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Antitrust Litigation 2021

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SOUTH KOREA

Law and Practice

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1. OVERVIEW

1.1 Recent Developments in Antitrust Litigation

Antitrust litigation in Korea can largely be classified into three types. The first occurs when the Korea Fair Trade Commission (KFTC), the agency which regulates violation of the Monopoly Regulation and Fair Trade Act (MRFTA) in Korea, imposes measures such as remedies or a surcharge on a violator of the MRFTA, the violator may file an administrative lawsuit against the KFTC for cancellation of the measures (Administrative Lawsuit Against the KFTC). The second type of litigation is a civil lawsuit in which a victim of a violation of the MRFTA seeks damages against the violator, who is the perpetrator (Antitrust Damages Lawsuit). The third type is a criminal lawsuit against a violator of the MRFTA after investigation by the investigating agency and filing of charges (Antitrust Criminal Lawsuit).

Recently, around December 2020, a bill for the full amendment of the MRFTA passed the National Assembly, which will take effect on 30 December 2021. The fully amended MRFTA (Amended MRFTA) contains several changes and is expected to bring many changes to the three types of antitrust litigation outlined above.

Administrative Lawsuit Against the KFTC

In relation to the Administrative Lawsuit Against the KFTC, the area often at issue in Korea is the administrative lawsuit regarding collusion. Currently, the MRFTA requires an “agreement” for collusion and has no separate provision regarding information exchange. Accordingly, there has been some debate as to whether, when competitors exchange information on price, this should be regarded as collusion prohibited by the MRFTA. The Supreme Court has strictly reviewed whether business entities’ information exchange constitutes collusion in several information exchange cases with the view that “it

cannot be concluded that there is an agreement on unfairly restricting competition based only on the fact that information was exchanged.” In fact, the court has cancelled the KFTC’s measures in many information exchange cases.

In consideration of the court’s judgment, the Amended MRFTA includes information exchange that substantially restricts competition as a type of collusion, and when external conformity of actions, such as joint increase in price and information exchange, is found, an “agreement” is presumed by law. However, this provision applies only to conducts terminated after the date of the enforcement of the Amended MRFTA (30 December 2021).

Due to the change above, the KFTC’s burden of proof will be significantly eased. Under the current MRFTA, the KFTC must prove both the price fixing agreement and the resulting anti-competitiveness. However, under the Amended MRFTA, if an agreement is presumed on the basis of external conformity of actions, of increased prices and information exchange, the KFTC will only have to prove anti-competitiveness, and the business entity will have to prove there is no agreement. Accordingly, it appears likely that there will be fierce argument over “external conformity of actions” in the Administrative Lawsuit Against the KFTC in the future.

Antitrust Damages Lawsuit

In the past, when the KFTC and the court found a violation of the MRFTA, victims did not often file damages lawsuits. Recently, in cases where a violation of the MRFTA has been found, damages lawsuits have been brought more actively.

Many construction projects were carried out in Korea around 2010 and, as a result, there were many public tenders. In a lot of tenders, construction companies engaged in bid-rigging such as agreeing on the successful bid price,

bid rate, and construction area allocation, and they were caught by the KFTC. Victims of the collusion filed a number of civil lawsuits seeking damages against the construction companies from around 2015. The biggest issue in these civil lawsuits was how to calculate the damages caused by those who had participated in the bid-rigging.

Appraisals were conducted in various courts in Korea to calculate the damages. There were arguments between the victims and the perpetrators regarding the selection of an appraisal method for calculating the amount of damages. The victims who filed lawsuits generally preferred an econometrics analysis method based on regression analysis of similar cases, while the perpetrator construction companies preferred a cost-based approach that was expected to reflect the unique characteristics of the construction site. The courts have recently tended to calculate the amount of damages by relying more on the appraisal according to the econometrics analysis method.

As such, in an Antitrust Damages Lawsuit, it was difficult for the victim to prove the amount of damages incurred due to the violation of the MRFTA. The Amended MRFTA introduces a new system of court orders to submit materials. Under this court orders system, pursuant to a party's request in an Antitrust Damages Lawsuit, the perpetrator can be ordered to submit materials necessary to prove damage or calculate the amount of damages. This is expected to alleviate some of the burden of proving damages.

Antitrust Criminal Lawsuit

Criminal litigation was previously conducted pursuant to the KFTC's referral of the violator for criminal prosecution after finding a violation of the MRFTA. It seems that, recently, the number of criminal litigation cases being pursued by investigating agencies, separate from

the KFTC's referral, is increasing. Investigating agencies are pursuing violators based on other laws that allow punishment of some violations of the MRFTA without the KFTC's referral, such as the Framework Act on the Construction Industry.

In addition, there is a provision in the MRFTA that even if the KFTC determines that the requirements of referral for criminal prosecution have not been met, if there is a request from the chairman of the Board of Audit and Inspection, a minister of the Ministry of SMEs and Start-Ups, or an administrator of the Public Procurement Service to the KFTC to make a referral, the chairperson of the KFTC must refer the matter for criminal prosecution. Thus, the provision of the MRFTA limits the KFTC's exercise of the right to refer or not refer a case for criminal prosecution.

Regarding the Antitrust Criminal Lawsuit, the Amended MRFTA removed the criminal punishment provision for certain conduct where there has been no case of criminal punishment and such punishment would not be in accordance with the legal system. Such conduct includes that having to do with M&A, some unfair trade practices (including refusal to deal, discriminatory treatment, exclusion of competitors, and conditional transactions), and resale price maintenance. As such, these types of MRFTA violations are no longer subject to criminal litigation.

