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Arbitrating international antitrust-related disputes in Japan

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Despite its potential, commercial arbitration has not been widely utilised, especially as a venue to resolve antitrust-related disputes in Japan. This is especially the case when non-Japanese parties are involved in antitrust cases.

In recent years, however, the new Japanese Arbitration Act (Law No 138 of 2003, also known as the 'JARA') was enacted so that the new legislation would be more in line with the UNCITRAL model law and gradually allow non-Japanese lawyers to be able to participate in commercial arbitration proceedings in Japan. These reforms will make commercial arbitration in Japan more attractive to parties to international transactions as the new legislation is expected to function well to resolve complicated international disputes. In addition, in light of the nature of antitrust related disputes, there are no disadvantages for commercial arbitrators to handle these disputes.

This article recommends that commercial arbitration in Japan should be considered more frequently as a venue to resolve international antitrust related disputes.

Introduction

As an example, suppose that it is necessary to conclude the agreement for a cross-border transaction in which Japanese and Singapore firms are involved, and that the parties to the transaction consented that the governing law be Japanese law. Further, assume that the parties to the transaction are still undecided as to whether or not they should put in a clause which requires legal proceedings to commence in Japan if any disputes in relation to the agreement were to occur. They need to consider which of two forums would be better for resolving their issues, ie court or commercial arbitration. In so doing, they must take into consideration the possibility that their disputes might arise from antitrust violations. Although private actions based on the 'Law Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade' (Law No 54 of 1947, also known as the 'JAA') have not been the primary means of enforcing the JAA, cross-border transactions relating to antitrust disputes (ie where violations of the JAA are the ground of claims) are a growing type of dispute in Japan.

In most of these cases, parties to a cross-border transaction will try to avoid the situation where they are compelled to commence both litigation and arbitration by settling their conflicts through amicable mediation. Also, even from the point where they are negotiating terms and conditions of an agreement, they will often try to create so complicated and detailed an agreement that it appears to cover everything so clearly that it would therefore be unnecessary to commence legal proceedings. However, as it is virtually impossible to create terms and conditions covering every case, it is still quite possible for antitrust-related disputes to happen after concluding the agreement and sometimes to be the subject of legal proceedings. As such, although parties may still be negotiating to conclude the agreement, it is necessary to analyse which type of dispute resolution would be better in light of cost and time. Even if they omitted the analysis regarding which form of dispute resolution to use in the future, they might need to make the same analysis if any antitrust related dispute should arise.

The previous hypothetical is not unrealistic in international transactions.

In order to resolve antitrust-related disputes, there are, in principal, two kinds of dispute resolution in Japan, ie litigation or arbitration.

In relation to litigation in Japan, there have been traditionally only a handful of cases in which violations of competition laws (the JAA and competition laws of other countries) are central issues. Moreover, it is not an exaggeration to say that Japanese courts have very rarely dealt with antitrust-related disputes involving non-Japanese parties.[3] As a result, there are no special divisions responsible for antitrust disputes in any courts in Japan and Japanese courts have not been considered an appropriate venue to resolve such disputes.

Given the current Japanese courts' processes in relation to antitrust disputes, it is important to consider, from an early stage of a transaction such as negotiating and drafting the agreement, using commercial arbitration as a method to resolve any disputes, especially antitrust disputes, in relation to an international agreement.[4] As more and more Japanese corporations are involved in cross-border transactions,

more antitrust-related disputes involving non-Japanese parties will likely arise.

In order to assist in such an analysis, first, this article delineates an overview of antitrust-related private disputes in Japan. Secondly, this article explains that antitrust-related disputes, by their nature, fulfil the arbitrability requirement as set forth in, article 13, paragraph 1 of JARA and therefore can be resolved through commercial arbitration in Japan. Thirdly, this article will point out that there are several advantages to using commercial arbitration as a venue to resolve antitrust disputes in Japan.

Overview of antitrust-related disputes in Japan

Overview of private enforcement of the JAA

The JAA has not traditionally been enforced privately ever since the JAA's enactment. Despite this, there is much potential that antitrust-related disputes among private parties will increase in Japan.

Although the total number of antitrust violations in Japan has been said to be more than 2,000 every year, fewer than 200 cases have been actually dealt with by the Japanese Fair Trade Commission ('JFTC').[5] This discrepancy between the real number of violations and the number of cases in which the JFTC actually enforced the JAA is a key factor which necessitates the introduction of measures for the strict enforcement of the JAA, wherein private enforcement action comes under the spotlight. In addition, in the Structural Impediments Initiative Talks between the Japanese and United States governments,[6] the Japanese Government was requested to strictly enforce the JAA in order to realise fair competition in the Japanese market. This is against a background where it has been said collusive trade practices have been relatively commonplace in Japan.

