner, Madoka Shimada is a partner and Masahiro Heike is an associate at Nishimura & Asahi. Tony Andriotis, a foreign counsel at Nishimura & Asahi, also assisted in the preparation of this chapter.

2 *Waste incinerator* case, Tokyo District Court, 20 March 2007. This case was finally settled in April 2009 and the defendants paid ¥7.5 billion.

3 *Iron bridge* case, Tokyo High Court, 30 August 2011.

4 Act No. 54 of 14 April 1947. The latest amendments to the Act came into effect in 2010.

5 The recent notable cases include *Naigai v. Nipro*, a pharmaceutical company, on Nipro's private monopolisation, which was brought to the court in December 2007; *AMD v. Intel*, on Intel's private monopolisation, which was brought to the court in June 2005, and finally settled in November 2009; and *Cansystem v. USEN*, a cable broadcasting company, on tort claims

private antitrust litigation, there have been fewer cartel cases (other than the leading case on oil wholesale distributors back in 1987[6]), although the Japan Fair Trade Commission ('the JFTC') has recently been more active in investigating cartel cases.

ii Recent legislative changes

The most recent legislative changes relating to private antitrust litigation are that, since April 2009, consumer groups certified by the government are allowed to be the plaintiffs in injunction cases pursuant to the Act against Unjustifiable Premiums and Misleading Representations ('the AUPMR'),[7] although they are not allowed to be plaintiffs in litigation for damages. Nevertheless, as noted *infra*, Japanese law has traditionally not allowed for the existence of class action suits and, as such, granting these consumer groups the right to litigate (even only in injunction cases) is a drastic shift in Japanese policy.

The following important changes in procedural aspects of private antitrust litigation were also implemented in the amendment of the AML in 2009 ('the 2009 Amendments'), which came into effect in January 2010: (1) introduction of a special rule[8] dealing with court orders to produce documents relating to litigation for injunctions pursuant to Article 24 of the AML; (2) revision of the system seeking the JFTC's opinion relating to litigation for damages pursuant to Article 25 of the AML; and (3) revision of the system of disclosure of the JFTC tribunal records to interested parties. These amendments will be explained below.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Damages claims pursuant to Article 25 of the AML

Under Article 25 of the AML, parties (companies and business associations) that were found to be engaged in, or a party to, private monopolisation, unreasonable restriction of trade[9] (cartels and bid rigging), or other unfair trade practices[10] are liable to indemnify those injured by such parties. The JFTC must order that either a cease-and-desist order,

---

arising out of USEN's private monopolisation, for which the Tokyo District Court partially admitted the plaintiff's claims in December 2008, and finally settled in July 2010. In addition, in September 2009, some of the franchisees of the well-known convenience store franchisor filed an Article 25-based lawsuit against the franchisor at the Tokyo High Court for its abuse of its dominant bargaining position, for which the JFTC issued a cease-and-desist order in June 2009.

6 *Tokyo toyu* case, Supreme Court, 2 July 1987.

7 The JFTC was formerly in charge of the AUPMR, but the Consumer Affairs Agency, which is a new ministry established in September 2009, is now in charge of the AUPMR.

8 Article 83(4) of the AML.

9 As defined in Article 3 of the AML.

10 As defined in Article 19 of the AML.

a surcharge payment order or a tribunal judgment is finalised before the plaintiff takes action pursuant to Article 25 of the AML.

In an Article 25 action, the plaintiff need not prove the defendant's intent or negligence as to the harmful acts; the relevant court will instead rely on the JFTC's findings from the order or tribunal judgment. The plaintiff would, however, need to prove the scope of its damages. The court may, therefore, request the JFTC's opinion on the scope of damages.[11] This differs from the pre-2009 Amendments situation, in that the court was previously required to seek out the JFTC's opinion on damages.