1.2 Other Developments

Treble Damages

When liability for damages arising from a violation of the MRFTA is at issue, the scope of the liability for damages borne by the perpetrator is generally limited to damage that actually occurred or is presumed to have occurred. However, when the MRFTA amended the relevant regulation in 2018, in the event that a person suffers damage due to collusion or prohibited retaliatory measures in connection with the unfair trade practices among the violations of

the MRFTA, a new provision was established that imposes damages liability on the business entity or business entities' organisation (ie, an association formed by two or more businesses for the purpose of promoting common interests) (Business Entities' Organisation) that engaged in such conduct "to the extent that it does not exceed three times the damage incurred by the victim". It also provided that, in the event that the business entity or business entities' organisation can prove that there was no intent or negligence, then it does not bear such liability for damages.

The MRFTA has the court consider, when deciding the amount of damages, as above:

- the intent or degree of recognition of the concern that damage would arise;
- the extent of the damage caused by the violation;
- the economic gains obtained by the business entity or Business Entities' Organisation from the unlawful conduct;
- the fine and surcharge from the violation;
- the duration and frequency of the violation;
- the financial situation of the business entity; and
- the degree of effort made by the business entity or Business Entities' Organisation to remedy the damage.

Private Person's Injunction Claim System

The Amended MRFTA introduced a new system for a private person's claim for an injunction. This system allows the victim of unfair trade practices (except for unfair support) to claim directly to the court for prohibition or prevention of infringing conduct without going through the KFTC. Under the current MRFTA, there are no immediate countermeasures or appropriate remedies for victims who have been harmed or are likely to be harmed by unfair trade practices. As a result, the victim had no choice but to report to the KFTC and wait for action. Under the Amended

MRFTA, the victim can request the suspension or prevention of unfair trade practices without having to wait for the KFTC's measures so that infringement can be stopped promptly or so that damages can be prevented in advance. But, when an injunction claim is filed, if the court deems it necessary to protect the interests of the defendant, the court may order, on its own or at the request of the defendant, that the plaintiff provide collateral security to prevent excessive claims for injunctive relief.

2. THE BASIS FOR A CLAIM

2.1 Legal Basis for a Claim

Legal Basis and Requirements of Antitrust Litigation

The legal basis for claiming damages due to violation of the MRFTA is provided in the law. The representative laws are the Civil Act and the MRFTA.

Claiming under the Civil Act

The Civil Act has a provision on claiming damages for general torts, and the requirements for claiming damages for tort under the Civil Act are as follows:

- there is intent or negligence in the perpetrator's conduct;
- there is damage to the victim;
- the perpetrator's conduct is unlawful; and
- there is a causal relationship between the perpetrator's conduct and the damage to the victim.

Violation of competition law, including violation of the MRFTA, is generally considered a tort, so a victim of the tort can claim damages based on the Civil Act. However, in order for the tort to be established, all four of the requirements above

must be met, and the victim must prove the facts meeting the requirements.

Claiming under the MRFTA

Meanwhile, the MRFTA has a provision for claiming damages caused by violations of the MRFTA, separate from the Civil Act. The requirements for claiming damages under the MRFTA are as follows:

- the perpetrator (business entity or Business Entities' Organisation under the MRFTA) violates a provision of the MRFTA;
- there is damage to the victim;
- there is a causal relationship between the perpetrator's violation of the MRFTA and the damage to the victim; and
- there is intent or negligence in the perpetrator's conduct.

There is no significant difference between the requirements under the MRFTA and those under the Civil Act. However, in contrast to the need for the victim to prove the intent or negligence of the perpetrator in the case of a claim for damages under the Civil Act, under the MRFTA, the perpetrator needs to prove that there is no intent or negligence. By shifting the burden of proof from the victim to the perpetrator as to whether or not intent or negligence exists, the MRFTA offers victims more protection than they enjoy under the Civil Act.

Proof of Damage in Antitrust Damages Lawsuits

The MRFTA provides that where it is recognised that the victim incurred damage due to the violation of the MRFTA, but it is extremely difficult to prove the precise amount of damages, due to the nature of the facts, the court may recognise a reasonable amount of damages based on the gist of the overall arguments and the results of evidence examination. As such, the burden on victims to prove a specific amount of damages

has been alleviated, and the court has been granted discretion in calculating the amount of damages. In principle, for a victim to claim damages, the victim must prove that they suffered damages and the specific amount of those damages. However, because there are cases where it is difficult to prove the amount of damages stemming from a violation of the MRFTA, this provision seeks to prevent the unreasonable situation in which the victim's claim is denied simply because the exact amount of damages has not been proved in a situation where it is clear that damage has been incurred.

In this regard, the Supreme Court further determined that when the court applies the provision to recognise the amount of damages, it must do what it can to search for indirect facts that may be grounds for calculation of the amount of damages and to reasonably evaluate the indirect facts that have been found to calculate an objectively acceptable amount of damages. If the fact that damage was incurred due to tort is recognised, the court must encourage proof by vigorously exercising its right to seek clarification, even if a party's argument and proof of the amount of damages is lacking, and, in some cases, determine the amount of damages based on its authority.

