

Young Scholars Lunchtime Talks Series
Anti-competitive Conduct and Private Law Remedies in Cross-border
Considerations
Kazuaki Nishioka

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Venue: Room 601, Cheng Yu Tung Tower, Centennial Campus, the University of Hong Kong

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1. Introduction

In this talk, Mr Kazuaki Nishioka (Kazuaki) talked about anti-competitive conduct and private law remedies in cross-border context.

Kazuaki first stated the structure of his talk and defined several key terms in the talk. For ‘anti-competitive conduct’, he defined it as conduct restricting fair and free competition in the market, for example, the cartel and abuse of market power. As for ‘private law remedies’, it is remedies for the loss and harm that the victim suffered from anti-competitive acts, including damages and injunction from tort claims.

Kazuaki focused on private enforcement alone in this talk and did not deal with public enforcement. There are two types of private enforcement. The first one is the action of the victim after public enforcement and it is called follow-on-action. The other one is stand-alone-action which is before public enforcement. The Hong Kong competition ordinance allow the follow-on-action alone but other countries may allow both of these. For domestic cases, if foreign domestic court has the case, it will enforce its own private law to determine the dispute and the judgment will be enforced in other countries. But here the circumstance is for international cases, for instance, if a victim in state X seeks a private law remedy against an undertaking in respect of anti-competitive conduct in state Y.

2. The main questions to be determined

There are 3 questions need to be determined. The first one is that whether victim should be able to sue the undertaking in state X. The second question is about applicable law. If victim can sue the undertaking in state X, what law should the state apply in state X for determine the dispute. The third question is about recognition and enforcement of the judgments. If the victim obtained private law remedy in state Y, in what circumstances is the court of state X recognize and enforce that remedy. Kazuaki would consider these three questions from the European Union (EU), Swiss and Japanese law perspective. So far, the cases in Japan are all domestic cases and there is no international

private enforcement case. But Japanese companies are often involved in international competitive conduct thus this problem is quite important.

(1) International jurisdiction

For the first question relating to international jurisdiction. According to the general principle in regarding to the international jurisdiction, the defendant should be sued in the state where he domiciles. In this example, it will be state Y. He may not be sued in state X. The court of state X can ask another jurisdiction around to exercise jurisdiction. The place of tort seemed to be relevant because in substantive law a plaintiff to seek private law remedy for competitive conduct is qualified as a claim as a tort action. So the place of tort is relevant to the other jurisdiction to grant remedy. But where should be the place of tort in a competition law case. It may be comprised of two places: the first one is the place where damage occurred or may occur (the place of damage); the other one may be the place where the event giving rise to the damage occurred or may occur (the place of act).

In regarding to the place of damage, in EU and Swizerland the place should be where the market is directly inflicted. This is based on two reasons. The first one is that in a competition law case, the competitive interest (for example, an interest to buy goods or service at a market price, not cartel price) is in question. That interest in locate in the market. The second is that the state whose market is affected has an interest to regulate the anti-competitive conduct at issue. The application of law can be justified based on domestic effect. To the contrary, according to the Court of Justice of the Europa Union (CJEU) the place of damage should be the place where victim has its registered office. This judgment has been strongly criticized that the court had ignored the proper interest in competition law cases.

As for the place of act, scholars in EU have no consensus over this issue. Some say this should be the place where the anti-competitive agreement is concluded, or the agreement was implemented or the defendant domiciled or had registered office. The CJEU stated the place of act should be the place where an anti-competitive agreement is concluded (if it is identifiable) and the place where it was implemented. In Japan, there is almost no discussion about these two issues. In Kazuaki's opinion, like EU and Swiss law the place of damage should be the place where the market is directly affected. As for the place of act, in light of the purpose of private enforcement that is to provide private remedies for victims, the place should be interpreted broadly to include the place of conclusion and the place of implementation.

In conclusion, for the first question of international jurisdiction, where state X is either conclusion or implementation or where the market is affected, the victim should be able to sue undertaking of the defendant in state X.

