



# COMPETITION LAW DAMAGES IN ASIA

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# SYNOPSIS

- Overview of competition law systems in Asia
- Role of private enforcement in competition law
- Examples of specific systems
  - Japan
  - South Korea
  - China
  - Hong Kong
  - Singapore
- Conclusion





# OVERVIEW OF ASIAN COMPETITION LAW SYSTEMS



- Modern Antitrust law in Asia
  - Transplant to Japan
  - Korea's problem with chaebols
  - China's WTO accession
  - Singapore and Hong Kong reluctant adoption as part of global trends
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# ROLE OF PRIVATE ENFORCEMENT IN ASIAN COMPETITION LAW

- Historically private litigation has been of only minor importance
  - Several jurisdictions still limit private claims to ‘follow-on’ actions after the antitrust agency has decided that of breach of a statutory prohibition has occurred.
  - Procedural issues, use of agency-discovered evidence, discovery of evidence and admissibility of judgments in private actions can be problematic
  - However, private damages claims including requests for preliminary injunctions have become increasing common in several jurisdictions
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# JAPAN

- The Antimonopoly Law was imposed on an occupied Japan by the Allied Occupation government in 1947
- Ss.24-25 provided a right to private damages; tort damages for antitrust violations were also possible under the S.709 Civil Code
- However, for almost 50 years the provisions were not used by plaintiffs
- Intriguingly, one area where a considerable deterrent effect has been noted is private damages claims by local authorities in bid-rigging cases in public procurement.

# TYPES OF PROCEEDINGS

- Private damages claims under the AMA can only be brought after a decision of the Japanese Fair Trade Commission (JFTC) and can only be brought in the Tokyo High Court.
- However, tort claims under S.709 Civil Code can be brought in any competent civil court de novo.
- Both damages and injunctions can be sought in either situation.
- Cartel and bid-rigging; private monopolization; and unfair trade practices such as price discrimination, collective boycotts, RPM, predatory pricing, anticompetitive territorial division, and abuse of superior bargaining position
- Shareholders can also use a derivative action to recover antitrust penalties and damages awarded against the company from the directors. Ss.423,847 Corporations Act

# PROOF OF CLAIM

- In a S.25 AMA follow-on claim, the plaintiff does not need to prove intent or negligence by the defendant and the Court may rely on the findings of the JFTC. Plaintiff does need to prove causation and quantum of damages suffered.
- However, the defendant can claim a passing a 'passing on' defence as only actual damage is recoverable.
- In tort claims, the evidential burden is higher, and Plaintiff must prove illegal conduct; intent or negligence; causation; and quantum of damages
- Discovery is limited and must be specifically ordered by the court
- Some JFTC file documents can be requested to assist in some aspects of a claim



# LIMITATIONS ON PRIVATE LITIGATION

- Generally, no class action mechanism
- No treble or enhanced damages
- Discovery relatively limited
- But significant damages awards in bid-rigging cases have been made and there is a trend for more use of private enforcement.



# SOUTH KOREA

- Monopoly Regulation and Fair Trade Act (MRFTA) was introduced in 1980
- The principal target of the law has traditionally been giant local conglomerates – the ‘chaebol’ who were encouraged to grow during decades of authoritarian rule
- MRFTA S.56 provides for private recovery of damages for violation of the provisions of the Act unless the defendant can prove absence of negligence or intention regarding the violation
- Civil Code S.750 provides a general cause of action for damages caused by intentional or negligent unlawful acts
- S56 cases thus beneficial to a plaintiff

## RELIEF AVAILABLE

- In addition to compensatory damages, a 2019 amendment to the MRFTA provided for treble damages in most antitrust cases but as this provision is new, no cases have yet been reported.
- However, generally, injunctive relief is not available but an amendment to provide such a power was proposed in December 2020 and should be enacted by 2024.

# PROOF OF CLAIMS

- In a follow-on action, KFTC decisions are not binding on the civil court but finding may be admitted to prove unlawful acts
- Plaintiff must prove causation of damage resulting from the violation
- Discovery is not automatically available but can be specifically requested with regards to particular documents by court order but there is no sanction for non-production
- KFTC documents may also be ordered to be disclosed in appropriate cases

# LIMITATIONS ON PRIVATE ACTIONS

- Class actions are not available
- Successful cartel leniency applicants are not liable to treble damages, only compensatory damages
- Calculation of damages payable can be complex and difficult due to the need to prove a 'competitive' price and the one paid by the plaintiff in cartel cases
- Punitive damages are not available
- But the pass on defence is not recognized but damages may be reduced on the 'fairness' principle in civil law

# CHINA

- The Anti Monopoly Law 2008 was introduced for a range of motives but was ostensibly part of the new economic regulatory framework to complement a market-based economic structure.
- S.50 AML provides that enterprises shall be liable for losses caused by their anticompetitive conduct., which has not been explicitly authorised by the State Administration for Market Regulation (SAMR)
- Initially, it was thought that private enforcement would be very limited in China but over the last 13 years it has become increasingly important and with some notable cases in the IT sector.