The Supreme Court has determined that the method of calculating damage from collusion is not limited to an econometrics model, and as long as they are reasonable and objective, various methods may be considered to calculate the amount of damages, such as:

- statistical data on excess prices due to collusion;
- the amount of amount of damages found in similar cases;
- the size of profits gained by a business entity from the violation;

- comparing the supply price of business entities that did and did not participate in the collusion during the collusion period; and
- making certain adjustments to the result of one party's calculation of the amount of damages.

Independent Litigation Proceedings

An Antitrust Damages Lawsuit can proceed independently of an Administrative Lawsuit Against the KFTC, regardless of whether the KFTC investigates and the degree of investigation. The victim can choose any or all of the bases for a claim mentioned above and proceed with the lawsuit against the perpetrator. However, since it is not easy for the victim to prove the facts that are a requirement for claiming damages, in practice, there are many cases where the victim files the damages lawsuit after observing – and according to the results of – the investigation and decision of the KFTC.

2.2 Specialist Courts

The Administrative Lawsuit Against the KFTC falls under the exclusive jurisdiction of the Seoul High Court, as prescribed by the MRFTA. The Seoul High Court is not a court that deals only with appeals related to violation of the MRFTA, but in the case of an Administrative Lawsuit Against the KFTC, actually functions as the first instance court. Unlike ordinary litigation, which proceeds through a three-tiered court system of district courts, high courts and the Supreme Court, in the case of an Administrative Lawsuit Against the KFTC, it actually goes through a two-tiered court system of the Seoul High Court and the Supreme Court.

Among the several judicial panels within the Seoul High Court, there are some dedicated to the Administrative Lawsuit Against the KFTC. The Administrative Lawsuit Against the KFTC is assigned to one of these judicial panels. Even if the case is reallocated, it will be reassigned to

one of the remaining judicial panels dedicated to the Administrative Lawsuit Against the KFTC. Since the Seoul High Court is prescribed as having exclusive jurisdiction over the Administrative Lawsuit Against the KFTC, an Administrative Lawsuit Against the KFTC received by the Seoul High Court will not be transferred.

However, since the Seoul High Court does not have exclusive jurisdiction over the Antitrust Damages Lawsuit and Antitrust Criminal Lawsuit, these go through a three-tiered court system, as is generally the case.

2.3 Decisions of National Competition Authorities

The national competition authority in Korea is the KFTC. The KFTC's decisions are not binding on the court and the court can review the validity of the KFTC's decisions in full, find different facts from those found by the KFTC, and make different legal determinations.

In the case of an Antitrust Damages Lawsuit, the victim proceeds by filing a lawsuit against the perpetrator, and there is no statutory basis for the KFTC to impose damages measures directly on the perpetrator or intervene in the damages process carried out by the victim. The MRFTA provides that the court in charge of an Antitrust Damages Lawsuit may make a request to the KFTC to send records related to the violation of the MRFTA.

2.4 Burden and Standard of Proof Administrative Lawsuit Against the KFTC

In the case of an Administrative Lawsuit Against the KFTC, the KFTC bears the burden of claiming and proving that there has been a violation of the MRFTA and that the measures imposed by the KFTC are appropriate. The party subject to the measures bears the burden of claiming and proving that there is justification for the violation of the MRFTA. The court determines whether the

KFTC has deviated from or abused its discretion by reviewing whether there are errors in the findings of fact that were the bases for the measures and whether the general principles of administrative law, such as the principles of proportionality impartiality, have been followed.

For example, in the case of the KFTC's surcharge imposition, the court considers that the KFTC has discretion to determine whether to impose a surcharge and the amount of that surcharge. The court believes that the "Notice on Standard for Imposing Surcharge" (Surcharge Notice) is only an internal standard within the KFTC and the KFTC's measures are not immediately unlawful simply because the Surcharge Notice was not followed. However, if the KFTC has repeatedly imposed measures pursuant to the Surcharge Notice so that it has become an administrative practice, then the court has determined that measures contrary to such administrative practice are unlawful. The fact that such administrative practice has been established must also be claimed and proved by the party subject to the measures.

Regarding the degree of proof, the Supreme Court has determined that even if the proof of facts in an Administrative Lawsuit Against the KFTC and an Antitrust Damages Lawsuit does not mean proof of the sort required by the natural sciences, where there is no shred of doubt, it does mean proof of high probability that a certain fact existed after comprehensive review of all the evidence in light of empirical rules – unless there are special circumstances – so that an ordinary person should have no doubt.

Antitrust Damages Lawsuit

In the case of an Antitrust Damages Lawsuit, if the victim has filed a damages lawsuit based on the provisions of the MRFTA, the victim bears the burden of asserting and proving that they incurred damage and the extent of the damage

(amount of damages). The perpetrator bears the burden of asserting and proving that there was no intent or negligence regarding the violation of the MRFTA and that there are circumstances under which the victim's claimed amount of damages should be limited. On the other hand, if the victim has filed a damages lawsuit based on a provision of the Civil Act, the victim must prove the perpetrator's intent or negligence.

The victim must also prove the specific amount of damages. The most problematic issue in this regard is calculating the amount of damages caused by collusion. The court deducts the estimated price that the victim would have borne had there been no collusion (hypothetical competitive price) from the actual price where there was collusion. However, it is not easy to calculate the hypothetical competitive price, which is the basis for calculating the amount of damages. In order to calculate the hypothetical competitive price, special appraisal methods such as an econometrics analysis are used. Appraisal according to the econometrics analysis method is usually carried out by academic experts. The court generally accepts the amount of damages calculated from the appraisal result as long as there is no clear error. Accordingly, the victim usually proves the amount of damages from collusion by making a request to the court for such an appraisal and reviewing the result.