(2) Applicable law

The question here is that if the victim can sue the undertaking in state X, what law should the court of state X apply to determine the dispute? There are mainly two issues to be considered. The first issue concerned the applicability of foreign competition law and the other is about the process of determining the applicable law.

In relation to the first question, in the United States, the private enforcement is regarded as an aspect implementation by the states of public interest through the exercise of their public authority. The domestic law is applied here so the relevant question to be considered is as a question of extra-territorial application. However, in EU and Switzerland, the private enforcement primarily aims to provide remedy for the victims that means compensation for the victim of competition law infringement. In addition, remedies are not counting that the offender is compelled by the competition authority and can be settled by agreement of the parties. Therefore, following the EU and Switzerland authorities, the grants of remedies regarding to infringement of free competition can be regulated by application of foreign law by national courts.

As for the second issue about process of determining the applicable law, EU and Switzerland follow the special choice-of-law rule. Under this rule, the law of the country whose market is, or likely to be affected will be applied. It is based on the Market Effects Principle. This rule is justified by the fact that the countries which is directly affected are normally in interest to regulate the act at issue. The legal interest to be protected are the competitive interest of the market participant to buy goods or services at the market price. In general, the law of the market should be applied. In relation to the choosing the law in competition law cases, in EU and Switzerland, basically the choice of law by the parties is not allowed. But in relation to some civil aspects, like the determination of the amount of damages, the claimant has the right to chose. The possibility of election of applicable law by private parties had gained support by some academics. In Kazuaki's opinion, as long as the civil aspect is concerned, there is room for the choice of law by the parties. This opinion is supported by the fact that in practice competition claimants are more aware of the acts done. In Japanese law, the application of foreign competition law is debatable. In light of the previous discussion, the application of foreign competition law by national courts can be allowed. So there is room for choice of law by parties under Japanese law.

In conclusion, in relation to the previous condition of law, the court of state X should apply the law of the country whose market is directly affected.

(3) **Recognition and Enforcement of Foreign Judgments**

The question to be answered is that if the victim obtains a private law remedy against the undertaking in state Y, in what circumstances will the court of state X recognize and enforce the remedy.

In most countries, there are some requirements to enforce foreign judgment. Take Japanese law as an example, there are 5 requirements: a final and conclusive foreign judgment, the jurisdiction is of the foreign court (indirect jurisdiction), service of claim form on the defeated defendant or voluntary appearance by that party, no infringement of substantive and procedural public policy and reciprocity. Among those requirements, it seems that public policy plays the most important role here since competition law considers public interest to keep the market in order. Indeed, the discussion in EU and Switzerland focus on how public policy function in the private enforcement.

In relation to public policy, there are mainly two issues to be considered.

The first one is that whether the law of the state whose market is affected should always apply. In EU and Switzerland, many scholars are positive to this question in light of the fact that competition law concerns public interest like keeping market order. This consideration is reasonable. But, under EU and Swiss law, the victims can choose another law and obtain private law remedy under the chosen law. But the remedy may not be recognized, because the law the parties had choose may not be the law of the country whose market is affected. That may lead to improper result. So as long as the market order is kept by another law, there is no need to set this requirement and public interest should not function in relation to this issue.

The second issue is whether punitive or treble damages should be recognized and enforced. This is not special in competition law area. Punitive damage or treble damage is a kind of damage with a penal function to punish the defendant. Under the law of the United States, the victim can be awarded three times of actual damage. However, in civil law countries including countries in EU and Switzerland, normally punitive damages are not recognized and enforced based on public policy. Punitive damages may not be accepted in private law area. But recently some civil law countries like China and Thailand accepted this remedy or some punitive element in private law. In Kazuaki's opinion, it is not necessarily unfair to order a tortfeasor to pay punitive damages in the light of the fact that he or she often profits by infringing intentionally and maliciously the law and causing damage in competition law cases. In conclusion, the recognition and enforcement of punitive damages should not be refused simply because of its penal nature.