An Article 25 action may only be brought before the Tokyo High Court, whose judgment can then be appealed to the Supreme Court. An Article 25 action by a private plaintiff must be brought within three years of the date on which the relevant JFTC order or tribunal judgment becomes final.[12] Since an Article 25 action is deemed a special type of general tort claim under Article 709 of the Civil Code, injured parties can choose to file either an Article 25 action or a general tort claim.

ii General tort claims under the Civil Code

Under Article 709 of the Civil Code, persons who violate the rights of another person must pay the damages resulting from their actions ('Article 709 action'); this is recognised as including anti-competitive acts.

A plaintiff in an Article 709 action faces a higher burden of proof than a plaintiff in an Article 25 action. The plaintiff in an Article 709 action must prove the intent or negligence of the defendant, the amount of damages and the reasonable causation between the defendant's conduct and the damages.

In practice, however, the burden of proof with regard to the intent or negligence of the defendant is not important because violations of the AML are normally associated at least with negligence of the violators. In this regard, the difference between an Article 709 action and an Article 25 action is that in Article 25 actions there are preceding JFTC orders or decisions, in which the violators' conduct is recognised, and the defendants cannot challenge such facts.

Filing Article 709 actions is more convenient for parties located outside Tokyo because they can be brought in their local district courts, while an Article 25 action can only be filed with the Tokyo High Court. The judgment of the local district court can be appealed to the local high court and finally to the Supreme Court. An Article 709 action must be brought either within three years of the possible victim or plaintiff becoming aware of the conduct that caused the damages or within 20 years of the execution of such conduct.

11 In practice, it is questionable that opinions of the JFTC for Article 25 actions are actually effective because such opinions are generally templates based on a 'before and after analysis', which is explained, *infra*.

12 Article 26(2) of the AML.

iii Injunctions pursuant to Article 24 of the AML

Under Article 24 of the AML, a private plaintiff may, in addition to seeking damages, seek an injunction (provisional as well as permanent) against certain unfair trade practices[13] (such as price discrimination, restrictions on resale pricing, below-cost sales and anti-competitive divisions of territories) in order to restore the injured party to the position held prior to the commencement of the violation ('Article 24 action'). The defendant must be engaged in the relevant unfair trade practices at the time an Article 24 action is commenced. On the other hand, an Article 24 action cannot be brought based on unreasonable restriction of trade, which includes cartels and bid rigging, and private monopolisation, although some unfair trade practices overlap with unreasonable restriction of trade and private monopolisation.[14]

An Article 24 action can initially be brought in a local district court, the Tokyo District Court or a local district court in the place where a high court is located.[15] A district court's decision may be appealed to a high court, and a high court decision may be appealed to the Supreme Court.

In practice, private plaintiffs have not prevailed in any injunction cases for the first 10 years since the introduction of the Article 24 action; this was partly because the private plaintiff bears a heavy burden of proof. The plaintiff needs to prove that the defendant was engaged in unfair trade practices resulting in or threatening to cause extreme damages, which is a higher standard than the ordinary level of damages for plaintiffs to prove. In March 2011, however, the Tokyo District Court issued the first decision in which a private plaintiff prevailed in an Article 24 injunction case. The case involved a plaintiff seeking an injunction against a competitor that actively sought to obstruct the business of the plaintiff.

iv Litigation on behalf of local governments by their citizens

In past bid-rigging cases, there were many cases in which citizens of certain localities brought actions against parties involved in bid rigging on behalf of their local governments pursuant to the Local Autonomy Act. Prior to the growth in popularity of private antitrust litigation, such litigation, filed on behalf of local governments by its citizens, was the main source of bid-rigging case law at the time.

Since the amendment of the Local Autonomy Act in 2002, citizens have been unable to directly bring an action against parties allegedly involved in bid rigging, and so the number of lawsuits filed under Article 25 or Article 709 has increased.

13 Article 19 of the AML (for conduct of trade associations, Article 8(5) of the AML).

14 In cases where an Article 24 action is not available (e.g., unreasonable restriction of trade or private monopolisation, which cannot be deemed as unfair trade practices), injunctions based on general tort may theoretically be possible, although such cases should be very limited.