However, this method of proof takes significant time and money. A victim who has difficulty bearing the cost of the appraisal or who wants to end the lawsuit quickly may instead prove the amount of damages without undergoing the appraisal method described, such as by using the amount of damages calculated in similar cases. In this situation, the court alleviates the burden on the victim of proving the amount of damages by recognising the amount, based on the provision that eases the burden of proving damages under the MRFTA.

With regard to the passing-on defence, the perpetrator may assert and prove that the amount of damages claimed by the victim should be limited because the victim passed the damage from the violation of the MRFTA (eg, through collusion) on to consumers. However, the Supreme Court does not take the view, even if the court accepts the passing-on defence, that there is a causal relationship in which the victim's harm is immediately reduced or in which the victim immediately recovers from it. Rather, its view is that the perpetrator's liability for damages can be limited by taking into account the circumstances of passing-on the victim's damages when determining the amount of damages.

Antitrust Criminal Lawsuit

In the case of an Antitrust Criminal Lawsuit, the prosecutor bears the burden of proving the facts necessary for maintaining the charges, such as the fact that the defendant has violated the MRFTA and should be subject to criminal punishment accordingly.

With regard to the degree of proof in an Antitrust Criminal Lawsuit, the Supreme Court has determined that for guilt to be found in a criminal trial, it must be based on evidence that has the power to prove that the charges are true beyond reasonable doubt on the part of the judge. The Supreme Court also determines that reasonable doubt does not include all doubts and distrust but rather means a rational question about the probability of facts. It is considered that conceptual suspicion or suspicion based on abstract possibility is not included in reasonable doubt.

2.5 Direct and Indirect Purchasers

Both direct purchasers who purchased a product directly from the business entity that colluded, or otherwise violated the MRFTA, and indirect purchasers who purchased the product from that direct purchaser or a product using such

product as raw material, may in principle file a damages lawsuit against the business entity.

Although it is not specified in the Civil Act and the MRFTA whether an indirect purchaser in addition to a direct purchaser may file a damages lawsuit against the business entity, the Supreme Court generally takes the view that violation of the MRFTA constitutes a tort under the Civil Act so that pursuant to general legal principles of tort under the Civil Act, if there is a substantial causal relationship between the business entity's violation of the MRFTA and an indirect purchaser's damages, the indirect purchaser may also claim damages.

2.6 Timetable

Administrative Lawsuit Against the KFTC

In general, it takes about three to four months for the first hearing to be held after a complaint is filed, but the time it takes for the court to announce its judgment after the first hearing varies from case to case. At the Seoul High Court level, it usually ends within two years, but at the Supreme Court level, it can take as little as four months and as long as several years.

An Administrative Lawsuit Against the KFTC is only possible after the KFTC's investigation has been completed and measures have been imposed, so it is not possible for the court proceeding to be suspended or postponed according to the KFTC's investigation.

Antitrust Damages Lawsuit

An Antitrust Damages Lawsuit basically proceeds irrespective of the investigation by the KFTC but, in practice, a victim often waits for the result of the KFTC's investigation and files the lawsuit according to its results. Even if the victim files a lawsuit before the KFTC's investigation results are released, the court may postpone or suspend the court proceeding until the KFTC's investigation results are available. If an Adminis-

trative Lawsuit Against the KFTC is filed regarding a violation of the MRFTA, whether there was a violation of the MRFTA is a preliminary question in the damages lawsuit, so in many cases, the court in charge of the damages lawsuit proceeds at full pace with the case after the results of the administrative lawsuit above have been confirmed.

The parties may ask the court to postpone or suspend the court proceeding until the results of the KFTC's investigation or related administrative lawsuit are available. However, a legal right to proceed as above is not recognised, and the court may decide whether to proceed with the court proceeding regardless of the views of the parties.

Accordingly, in the case of an Antitrust Damages Lawsuit, much time is spent waiting for the result of the related administrative lawsuit. In order to calculate the amount of damages, an additional six months to one year is required during the appraisal process.

3. CLASS/COLLECTIVE ACTIONS

3.1 Availability

There is no system that allows class/collective actions in antitrust litigation in South Korea. However, in the case of an Antitrust Damages Lawsuit, victims can file a lawsuit as joint plaintiffs. While the result of the damages lawsuit filed by some of the victims is not legally binding on the rest of the victims, it does have an impact on them. Thus, the victims who have not filed a lawsuit can proceed more easily by filing a separate damages lawsuit based on the result of the initial lawsuit.

In this regard, the Ministry of Justice recently announced a Class Action Law that was

intended to introduce the class action system by around September 2020, but the bill is still being reviewed by the Ministry of Legislation. If the Class Action Law is passed by the National Assembly, class actions will be possible in antitrust litigation.

3.2 Procedure

There is no system in South Korea that allows class/collective action in antitrust litigation. See

3.1 Availability.

3.3 Settlement

There is no system in South Korea that allows class/collective action in antitrust litigation. See

3.1 Availability.

4. CHALLENGING A CLAIM AT AN EARLY STAGE

4.1 Strikeout/Summary Judgment

There is no provision allowing strikeout/summary judgment in an Administrative Lawsuit Against the KFTC and an Antitrust Damages Lawsuit. However, in the case of an Antitrust Criminal Lawsuit, the proceeding is often simplified, the prosecutor requesting a summary trial and the court issuing a summary judgment. In this case, if a defendant objects to the summary judgment and requests a formal trial, the case will proceed through a formal trial.