The private enforcement of the JAA is also important in light of ensuring the transparency of enforcing the JAA. Thus far, the JFTC has been the only organisation in Japan which could enforce the JAA. The JFTC investigates antitrust violation cases based on the information collected through its own search activities or reports by private parties.[7] As a result of an investigation, the JFTC may render a cease and desist order. The JFTC does not, however, have to disclose the evidence on which it rendered the order. In case the JFTC terminates its investigation after issuing an administrative warning, the JFTC need not make disclosure of its findings and rationale behind the decision. In case a hearing procedure is commenced, on the face of the law, victims of antitrust violations may participate in the proceedings as intervener if the JFTC so consents.[8] However, the JFTC has rarely given such consent. Moreover, although interested parties in relation to antitrust violations may obtain duplicates of records regarding hearing proceedings under the JAA,[9] the disclosed information is often limited on the basis that trade secrets need to be protected. As such, the procedures at the JFTC are not facilitative to allow disclosure of information to relevant parties, which makes the process rather opaque. On the other hand, in a case of private enforcement, disclosure of information can be more effectively realised under the Code Civil Procedure (Law No 109 of 1996, as amended).[10] In light of ensuring the transparency of the JAA enforcement, private actions based on the JAA has come under the spotlight.

Damage actions under the JAA

Under the JAA, any entrepreneur that has committed an antitrust violation of the JAA articles 3 (Prohibition on Private Monopolization and Unreasonable Restraint of Trade), 6 (Prohibition on Concluding Certain Type of International Agreement),[11] or 19 (Prohibition on Unfair Trade Practice) and any trade association that has committed an act in violation of article 8, paragraph 1, shall be liable to indemnify the person injured, on the condition that the JFTC has already rendered a cease and desist order against the violation.[12] It is considered by Japanese Courts that the JAA, article 25 stipulates absolute liability, so that violators of the JAA can not avoid liability even when they successfully demonstrate that their acts were neither intentional nor negligent. On the other hand, there are several limitations on this type of damages action. First, in order to bring a damages action, it is necessary for the cease and desist order rendered by the JFTC to become final and conclusive.[13] When the JFTC does not render a cease and desist order, a surcharge order needs to be become final and conclusive.

Secondly, a three year statute of limitation applies to this damages action.[14] Thirdly, the first instance of this action is limited to the Tokyo High Court[15] and when a damages action is brought to the Tokyo High Court, the court is obligated to obtain the JFTC's opinion on the amount of damage.[16] As to the relationship between this type of action and a general tort claim, the Supreme Court of Japan has clearly articulated that to the extent that antitrust violations satisfy the constituent elements of a general tort claim,[17] regardless of whether or not the JFTC's decision on the violation becomes final and conclusive, there is no reason to prohibit victims of antitrust violations from initiating damages actions based on general tort claims.[18] Accordingly, even if a damages action based on the JAA commences after a general tort claim is brought and the JFTC's decision

becomes final and conclusive, the damages action based on the JAA will not be dismissed. As such, victims of antitrust violations may base their cause of action on either the JAA or the general tort law.

This has a number of implications. First, given that the JFTC's decision has already become final and conclusive, the defendant's mens rea will be inferred in the general tort claim. Secondly, there are several lower court decisions which indicate that when antitrust violations occur, and if no special circumstances exist, the conduct in question will be deemed illegal under the Civil Code (Law No 89 of 1896, as amended).[19] For this reason, not all the constituent elements of a general tort claim have to be met. Therefore, there will not be much practical difference between a damages claim under the JAA, article 25 and a general tort claim.

This analysis on both damages actions is very important. If the Tokyo High Court were to be the only avenue by which victims of antitrust violations may seek compensation, there is no scope for commencing commercial arbitration in Japan to be a means of resolving antitrust-related disputes.

Concerning the scope of action for damages based on general tort claims, antitrust violations of the JAA articles 3 (Prohibition on Unreasonable Restraint of Trade), 6 (Prohibition on Concluding Certain Type of International Agreement), and 19 (Prohibition on Unfair Trade Practice) are generally considered to be illegal under the Civil Code.[20] On the other hand, there are two views as to whether or not violations of the JAA article 3 (Prohibition on Private Monopolization) and the JAA's regulation on business combination will entitle a complainant to seek damages based on general tort claims.[21] Although the Japanese Court has reached a decision on this issue, it is challenging in practice to prove a causal nexus between antitrust violations of the JAA article 3 (Prohibition on Private Monopolization) and the JAA's regulation on business combination and damages from which the complainants allegedly suffer.