15 Article 84(2) of the AML.

v Derivative shareholder actions under the Corporation Act

Although this is not exactly private antitrust litigation, derivative shareholder actions under the Corporation Act may have an impact on companies violating the AML.[16] Under Articles 423 and 847 of the Corporation Act, if a company has been found liable under the AML, the Civil Code or other laws, its shareholders[17] may sue the directors of the corporation for their intentional or negligent acts if the corporation does not implement its own lawsuit against its directors within 60 days of receipt of the shareholders' request. Thus, if the corporation is given a surcharge payment order by the JFTC, or is liable for damages under an Article 25 action or an Article 709 action, the shareholders of the corporation may file a derivative shareholder action against the directors of the corporation. In December 2010, it was reported that a derivative shareholder action was filed against the directors of Sumitomo Denko for negligence in 'not filing a leniency application' in the cartel on optical fibre cable, for which Sumitomo Denko received a surcharge payment order in May 2010. As such, derivative shareholder actions came to be recognised in Japanese society, and in the legal and business community specifically, as one of the measures to question the responsibility of corporations in the field of antitrust.

Derivative shareholder actions are filed in the local district courts. Under Article 167(1) of the Civil Code, derivative shareholder actions must be brought within 10 years of the date of the harmful act.

vi Civil litigations alleging invalidity of contacts violating the AML

Although this is also not exactly private antitrust litigation, if contracts are deemed to be in violation of the AML, a party may allege invalidity of such contracts pursuant to Article 90 of the Civil Code, which is a general provision invalidating any legal conduct violating public policy and morality, in civil litigations.

III EXTRATERRITORIALITY

i Effects doctrine

If a violation of the AML has a substantial effect on the Japanese market, then the AML can apply to conduct that occurs in a foreign country or is conducted by a foreign party ('the effects doctrine'). The Japanese market entails consumers or users located in Japan. 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 AML is the *Marine Hose* cartel case of February 2008,[18] in which cease-and-desist orders were issued for the first time to parties involved in cartels – including foreign parties – for cartel activities carried out

16 A notable example of such derivative shareholder actions is the *Nomura Securities* case, Supreme Court, 7 July 2000.

17 A shareholder must continuously hold a corporation's shares for a period of six months in order to file a derivative shareholder action.

18 JFTC cease-and-desist order and surcharge payment order, 22 February 2008.

in foreign countries. However, the JFTC did not issue any surcharge payment orders against the foreign parties that did not sell their products in Japan.

The first case in which the JFTC imposed surcharges upon foreign parties was the *CRT* cartel case of October 2009,[19] in which the JFTC issued surcharge payment orders against Malaysian, Thai and Korean corporations.

With respect to private antitrust litigation, there is no specific statute with respect to extraterritoriality (or jurisdiction) of the AML in private lawsuits. It is likely that the effects doctrine, which is the basis of extraterritoriality for administrative law purposes, can apply to substantial aspects of the case. With respect to procedural aspects such as jurisdiction, it is not expected that private plaintiffs would respect international comity in the same manner as the Japanese government does. As such, it may be possible for a Japanese court to have jurisdiction in a private antitrust lawsuit brought by a foreign plaintiff if the location of the respondent or the location of the illegal conduct is in Japan.

ii Sovereign immunity

There are no statutory provisions regarding sovereign immunity in Japan. However, a July 2006 Supreme Court judgment[20] declared that sovereign immunity must be applied only to certain limited conduct of foreign governments, such as the use of state power, but not to conduct in which a foreign governments acts as an ordinary entity.