4.2 Jurisdiction/Applicable Law

Jurisdiction

In the case of an Administrative Lawsuit Against the KFTC, the MRFTA specially provides that the Seoul High Court has exclusive jurisdiction of the first instance, and accordingly, an Administrative Lawsuit Against the KFTC goes through a two-tiered court system of the Seoul High Court and the Supreme Court.

An Antitrust Damages Lawsuit is a civil lawsuit, and jurisdiction is determined according to the provisions of the Civil Procedure Act. Under the Civil Procedure Act, the court in charge of the following has jurisdiction over the case:

- if the defendant is a person, the place of domicile (if the person has no domicile in Korea or the person's domicile is unknown, then the person's place of residence, and if the place of residence is unfixed or unknown, then the place of the last domicile); and
- if the defendant is a corporation or other association or foundation, the place of principal office or place of business (if there is no such office or place of business, then the domicile of the main person in charge).

In addition, there are various cases where jurisdiction is additionally recognised. Accordingly, if jurisdiction is recognised for multiple courts in different regions for a single case, a plaintiff may file a lawsuit with any of them. Furthermore, even if a plaintiff files a lawsuit in a court that does not have jurisdiction, jurisdiction is recognised if there is an agreement between the plaintiff and the defendant, or if the defendant responds to the pleading without an objection.

In the case of an Antitrust Criminal Lawsuit, jurisdiction is determined according to the provisions of the Criminal Procedure Act. The Criminal Procedure Act basically provides that jurisdiction is the court in charge in the place where the offence took place, the place of the defendant's domicile, the place of the defendant's residence, or the defendant's present location.

Applicable Law

In an Administrative Lawsuit Against the KFTC, since the issue is whether the KFTC's measures based on the MRFTA are lawful, the MRFTA applies in terms of substance. In terms of procedure, the MRFTA, the Administrative Litigation

Act, and the Civil Procedure Act apply, among others.

In an Antitrust Damages Lawsuit, in terms of substance, the Civil Act and the MRFTA apply, and the victim may choose the law that is the basis for the claim in filing the lawsuit. In terms of procedure, the Civil Procedure Act applies.

4.3 Limitation Periods

In the case of an Administrative Lawsuit Against the KFTC, under the MRFTA, a company has to file a lawsuit with the Seoul High Court against the disposition of the KFTC within 30 days from the date the company was notified of the KFTC's disposition. If the company has filed an objection to the disposition by the KFTC, the company also has to file a lawsuit with the Seoul High Court within 30 days from the date of receipt of the original copy of the KFTC's decision regarding the objection. An Administrative Lawsuit Against the KFTC will be dismissed after the 30-day period.

In the case of an Antitrust Damages Lawsuit, there is no time limit for the victim to comply with, other than the statute of limitations in accordance with the characteristics of the victim's right to claim damages. The victim's right to claim damages for a violation of the MRFTA corresponds to the right to claim damages resulting from tort in the Civil Act. Under the Civil Act, the statute of limitations for claiming damages resulting from tort is three years from the date on which the victim (or their legal representative) became aware of the damage and the perpetrator, or ten years from the day the perpetrator committed the tort. The statute of limitations is complete when one of the above two periods elapses. Victims of MRFTA violations must, in principle, file a lawsuit with the court within the above period, unless a ground for suspension of the statute of limitations provided by the Civil Act is recognised. Since collusion is secretive

in nature, it is often unknown externally until the KFTC investigates and takes administrative action against the colluding parties. Therefore, victims often only become aware of the existence of the collusive behaviour and that they have been injured by it after a long time has elapsed, and on occasion, after the statute of limitations has elapsed. Such consequences are inevitable under current Civil Act regulations.

5. DISCLOSURE/ DISCOVERY

5.1 Disclosure/Discovery Procedure Court Orders to Submit Materials and Document Submission Orders

Under Korean law, there is no “discovery” system, as under common law. However, the Amended MRFTA introduces court orders to submit materials. Under this system, in damages lawsuits due to collusion, unfair trade practice (except for unfair support), and collusion by Business Entities’ Organisations, upon the request of a party, the court may order the submission of materials necessary for proof of damage or calculation of the amount of damages.

In addition, in the course of proceeding with a lawsuit, the parties to the lawsuit may follow the procedure for getting the opponent or a third party to submit documents via court in accordance with the Civil Procedure Act. Based on the MRFTA, a court in charge of a damages lawsuit can ask the KFTC to send records related to the MRFTA violations.

A party to a lawsuit that wants an opponent or third party to submit documents, may ask the court to request that the opponent or third party submit the document voluntarily. Where the opponent or third party does not submit the document voluntarily, the party can petition the court to order the opponent or third party to sub-

mit the document, by means of a “document submission order petition”.

Requirements and Procedure for Court Orders to Submit Materials in the Amended MRFTA

Under the system for court orders to submit materials introduced in the Amended MRFTA, in lawsuits for damages due to collusion, unfair trade practices (excluding unfair support), and collusion by Business Entities’ Organisations, a party may ask the court to issue an order to submit materials necessary for proof of damage or calculation of the amount of damages. Upon a party’s request, the court can order the other party to submit the relevant materials (except for material related to leniency). The system requires a party’s request, and the target of the court’s order to submit materials is the other party. This is distinct from a document submission order under the Civil Procedure Act which can also be issued to a third party in possession of the document.