Subject matters for arbitration in Japan

Interpretation of the JARA

Commercial Arbitration in Japan

The number of arbitrations in which Japan is the place of arbitration have not been large.[22] As the activities of Japanese corporations become more and more world wide, the number of commercial arbitrations involving Japanese corporations has been increasing. In such cases, however, countries other than Japan are selected as a place of arbitration. For example, in 2004, there were 2 cases filed with the ICC in Japan, while the number of arbitrations in which Japanese corporations are involved is 26.[23] This discrepancy demonstrates clearly that parties to cross-border transactions have preferred countries other than Japan as a place of arbitration. Even though there are no official records, when it comes down to antitrust-related disputes arising out of cross-border transactions, the number of arbitrations will decrease.

In spite of the current trend, there are several factors indicating that commercial arbitration in Japan will become a more attractive avenue for international commercial dispute resolution.

First, non-Japanese lawyers are now statutorily allowed to represent their clients in Japanese commercial arbitration proceedings.[24] Before this reform, it had generally been construed that having non-Japanese lawyers representing their client was a violation of the Japanese Attorney Act (Law No 205 of 1949) article 72, whereas many countries already allowed foreign lawyers to represent their clients in commercial arbitration proceedings. The prohibition was criticised as hindering sound development of commercial arbitration in Japan. On account of this reform, the number of Japanese commercial arbitrations is expected to increase.

Second, the JARA is modelled after the UNCITRAL model law on International Commercial Arbitration so that each provision of the JARA is closer to the international standard. Along the same lines, arbitral institutions in Japan (eg the Japan Commercial Arbitration Association, or the 'JCAA') created their own rules and regulations which can be applied to arbitrations in Japan if arbitration parties so agree. These rules and regulations are also based on the international standard. These developments suggest that there are no disadvantages, on the face of the rules and regulations, to conducting commercial arbitrations in Japan.

Third, the number of arbitral institutions in Japan has been increasing. Even though the representative arbitral institution in Japan is the JCAA, other arbitral bodies have developed in order to deal with disputes in particular areas such as intellectual property law and maritime law. Although the permanent arbitral bodies in Japan are not currently used actively, this trend demonstrates the potential that, even if the number of arbitration cases were to increase, they will be properly dealt with in Japan.

In sum, all these factors indicate that commercial arbitration in Japan will become a more attractive venue for international commercial dispute resolution.

Arbitrability under the JARA

Arbitrability is an issue as to whether disputes can be arbitrated and one of the indispensable elements of an arbitration agreement under the JARA. Whether or not antitrust-related disputes were outside the ambit of arbitration in Japan is an example of an arbitrability issue.

Concerning arbitrability in general, the JARA, article 13, paragraph 1 stipulates that civil disputes (except for divorce and dissolution) for which parties can settle through mediation can be arbitrated. As such, an agreement in which disputes that cannot be mediated are subject matter for arbitration is null and void under the JARA. A dispute with respect to the effectiveness or the scope of a patent has to be resolved by the governmental patent office. It therefore cannot be settled though mediation and thus lacks arbitrability under the JARA. Parties cannot seek to agree regarding the scope of the relevant patent by themselves and thus cannot submit such a dispute to commercial arbitration in Japan. On the other hand, parties can submit a dispute regarding a licence agreement, because it is only a contractual matter and can be settled by agreement, fulfilling the arbitrability requirement of the JARA. The JARA and its case law do not state anything about arbitrability of antitrust-related disputes, though.

Arbitrability of antitrust-related disputes

Discussion of the position in Japan

Whether or not antitrust-related disputes fulfil the arbitrability requirement under the JARA has long been a subject of discussion.

Commercial arbitration is a process to resolve disputes among private parties based on the agreement that they will select private persons as arbitrators and, instead of relying on governmental authority, put their trust in a decision of a private person. On the other hand, the JAA has the characteristics of a public law, which is inferred from the following aspects. First, the purpose of the JAA is to promote free and fair competition through the exercise of governmental authority. Secondly the JFTC, the governmental body, is designed to enforce the JAA. Under the JAA, private parties are not supposed to be the main enforcement body of the JAA. Thirdly, damages actions pursuant to the JAA, article 25 shall be brought solely to the Tokyo High Court. These actions are not designated to be dealt with by commercial arbitration. Finally, administrative and criminal sanctions will be imposed on contravenors of the JAA.

When focusing on these characteristics as a public law, it could be considered that antitrust-related disputes lack arbitrability, thus putting it outside the scope of commercial arbitration under the JARA, although private actions of the JAA appear to be of no more than private nature.