# RELIEF AVAILABLE

- Compensatory damages, invalidity of infringing anticompetitive agreements and injunctive relief (via the civil code)
- Applications for relief are made to the relevant intermediate civil court with appeals to a specialist national tribunal and finally to the Supreme Court
- Only entities that suffer losses can sue including indirect purchasers and consumers.

# LIMITATIONS ON PRIVATE ACTIONS

- There is no collective redress mechanism in China
- No treble or punitive damages can be claimed
- Discovery is very limited
- Plaintiff must prove dominance and abuse in relevant cases and the existence of anticompetitive agreements
- Plaintiff must also adduce evidence of abusive conduct and anticompetitive effects that caused relevant damage
- The law and decided cases are silent on passing-on defences. But may be relevant in calculation of damages.
- SAMR can be ordered to disclose relevant documents where it has investigated
- But published decisions are not binding on the civil court and commitment & settlement documents may not be used to prove infringements



# FUTURE REFORM

- Recent successful damages actions in cartel cases and in IT related cases suggest that private litigation may well play a more important role in the future
- The new centralized appeal system will encourage higher quality scrutiny of lower court decisions
- Reform proposals including lowering the plaintiff's burden of proof and increasing the scope of discovery
- Additionally, the increased private antitrust litigation in several leading IT cases will strengthen private enforcement
- But the lack of private enforcement against major state-owned companies is noticeable

# HONG KONG

- After more than 20 years of consideration the Competition Ordinance 2010 was enacted
- Big and small business in Hong Kong was hostile to the enactment and government was hesitant to legislate
- The Ordinance has several significant flaws in that only mergers in telecommunications are regulated and only follow-on private litigation is permitted after an adverse finding in the Competition Tribunal except where anticompetitive conduct is pleaded as a defence.
- Enforcement of the law only began in 2015

# RELIEF AVAILABLE

- Competition Ordinance S.110 provides that 'any person who has suffered loss or damage caused by a contravention proved by the Competition Commission before the Competition Tribunal has a cause of action against any person who infringed the Ordinance or any person involved in an infringement
- Formal admissions of a contravention to the Commission can also be a ground for a claim
- Thus, business or consumers who can prove damage caused by a contravention can claim
- Liable parties can be the business involved in the infringement or persons involved – employees or directors of such firms
- Private claims cannot be brought until all channels of Appeal have been exhausted

# ADVANTAGES AND LIMITATIONS

- Any infringement decision binds the Tribunal in any subsequent private claim
- Ordinary common law discovery is available
- Plaintive must prove causation of the loss claimed and quantify damages
- No treble or punitive damages provided
- No class action procedure
- To date, 6 years after enforcement began, no private damage claim has been launched
- In October 2021, a defendant in a civil claim for money owed failed to successfully defend the claim using a cartel defence. Tribunal held that there was no credible evidence of cartel activity by the claimant.

# REFORM

- Amending the Ordinance to allow stand-alone private damages claims may be considered as part of a promised 5-year review after the law became operational
- However, so far, no proposals have been made public by the government

# SINGAPORE

- The Singapore Competition Act was enacted in 2005
- Singapore, like Hong Kong, had argued against competition law adoption for decades.
- As a result of free trade agreements with the US and Australia, Singapore agreed to enact a competition law
- Specific concerns about the possible anti competitive effects of government linked companies (GLCs) were a motivation for foreign governments to insist on adoption of a competition law, though SG government had also decided a law was necessary

# RELIEF AVAILABLE

- S.86 Competition Act provides a private right of action but only after a determination of a competition infringement by the Competition and Consumer Commission or the Appeal Board or the High Court
- Any person who suffers loss or damage caused by a competition infringement can bring a claim against an infringing undertaking but only after all appeals are exhausted
- Infringing contracts are void
- Common law discovery of document is available



# LIMITATIONS

- To date no private enforcement cases have been brought in Singapore, 16 years after the enactment of the law
- No class action regime
- No treble or punitive damages available
- Likely that CCCS would resist requests for third party discovery of leniency or settlement documents in cartel cases
- No specific provision that a CCCS or Court determination of liability would be binding on a court dealing with a follow-on civil claim

# CONCLUSIONS

- Private enforcement of competition law in Asia varies considerably
- Japan, Korea have developed systems, but some procedural difficulties persist especially in relation to discovery
- China has a fairly new regime, but procedural reforms may soon make it easier to bring private claims
- Hong Kong and Singapore have ineffective private enforcement regimes and the establishment of a stand-alone right is a necessary precursor to improvement