IV STANDING

The parties who can bring a case against a defendant in each type of action are as follows.

i Damages claims pursuant to Article 25 of the AML

Parties injured by any violation of the AML, where 'reasonable causation' is established between an injury and a violation, can claim damages. As previously noted, it is required that a relevant JFTC order or tribunal judgment is finalised before an Article 25 action. Direct purchasers, indirect purchasers and consumers, in general, may be plaintiffs.[21] Even if an injured party has 'passed on' the relevant costs to its own customers, it nonetheless maintains its standing. In practice, however, it is likely that such passing on of costs would be taken into account in calculating the actual amount recoverable.

ii General tort claims under the Civil Code

Parties injured by any violation of the AML, where 'reasonable causation' is established between an injury and an intentional or negligent violation, have standing to bring such actions. It is not necessary that the JFTC findings regarding the violating conduct are final and binding.

---

19 JFTC cease-and-desist order and surcharge payment order, 7 October 2009.

20 Supreme Court, 21 July 2006.

21 *Matsushita Electric* case, Tokyo High Court, 19 September 1977; *Tsuruoka Toyu* case, Supreme Court, 8 December 1988.

iii Injunctions pursuant to Article 24 of the AML

A party whose interest is harmed or is threatened by unfair trade practices (and not cartels or private monopolisation) has standing to bring such an action. It is not necessary that the relevant JFTC order or tribunal judgment is issued or finalised. Indirect purchasers can also be plaintiffs in such injunction actions.

iv Derivative shareholder actions under the Corporation Act

A shareholder of a corporation who continuously holds the shares of a corporation for a period of six months has standing in such an action.

V THE PROCESS OF DISCOVERY

There is no US-style mandatory document production or extensive discovery system in Japan, except when a court order for production under the Civil Litigation Code is issued. The statutory scope of the court order has been expanded in recent years. There has been specific growth in the number of private antitrust litigation cases in which a court order has been issued under the Civil Litigation Code requesting documents retained by the JFTC, most typically (but not limited to) interview records prepared by the JFTC.[22]

Under the Civil Litigation Code, if the court so orders, the relevant party must comply and submit requested materials.[23] If the ordered party does not submit the relevant evidence, then the other party, as well as the court, is generally entitled to deem such other party's allegations related to the content of such materials as true.[24] There are several exceptions, such as (1) documents subject to confidential obligations of public servants or professionals; (2) documents created exclusively for self use; and (3) documents relating to the right to remain silent under criminal procedure.[25]

The 2009 Amendments introduced a special rule for such a court order relating to an Article 24 action, similar to the rule in intellectual property litigation. The relevant party is entitled to request that the other party submit materials as ordered by the court, except for cases in which there is a justifiable reason to reject submission of the requested materials. This rule expands the scope of documents to be disclosed since it targets all documents except for those with a justifiable reason not to be submitted. However, this special rule does not apply to materials held by a third party and applies only to an Article 24 action, not to an Article 25 action.

22 For example, *Goyo Kensetsu* case, Tokyo High Court, 16 February 2007.

23 Article 223 of the Civil Litigation Code.

24 Article 224 of the Civil Litigation Code.

25 Article 220 of the Civil Litigation Code.

VI USE OF EXPERTS

In general, expert testimony, opinions or examination by experts are widely used in Japanese courts as evidence. Where expert testimony is used to determine the scope of damages as well as the existence of illegal conduct in private antitrust litigation, experts are often academics or experts in the relevant industry. However, unlike in other jurisdictions, Japanese courts have not established a practice of utilising economic analysis offered by economists to prove the scope of damages.

VII CLASS ACTIONS

Class actions are not available in Japan. Certified consumer groups may, however, seek injunctions for certain types of lawsuits, for example, cases under the Consumer Contract Law. As previously noted, since April 2009, certified consumer groups are also entitled to seek injunctions under Article 10 of the AUPMR.

In the course of the discussions regarding the recent amendments of the AML, there was debate as to whether collective actions should be introduced in private antitrust litigation (i.e., Article 25 or 24 actions) in order to accelerate the use of private antitrust litigation and to protect consumers' interests. However, such amendments were not adopted because it was thought that it would be difficult to prove violations of the AML for public consumers, as they are often conducted in a secretive manner, and because private parties already have the right to bring a lawsuit for antitrust violations, despite the unavailability of class actions.