That said, as the Supreme Court of Japan has not directly addressed the issue of arbitrability of antitrust claims, the issue is not fully settled in Japan. In order to analyse whether or not antitrust-related disputes are arbitrable under the JARA, this article first considers the discussion in the United States and then whether or not antitrust related disputes fulfil the arbitrability requirement of the JARA.

Discussion of the position in the United States

In the United States, antitrust-related disputes were considered to be outside the scope of commercial arbitration as a matter of law based on public policy grounds until 1985.[25] The old rule, known as the American Safety Doctrine, prohibited enforcement of contractual arbitration clauses covering antitrust disputes even if the parties specifically agreed to arbitrate antitrust disputes.[26]

One exception to this rule was that a Court would often enforce an agreement to transfer an antitrust dispute to arbitration if the agreement to arbitrate was reached after the disputes had arisen. The US Supreme Court changed the American Safety Doctrine in 1985. In *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc,* the US Supreme Court faced the issue of whether a counterclaim for violation for antitrust laws prevails over an arbitration agreement and held that Soler's antitrust claims were arbitrable pursuant to the Arbitration Act, holding the full support of arbitrability of antitrust-related claims.

Analysis of implications for Japan

Unlike the United States where the Supreme Court has directly addressed the issue of the arbitrariability of antitrust claims, the issue of whether or not antitrust-related disputes are arbitrable is less clear in Japan. As arbitrariability is a matter of law which determines the validity of the arbitration agreement, insofar as the governing law is the JARA, the question of arbitrariability is essentially a question of how to construe the JARA, article 13, paragraph 1.

As explained earlier, similar to the United States antitrust law, the JAA has some characteristics of a public law. These characteristics do not, however, constitute grounds to preclude antitrust-related disputes from commercial arbitration in Japan for the following reasons.

First, the importance of the JAA's private damages

remedy does not compel the conclusion that it may not be sought outside a Court. Although the JAA has characteristics of a public law, there is no reason to construe that private actions based on the JAA must take cognisance of a court. Despite its important incidental function to realise the JAA's policy goal, the JAA, article 25 merely enables private parties to gain compensation for the injury they suffered. Apart from the JAA, article 25, private parties injured due to antitrust violation may also seek compensation pursuant to the Civil Code, article 709. This demonstrates that the nature of private actions of the JAA, article 25 is similar to those based on the Civil Code, article 709. Claims based on the Civil Code, article 709 have no aspects of public action, leading to the conclusion that it is not necessary to pay much attention to the public law aspect of private actions of the JAA, article 25. Also, the antitrust cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an antitrust suit, and the private antitrust plaintiff needs no executive or judicial approval before settling one.

Given this premise of the nature of claims pursuant to the JAA, article 25, there is no reason to construe, under JARA, article 13, paragraph 1, that parties to antitrust-related claims cannot settle their disputes through arbitration.

Secondly, there is no reason to assume that arbitration will not provide an adequate mechanism for resolving antitrust-related disputes. The cases that commercial arbitral institutions are called upon to resolve have increased in diversity as well as in complexity, eliminating differences between litigation and arbitration in terms of the nature of disputes. As such, the potential complexity of antitrust-related disputes does not automatically mean that those disputes cannot be resolved appropriately at commercial arbitration. Rather, arbitration parties may select arbitrators who are familiar with how to analyse complicated evidence submitted in antitrust cases and specific industries, while Japanese judges often lack such knowledge.

Thirdly, the interpretation of the JARA, article 13, paragraph 1, that antitrust-related disputes are arbitrable is in line with those in the United States and European Union. There is no reason to depart from those interpretations.

Therefore, it is open to interpretation that, under the JARA, article 13, paragraph 1, antitrust-related disputes are arbitrable.

Utilising commercial arbitration for resolving antitrust-related disputes

Commercial arbitration offers significant advantages for parties seeking an alternative to costly and time-consuming litigation in a domestic court currently lacking in antitrust expertise. This article enumerates some of the advantages of commercial arbitration in Japan.

Confidentiality

Confidentiality is a decided advantage of commercial arbitration. Proceedings that are confidential have the benefit of allowing parties to resolve their dispute in a private setting and not in an open public forum. This factor could be an important consideration, especially in disputes involving parties in ongoing relationships that may want to keep confidential the terms of, or even the actual existence of, their relationship from competitors or other market participants.

Efficiency

Arbitration proceedings can be more efficient, informal and expeditious than domestic courts, which can be drawn-out, motion intensive, expensive and often invasive. The parties to commercial arbitration have the flexibility to choose the time frame within which hearings must be conducted, the location of hearings, and other relevant time lines.