Even if a party asks the court to order submission of materials, if the holder of the materials has justifiable grounds for refusing to submit the materials, the court cannot order submission of the materials. If the holder of the materials claims there is a justifiable ground for refusing to submit the materials, the court can order presentation of the materials in order to determine whether the claim is appropriate. In this case, the court should not allow others to view the materials. However, even if the materials to be submitted pursuant to the court order are business secrets, the Amended MRFTA does not consider this as a justifiable ground for refusing to submit if that submission is necessary for proof of damage or calculation of the amount of damages. In this case, the court must designate the scope or persons who can access the materials within the purpose of the court order.

If the other party fails to comply with the court order to submit materials without justifiable grounds, the court may recognise the party's assertion as to the content in the materials to be true.

Requirements and Procedure for a Document Submission Order Petition

If the court orders the opposing party or a third party to submit a document, the person who is in possession of the document bears the duty of submitting the document unless there is a ground for denial, as provided in the Civil Procedure Act. In this regard, the Civil Procedure Act stipulates that a person who is in possession of a document cannot refuse to submit it in the following cases.

- 1) When a party is in possession of documents cited in a lawsuit.
- 2) When a petitioner has a private legal right to request that the person who is in possession of the document hand it over or show it.
- 3) When a document has been written for the benefit of the petitioner or prepared with regard to the legal relationship between the petitioner and the person in possession of the document; however, this is not applicable to any of the following cases:
 - (a) documents that contain matters related to occupational secrets of a public official or a person who used to be one, if the consent of the relevant public official (or person who used to be one) or related organisations has not been obtained;
 - (b) documents that contain matters related to information that may lead to the prosecution or conviction of, or the disgrace of, the person who is in possession of the document, their relative (or a person who used to be one), their legal guardian or ward; or
 - (c) documents that contain matters concerning secrets of professional duties or skills,

or occupational secrets of a person who is obliged to keep secrets under laws and regulations, and that are not exempted from the obligation to keep secrets.

When documents other than “documents that a public official or a person who used to be one holds or is in possession of, for their public duty” are not within the scope of either b) or c) for exceptions among the provisos of point 3 above, or documents that exist solely for the utility of their owners.

When a party petitions for a document submission order, the court first hears the opinions of the respondent, regarding their possession of the document, and whether they have a reason to object to the document submission. If the court determines that the document submission order petition is appropriate, the court will order the respondent to submit the document.

In principle, the petitioner must clearly specify the target document when petitioning for a document submission order. However, it is not always easy for a person who is not in possession of a document to accurately specify the target document. In such a case, the Civil Procedure Act stipulates that the document submission order petitioner first submit a general description of the target document's gist or the facts to be proved by the document. Then, according to the Act, the court may order the respondent to organise the titles and the gist of the documents they are in possession of, or of the documents to be submitted as documentary evidence in relation to the petition, etc, as a list, and submit it. Following the procedure, the petitioner can petition for a document submission order by checking the list of documents and specifying those they deem necessary.

Consequences of refusal to submit

If a respondent refuses to submit a document without giving any of the reasons mentioned above, or if a respondent destroys or throws away a document that they are required to submit, or renders it unusable for the purpose of hampering the petitioner's use of it, the court may recognise the petitioner's claims about the contents of the document as true. However, the court may not determine that the fact the petitioner intended to prove with the document has been instantly proved. For example, if a petitioner petitions for a document submission order to prove that a sales contract has been made, and the respondent refuses to submit a copy of the contract without any grounds, despite the court's order for the document submission, the court may acknowledge that there was a copy of the contract with the written content alleged by the petitioner, but beyond that, it may not immediately acknowledge that the sales contract alleged by the petitioner has been made.

5.2 Legal Professional Privilege

Privileges such as attorney-client privilege are not recognised under Korean law.

5.3 Leniency Materials/Settlement Agreements

In principle, the MRFTA stipulates that the KFTC and its officials may not provide information or data regarding leniency applicants to others unrelated to the handling of the case. However, should the leniency applicant consent, or if it is necessary in order to file or carry out a lawsuit related to the case, such information or data can be provided to others.

6. WITNESS AND EXPERT EVIDENCE

6.1 Witnesses of Fact

A court can admit facts based on a witness statement. A witness statement can be made both orally and in writing. In principle, a witness statement is subject to cross-examination, but cross-examination is not conducted in exceptional cases where a witness submits a written affidavit. A court sometimes only requires a written affidavit from a witness when the case does not concern factual grounds that need to be verified through cross-examination. It is sufficient for a witness to make a statement, and they do not bear the burden of providing evidence to support the authenticity of the statement.

6.2 Expert Evidence

Expert witnesses are often utilised where one of the issues in a lawsuit requires special learning and experience. The procedure for the expert witness statement is the same as for the general witness statement. The expert witness statement can be made both orally and in writing, and is subject to cross-examination in principle.

A party does not need to obtain court approval to submit expert statements in writing, but they must obtain court approval if they conduct an interrogation of the expert in court or if they request an expert's appraisal. Courts do not require experts to produce joint statements in advance of a trial indicating the areas in which they agree or disagree.

In addition to receiving expert opinions or questioning experts as witnesses to investigate expert evidence, courts can also adopt other measures such as requesting experts to appraise the issues of the trial, or follow the process of simultaneously seeking opinions from multiple experts.