Currently, the Consumer Affairs Agency is proposing a new two-step system for consumer group litigation in relation to suits for damages arising out of consumer contracts. In this currently proposed consumer group litigation system, the consumer groups certified by the government will be allowed to be the plaintiffs in litigations for damages. At this stage, however, it is still unclear whether the scope of the currently proposed consumer group litigation system will apply to the field of antitrust lawsuits.

The Civil Litigation Code allows for the 'appointed party' system,[26] in which each plaintiff or defendant can appoint another plaintiff or defendant as its representative.[27] This is different from a class action as the appointed party does not represent a 'class'. Furthermore, derivative shareholders actions in Japan are also different from class actions because damages are recoverable only by the company, not by the plaintiffs.

VIII CALCULATING DAMAGES

Both in Article 25 and Article 709 actions, damages are limited to those cases where reasonable causation links have been established to the conduct violating the AML. Under Japanese law, no punitive damages are available.

26 Article 30 of the Civil Litigation Code.

27 The appointed party system was actually used in *Tsuruoka Toyu* case, Supreme Court, 8 December 1988.

i How damages awards are determined

With respect to how damages awards are determined, *inter alia*, the 'before and after analysis' may often be used as a method of calculating damages in private antitrust litigation. Under this approach, actual financial results from the pre-cartel period (or post-cartel period) are compared with those from the cartel period, and the difference forms the amount of relevant damages. This method of damage calculation is often used in bid-rigging cases as well as cartel cases.

If the scope of the damages is uncertain and the 'before and after analysis' is not available or inappropriate, then the court may determine the scope of damages at its discretion under Article 248 of the Civil Litigation Code. For example, in previous bid-rigging cases, courts found that relevant damages should be 5 to 13 per cent of the turnover of the period, to which the violating conduct was relevant, pursuant to Article 248 of the Civil Litigation Code.

In bid-rigging cases, recently, more local governments and public corporations have had a tendency to insert clauses for liquidated damages into contracts with their service providers, which specify an agreed amount of damages to be paid if violations of the AML are subsequently discovered. Typically, the amount specified in such provision is 10 per cent of the contract value.

ii Interest and attorneys' fees

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

As for attorneys' fees, each party must generally bear its own lawyers' fees. Although there has been discussion about requiring the losing party to pay the lawyers' fees of a winning party, such a system was never implemented. However, in Article 25 and Article 709 actions, some lawyers' fees may be recoverable if the court finds it appropriate.[28]

IX PASS-ON DEFENCES

Under the AML, unlike US law, the defendant is free to allege that no damages should be granted to the plaintiff where the plaintiff has already passed on the amount of the damages to its own customers. However, as noted earlier, although it can be argued in the context of the scope of damages, it should not be a factor when considering the issue of standing. This means that under the AML, a damages award must compensate for the injury 'actually' suffered by the plaintiff. Thus, if a direct purchaser passed on the amount of the injury to its own customers, it may have difficulty showing the existence of an injury or proving the full amount of the damages.

28 Generally, approximately 10 per cent of awarded damages are ordered by the court as recovery of lawyers' fees.

X FOLLOW-UP LITIGATION

i Damages claims pursuant to Article 25 of the AML

As previously noted, with respect to an Article 25 action, it is required that either a cease-and-desist order, a surcharge-payment order or a tribunal judgment regarding the target violation of the AML becomes final and binding in order for the plaintiff to bring an action. Although the defendant cannot argue that it did not intentionally or negligently violate the AML, the plaintiff still needs to prove the amount of the damages and the reasonable causation between the violation and the damages.