Arbitrators

The ability of selecting arbitrators is often viewed as an advantage of commercial arbitration. Arbitrators may be selected for their relevant industry expertise, familiarity with international business relationships and/or related market expertise.

Finality

Arbitration awards are often viewed as having greater finality than a domestic court judgment, which may be subject to lengthy appeal.

Concluding remarks

As discussed in this article, antitrust-related disputes meet the arbitrability requirements of the JAA, article 13, paragraph 1, enabling arbitrators in Japan to take cognisance of antitrust-related disputes. In addition, international commercial arbitration often offers significant advantages for parties seeking an alternative to domestic litigation for antitrust cases in Japan. Since Japanese litigation is currently a problematic place to resolve antitrust related international disputes, it is important at the outset of negotiating and drafting agreements involving cross-border transactions to analyse the various advantages and disadvantages of arbitration and the potential needs for

enforcement proceedings in domestic court proceedings. As demonstrated in this article, in many cases, commercial arbitration in Japan will be a desirable means of resolving antitrust-related international disputes.

Therefore, this article recommends that commercial arbitration in Japan be considered as a more appropriate venue to resolve international antitrust-related disputes.

Notes

1 Akira Inoue is an attorney at law in Japan (admitted in 2000) and in New York State (admitted in 2006) and an associate with the Tokyo law firm of Anderson Mōri & Tomotsune.
3 This is a clear indication demonstrating the fact that foreign firms have regarded Japanese courts as an inappropriate venue to resolve antitrust disputes.
4 As explained later in this article, the number of arbitrations in Japan is still relatively small, which fact has been cited in many articles. See eg, Nozomu Ohara, *Dispute Resolution Culture in Japan: Its Impact On Arbitration Procedure*, 4 (2004), available at http://archive.ibanet.org/Docs/3165_AU75.pdf. It is reported in this article that the total number of arbitration proceedings in Japan is around 100 cases each year, whereas the American Arbitration Association alones handles approximately 200,000 cases each year.
5 Masahiro Murakami & Makoto Awata, Dokusen Kishi Ho No Tetuzuki (The Procedure under the Japanese Antimonopoly Act) 207 (Chuokeizaisha 2006).
6 The Structural Impediments Initiative Talks between the Japanese and United States governments were conducted between 11 November 1989 and April 1990, whereby the Japanese Government promised to deal with several domestic issues which were said to have prevented fair competition in the Japanese market.
7 Article 45 of the JAA.
8 Article 70-3 of the JAA.
9 Article 70-15 of the JAA.
10 Eg, Article 220 of the Code of Civil Procedure. As in the case of international arbitration, documents are often considered to be a reliable form of evidence in Japanese court procedures.
11 Entrepreneurs whose act has violated the JAA article 6 are limited to those who have effected unreasonable restraint of trade or employed unfair trade practices in the international agreement or contract concerned.
12 Article 25 of the JAA.
13 Article 26, Paragraph 1 of the JAA.
14 Article 26, Paragraph 2 of the JAA.
15 Article 85, Item 2 of the JAA.
16 Article 84, Paragraph 1 of the JAA.
17 Article 709 of the Civil Code.
18 *Ibid.*
19 Nihon Yugi Ju Association, 1629 Hanreijiho 70 (Tokyo Dis Ct 9 April 1997).
20 Tetsu Negishi, 'Hanrei Kaisetsu (Explanation on Japan Toy Gun Association Case)', 161 *Additional Volume Jurist* 241 (2002).
21 Masahiro Murakami & Takeo Yamada, *Dokusenkinshiho to Sashitome+Songaibaisho (Japanese Antimonopoly Act and Injuctive and Damage Actions)* 84 (2d ed 2005).
22 In 2004, only two international commercial arbitration are filed with the ICC in Japan. See ICC *International Court of Arbitration Bulletin* Vol 16 No 1, Spring 2005 at 10 'Place of Arbitration'.
23 Satoshi Niibori & Noboru Kashiwagi, *Global Shotorishikito Hunso Kaiketu (Global Commercial Transation and Dispute Resolution)* 115-116 (Dobunkan Publishing 2006).
24 Effective 1 September 1996, the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers (Law No 66 of 1996) was amended to allow non-Japanese lawyers to represent their clients in international commercial arbitration in Japan.
25 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth*, 473 US 614, 655 (1985) (Stevens J Dissenting).
26 *American Safety Equipment Corp v J P Maguire Co*, 391 F 2d 821 (2nd Cir 1968).