7. DAMAGES

7.1 Assessment of Damages

In an Antitrust Damages Lawsuit, the amount of damage is calculated based on the actual amount of injury or estimated amount of injury sustained by the victim. Regarding some violations, such as collusive acts, a provision established in 2018 renders a perpetrator liable for compensation of damages within an amount not exceeding three times the damages incurred by the victims. Compensation for damages in accordance with the provision are regarded as punitive damages.

When the court determines the amount of compensation in accordance with the provision above, certain factors should be taken into account, including:

- intent or degree of recognition of the concern that damage will arise;
- the extent of damage caused by the violation;
- the economic gain the perpetrator has acquired from the violation;
- the fines and surcharge for the violation;
- the duration and frequency of the violation;
- the financial condition of the business entity; and
- the extent of efforts the business entity or Business Entities' Organisation has made to remedy the damages.

7.2 "Passing-On" Defences

The perpetrator can claim and prove that the victim has not been harmed by a collusive act which is an MRFTA violation by passing on the victim's damages to consumers. When the court accepts the passing-on defence, it is also considered as a factor that limits the scope of the perpetrator's liability.

7.3 Interest

Interest and damages for delay are distinguished from one another by law, and while interest does not accrue on compensation, damages for delay do. The court views that in the case of liability for damages arising from tort, in principle, the damages for delay accrue from the time the liability is established. In the case of a violation of the MRFTA, which is a form of tort, the damages for delay, in principle, also accrue from the time the liability is established. Accordingly, the victim can claim damages for delay incurred during the period from the time the liability for damages arising from the MRFTA violation is established until the actual payment of all damages, including before and after the trial, unless extraordinary circumstances exist.

Damages for delay are generally calculated by applying an interest rate of 5% per year, which is the statutory interest rate under the Civil Act, to the compensation for damages. However, depending on the result of a damages lawsuit, the rate of 12% per year stipulated in the Act on Special Cases Concerning Expedition, etc of Legal Proceedings can be applied. If the victim wins completely in the litigation, the annual rate of 12% is applied from the day after the date on which the complaint of the case was delivered to the perpetrator. If the victim partially wins, the annual rate of 12% is applied from when the court makes the decision. In short, the damages for delay are calculated at a rate of 5% per year from the time the liability is incurred, and are calculated at an annual rate of 12% at some point after the victim files the lawsuit for damages.

8. LIABILITY AND CONTRIBUTION

8.1 Joint and Several Liability

In a case where several people commit a violation of the MRFTA and thereby inflict damage on

a victim, the violators become jointly liable for the damages to the victim. The Korean Civil Act stipulates that in a case where multiple people inflict damage on others in a joint tort, they are jointly liable for the compensation for damages (quasi-joint debt). An MRFTA violation is a tort under the Civil Act, and when multiple people commit a tort together, it constitutes a joint tort. Accordingly, the MRFTA violators become jointly liable for a victim's damages. As a result, the violators are obliged to compensate the victims for all the damages until the victims' damages are compensated in full, and whether all or only some of the violators compensate the victims for damages, they all become exempt from the liability to pay further damages to the victim.

On the other hand, even if some of the violators have obtained mitigations of, or exemptions from, the KFTC's dispositions or criminal prosecution procedures, for reasons such as leniency or co-operation with the investigation, this does not reduce or exempt them from liability for damages to the victim.

8.2 Contribution

Where a victim prevails in a damages lawsuit against multiple violators, the violator who has compensated the damages suffered by the victim can file a civil lawsuit against the other violators, claiming compensation for the portion of the damages paid beyond their liability. In this case, with respect to the criteria for determining whether the violator has compensated beyond their liability to the victim, the Supreme Court suggests using "the degree of wrongdoing of the joint tortfeasor in the joint illegal acts" as a criterion.

9. OTHER REMEDIES

9.1 Injunctions

Administrative Lawsuit Against the KFTC

In the case of an Administrative Lawsuit Against the KFTC, the business entity may petition for suspension of the enforcement of a disposition on the ground that there is a risk of irreparable damage due to the disposition of the KFTC, while claiming cancellation of the disposition on the ground that the disposition is unlawful. The court may decide to suspend the enforcement of the disposition before its judgment on the case on the merits on petition by that business entity or on its own official authority.

Antitrust Damages Lawsuit

In the case of an Antitrust Damages Lawsuit, the court's role becomes limited to the extent of ordering the perpetrator to monetarily compensate for the damages, and deciding whether it will accept the victim's request for provisional seizure for effective recovery of damages.

In order for the victim to request seizure by rendering the right to claim damages arising from the MRFTA violation as a right to preservation, there must be a serious concern that it may not be possible to enforce the award without the seizure, even if the victim prevails in the damages lawsuit. The fact that there is a concern that it will be very difficult or impossible to enforce the award will be acknowledged depending on whether the level of situation that provides for the court's presumption of certainty, if not its confidence, has been shown.

When the victim requests the seizure, the court usually decides whether to accept the request without notifying the perpetrator. The court's decision can be made within one month from the time the request is made.

On the other hand, if the victim has obtained a decision approving the seizure but lost in the main case, the perpetrator can request the cancellation of the seizure on the grounds that they have prevailed in the main case, and the victim could be liable for damages if they have inflicted damages on the perpetrator by the decision that approved the seizure.

9.2 Alternative Dispute Resolution

In the case of an Antitrust Damages Lawsuit, the parties can resolve the case in accordance with alternative dispute resolution procedures by going through procedures such as reconciliation, meditation, etc, both inside and outside the lawsuit. Particularly for a case regarding damages caused by collusion, it takes a considerable amount of time and money to calculate the appropriate amount of damages. Resolving the case through alternative dispute resolution procedures can be effective for all the parties concerned.