An Article 25 action only targets entities that received a cease-and-desist order or a surcharge payment order from the JFTC. As far as we are aware, there is no reported case in which the plaintiff brought an action against an entity who did not receive either a cease-and-desist order or surcharge payment order, even though it was actually involved in the violating conduct (e.g., a leniency applicant who was given immunity).

ii General tort claims under the Civil Code

With respect to Article 709 actions, there is no limitation in theory on private actions against parties who have been subject to administrative or criminal enforcement actions. However, the court may rely on a judgment or decision rendered in a criminal proceeding or a JFTC administrative proceeding. Unlike Article 25 actions, a JFTC order or tribunal judgment is not a precondition required for Article 709 actions.

XI PRIVILEGE

In Japan, privileges such as the lawyer–client, attorney-work product or joint-work product privileges are generally not recognised. Therefore, the JFTC or the public prosecutors may seize and rely upon any information without regard to any such privileges, except for evidence obtained by illegal activity.

The JFTC must also keep any information seized by, provided to or created by the JFTC (such as interview records) confidential under Article 39 of the AML. Once a JFTC tribunal is initiated with regard to the relevant case, however, the documents submitted to and adopted by the tribunal will be available for disclosure and production to the interested parties.[29] The scope of interested parties includes the victims of the infringement, most typically, citizens of the local government that were harmed by bid rigging.

Under such a system, it was difficult in practice for the JFTC or any companies to submit documents containing important trade secrets to the JFTC tribunal. In this regard, the 2009 Amendments enabled the JFTC to restrict disclosure or production of such information 'if the JFTC considers there is a risk of harming the interest of a third party or finds a justifiable reason to do so'.[30]

29 Article 70(15) of the AML.

30 Article 70(15)(1) of the AML.

It is not yet clear whether documents submitted to the JFTC will be subject to discovery in foreign courts. However, the JFTC has recently issued a letter to the US District Court arguing that documents submitted in the process of a leniency application or regarding cases still under investigation should be exempt from discovery, as the European Commission did, in view of ensuring the parties' cooperation with its leniency programme and subsequent investigations.

XII SETTLEMENT PROCEDURES

Settlement in civil litigation is available either in the course of court procedures or outside the courts. In case of settlement in the courts, judges may often recommend a settlement to the parties, and if a settlement is reached a record of settlement is created by the court. However, there are no specific procedures for out-of-court settlements, while it is possible to make a settlement record at a notary's office.[31]

The Japanese court system has no formal procedure to facilitate or encourage settlement in private antitrust litigation as the volume of private antitrust litigation is still rather low. Nevertheless, many cases are closed by way of settlement.[32]

XIII ARBITRATION

Arbitration, such as proceedings administered by Japan Commercial Arbitration or the Committee for Adjustment of Construction Work Disputes, is generally available for dispute resolution in Japan.

In theory, if there is an agreement on arbitration between the parties, private claims for violation of the AML may be resolved by this method. However, as far as we know, no such arbitration or other means of alternative dispute resolution have taken place in Japan in private antitrust litigation. Access to such data is, however, limited, as such decisions or filings are usually not reported due to their confidential nature.

There are no specific procedures in court to facilitate arbitration.

XIV INDEMNIFICATION AND CONTRIBUTION

Under Japanese law, parties who have jointly conducted torts are deemed 'joint tortfeasors', and are generally liable for damages on a joint and several basis.[33] In such cases, the defendants may seek indemnification from their co-defendants and demand contributions equivalent to their respective proportion of the damages. There is no limitation on seeking indemnification or contribution; however, in practice, it is difficult

31 Notarised settlement records with respect to monetary liabilities are enforceable just as final judgments by the courts are.

32 For example, Fresh concrete cooperatives case, Tokyo High Court, 26 December 1996, and *Usen v. Cansystem*, Tokyo High Court, 29 July 2010 (see footnote 4, *supra*).

33 Article 719 of the Civil Code.

to distinguish the degree of fault among the respective parties to properly determine the amounts of their contributions for the tort.