3. Conclusion and remarks

In this talk, Kazuaki has dealt with 3 main questions. In his opinion, a person should be able to be sued in the state where he or she domiciles or the anti-competitive agreement in question is concluded or implemented, or whose market is directly affected. The applicable should be basically the law of the country whose market is, or likely to be affected, including its competition law. There is no need of special treatment in competition law cases and the foreign judgments should be recognized and enforced.

4. **Q&A Session**

(1) **Question 1**

Q: What is the condition relating to application of foreign competition law in Japan now? For example, the application of American law in this area?

A: If in relation to punitive damages, as you know TPP (Trans-Pacific Partnership) included a provision which allow awarding punitive damages and now since Japan is a member of TPP it have to apply this provision.

Additional comments by Mr Anselmo Reyes (Reyes): Kazuaki has identified that there is a going trend toward awarding punitive damages particularly in civil and common law jurisdiction (including Hong Kong) when deciding domestic cases had awarded punitive damages. The Hague conference in private international law which Reyes was representing the pacific region office is drafting conventions for the recognition and enforcement of civil commercial judgments and one of them expressly deal with punitive damages. That decision is still subject to discussion and we will see the result in the future. But in light of the relevant discussion today, Reyes believes that there will be a move towards cross-border recognition of treble damages.

(2) **Question 2**

Q: The question is about the enforcement of remedies. For example, if two undertakings in Hong Kong are to merge under Hong Kong law, but affect the market in Australia (assuming the merger not permissible in Australia), the party obtained the remedy in Australia and come to the Hong Kong courts to enforce such judgment, would it be improper that the undertaking is merged legally here in Hong Kong but have to pay compensation here in Hong Kong according to a foreign judgment?

A (by Reyes): That is actually related to the public policy of Hong Kong. Indeed, under the Hong Kong competitive ordinance, if two entities emerged and engaged in anti-competitive conduct that have effect in Hong Kong that contravenes the competition ordinance, Hong Kong will come down as hard as foreign courts as well. As a matter of public policy in Hong Kong, it will take into account the fact that Hong Kong has the provision allowing remedies to be granted upon anti-competitive conducts having effect here in Hong Kong even by foreign undertakings. So Reyes thinks that reciprocity would probably suggest that the court will be quite acceptable to recognize the foreign judgment.

Follow up question:

Q: In a merger regulation case in EU, the competition authority actually has a power to completely ban the merger and it is perceived by EU that the merger has anti-

competitive effect. If the EU court upheld the decision to ban the merger of two Hong Kong undertakings which is completely legal in Hong Kong, can the party come to the Hong Kong court to seek enforcement of that decision? Or say a Japanese merger is banned.

A: Since it is enforced by a competition authority and thus a public decision, the decision cannot be enforced in Japan according to private international law.

(3) Question 3

Q: In Hong Kong, the court will considerate a case in tort but if it is a foreign tort and it is a civil wrong in the foreign jurisdiction, then it would be wrong if committed in Hong Kong. In private international law, there are many comments saying that this rule is out dated. A lot of jurisdiction have changed the rule but Japan and Hong Kong did not. So to what extent the Japanese courts would apply this double action ability rule in relation to cases relating anti-competitive conduct.

A: There is no international case like this so the following is only Kazuaki's opinion. There are a lot of criticisms relating to this double action ability rule in Japan. Many academics suggest at least Japan should critically apply this rule. For example, in competition law cases, if the Japanese law did not have an interest to regulate the act, we should not apply this rule. The reason for the existence of this rule is to protect business entities of Japan from foreign judgment, but it is quite unfair to foreign companies.

(4) Question 4

Q: There might be a fourth aspect to be considered in addition to the 3 main issues discussed today, that is the pressure from The Hague Conference. That is in relation to the gradual harmonization of private international law across border. To what extent would you advocate a international convention relating to or dealing with cross-border anti-competitive conduct? Do you consider it possible?

A: Kazuaki hoped that the convention can be done but for the condition now it is unlikely to be possible. It is quite difficult to find a point to compromise to make a convention. ASEAN might be possible to make a convention like this.