10. FUNDING AND COSTS

10.1 Litigation Funding

There is no regulation in Korea that limits or guarantees litigation funding in relation to litigation procedures.

10.2 Costs

Dividing Litigation Costs

In filing a suit, the plaintiff pays a certain amount of the litigation costs in accordance with the relevant laws and regulations. Where additional litigation costs are incurred, for example, due to an expert appraisal procedure during the course of the litigation, the party that has applied for the procedure will pay such costs in advance. When the court makes a decision, it rules on which party should ultimately bear the litigation costs incurred in the course of the trial and the ratio of litigation costs the respective parties must bear.

Litigation costs are, in principle, to be borne by the losing party, and in the case of partial victory, the ratio of the litigation costs is usually determined according to the percentage of victory between the parties. The specific amount of litigation costs to be borne by the parties will be determined through a separate trial process known as the procedure for confirming litigation costs, and the parties will go through the process of paying the confirmed litigation costs to the other party afterwards.

Attorneys' Fees

Attorneys' fees are also a type of litigation cost, but the full amount of attorneys' fees is not included in the litigation costs the parties will actually pay. The Supreme Court rules about calculating and including attorneys' fees in litigation costs stipulate that the lesser of the amounts calculated, based on a certain standard prepared according to the value of the litigation and the actual amount of attorneys' compensation paid, is included in the litigation costs to be borne by the parties. In most cases, the prevailing party receives a refund that is less than the amount the party actually spent on attorneys' fees.

Collateral

According to the Civil Procedure Act, if the court finds that the provision of collateral for litigation costs is necessary, as the plaintiff does not have an address, office, or a place of business in Korea, or when it is obvious that the plaintiff's claim is unreasonable, upon request of the defendant, the court may order the plaintiff to provide collateral for litigation costs. Where the court orders the plaintiff to provide the collateral, the plaintiff can provide it by depositing money or securities recognised by the court, or submitting a document (guarantee insurance policy) in which a payment guarantee contract with a financial institution or insurance company has been made.

11. APPEALS

11.1 Basis of Appeal

Administrative Lawsuit Against the KFTC

In the case of an Administrative Lawsuit Against the KFTC, the losing party can file a final appeal with the Supreme Court within two weeks after they receive the service of the Seoul High Court's decision. Unlike general cases, the Seoul High Court becomes the court of first instance for an Administrative Lawsuit Against the KFTC, and thus, the Administrative Lawsuit Against the KFTC actually operates as a two-tiered court system. In order to appeal to the Supreme Court, the appellant must file a petition of final appeal with the Seoul High Court, which may or may not state the grounds for appeal. If the appellant submits the petition without stating the grounds for the final appeal, the appellant must submit the grounds for appeal to the Supreme Court within 20 days from the date of receiving notice that the Supreme Court has received the record of the lawsuit from the Seoul High Court. If the appellant does not submit the grounds for appeal within that period, the Supreme Court will dismiss the final appeal.

Since the Supreme Court operates as a court that addresses questions of law, grounds for appeal that can be claimed are limited, in principle, to grounds that the judgment of the Seoul High Court is incorrect from a legal perspective. A statement that the Seoul High Court has incorrectly admitted the facts cannot be provided as grounds for appeal.

The Supreme Court will dismiss the final appeal if it determines that the grounds for appeal cannot be admitted. If it determines that the grounds for appeal can be admitted, the Supreme Court will reverse the ruling of the Seoul High Court and, in principle, remand the case to the Seoul High Court to re-decide the case.

Antitrust Damages Lawsuit

In the case of an Antitrust Damages Lawsuit, the district court becomes the court of first instance, and the party that loses in the first instance trial can appeal by filing a petition of appeal with the court of first instance, while the party that loses in the appeal can file a petition of final appeal with the Court of Appeal. A petition of appeal and final appeal must be filed within two weeks from receiving the original copy of the decision from the court. In the case of the appeal at the second instance court, even if the grounds for the appeal are not stated in the petition of appeal, there is no legal deadline for filing a brief stating the grounds for appeal. The Court of Appeal will dismiss the appeal if it decides that the judgment of the first instance court is valid. If it decides that the judgment of the first instance court is wrong, it will reverse the judgment and rule on the case on its own. The procedure for final appeal at the third instance court follows the same procedures.

Antitrust Criminal Lawsuit

In the case of an Antitrust Criminal Lawsuit, a party that objects to the judgment of the first instance court or the Court of Appeal must file a petition of appeal or final appeal within seven days from when the court gives the decision, and must submit the grounds for appeal within 20 days from when the party received the notice from the Court of Appeal or final appeal that the record of the lawsuit had been sent.

SOUTH KOREA LAW AND PRACTICE

Contributed by: John H Choi, Byung-II Im and Changhun Lee, Shin & Kim

Shin & Kim has the largest team of antitrust specialists in Korea, with more than 70 dedicated experts, including a former Korea Fair Trade Commission (KFTC) chairman, officers and committee members, and former prosecutors and judges. The group is complemented by the largest number of KFTC alumni lawyers of any law firm, all of whom have extensive expertise in antitrust law and deep familiarity with

KFTC enforcement practice. The firm has also gained a strong reputation for defending clients in KFTC investigations, including onsite investigations and hearings, and for representing clients in administrative appeals and relevant damages lawsuits. The group has represented numerous foreign clients in KFTC investigations and litigation.

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