In Japanese bid-rigging cases, participants to the bid rigging and the party who encouraged the bid rigging may be joint tortfeasors and subject to possible indemnification if one of their co-defendants pays the damages.

XV FUTURE DEVELOPMENTS AND OUTLOOK

In Japan, the number of private antitrust cases is still limited; as such, there are discussions aimed at encouraging private antitrust litigation. The government, however, is still very cautious in its approach towards introducing a collective action system in Japan, in particular with litigation seeking damages.

Although it is not directly related to private litigation, the expected amendment to the AML[34] may abolish the JFTC tribunal system. If the amendment is passed, JFTC orders will be challenged directly (without the JFTC tribunal) in the local district courts, not only in the Tokyo High Court, as the current system allows. As such, we can expect that antitrust litigation will be more active and that knowledge and experience with regard to the AML will be widely shared. In addition, the JFTC's recent enforcement of the AML against violators has become more aggressive. Bearing those factors in mind, we can expect that the number of private antitrust litigation cases will increase.

It is also notable that more companies have made requests that violators of the AML pay damages outside of court. This is because if the company injured by a violation of the AML does not request that the violators pay damages, its shareholders may well criticise the company's attitude. In other words, private antitrust claims have become more common in Japanese society. As such, although the current number of private antitrust litigation cases is still not particularly large, the basis of private antitrust litigation has been expanded.

34 The amendment to the AML was approved in a Cabinet meeting on 12 March 2010. Please see www.jftc.go.jp/pressrelease/10.march/10031204.pdf. As of 23 July 2012, the bill of the amendment to the AML is still under discussion.

Appendix 1

ABOUT THE AUTHORS

KOZO KAWAI

Nishimura & Asahi

Kozo Kawai is a senior partner at Nishimura & Asahi and renders a wide range of services to both domestic and overseas clients, covering every area of competition law. He represented the Japanese companies who filed the first and second leniency applications with the JFTC, and he represented foreign companies in connection with the first international cartel cases ever handled by the JFTC. Mr Kawai graduated from the University of Tokyo (LLB) in 1984 and earned a Master of laws degree from Columbia University School of Law in 1993 and an LLM in EC law from Katholieke Universiteit Leuven in 1994. He also worked at Cleary, Gottlieb, Steen & Hamilton in Brussels from 1994 to 1995 and the Ministry of International Trade and Industry in Tokyo from 1995 to 1997, and has taught competition law at the University of Tokyo School of Law since 2006.

MADOKA SHIMADA

Nishimura & Asahi

Madoka Shimada is a partner at Nishimura & Asahi and handles a broad range of matters pertaining to Japanese competition law, including domestic and international cartels, bid rigging, M&A transactions, investigations by the JFTC, leniency applications and general competition law compliance. Ms Shimada is especially active in cross-border matters such as international cartels and international merger control cases. She has represented clients in connection with international cartels on airline surcharges, air cargo forwarders, marine hoses, TFT-LCDs, etc. Ms Shimada graduated from the University of Tokyo (LLB) in 1997 and earned a Master of laws degree from Harvard Law School in 2003 and a Masters degree in public administration from Harvard Kennedy School in 2005.

MASAHIRO HEIKE

Nishimura & Asahi

Masahiro Heike is an associate at Nishimura & Asahi and is engaged in a broad range of matters pertaining to Japanese competition law, including domestic and international cartels, bid rigging, M&A transactions, investigations by the JFTC, leniency applications and general competition law compliance. Mr Heike graduated from the University of Tokyo (LLB) in 2005 and earned a Master of laws degree from University of Tokyo School of Law in 2007.

NISHIMURA & ASAHI

Ark Mori Building
1-12-32 Akasaka, Minato-ku
Tokyo 107-6029
Japan
Tel: +81 3 5562 8500
Fax:+81 3 5561 9711/12/13/14
info@jurists.co.jp
www.jurists.co.jp/en