THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Thirteenth Edition

Editors
Ilene Knable Gotts and Kevin S Schwartz

THE LAWREVIEWS

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THIRTEENTH EDITION

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. Antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed, using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for standing, which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government has undertaken a comprehensive review and has implemented significant changes to its private enforcement

law. The most significant developments, however, are in Europe as the EU Member States implement the EU's directive on private enforcement into their national laws. The most significant areas standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period and privilege. Member States continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there has been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a preferred jurisdiction for commencing private competition claims. Collective actions are now recognised in countries such as Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have taken steps to facilitate collective action or class-action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the public interest.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must opt out of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must opt in to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a

private action will be decided by the court. Of course, in the UK – an EU jurisdiction that has been one of the most active and private-enforcement friendly forums – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, e.g., Sweden). Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on effects within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider spillover effects from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for unjust enrichment by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is, in essence, consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in a case (e.g., in Brazil, as well as in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for

punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of unjust enrichment law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Japan, Korea, the Netherlands, Switzerland and Spain) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views toward protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties

to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries, and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts and Kevin S Schwartz
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Chapter 20

SINGAPORE

Matthew J Skinner, Sushma Jobanputra, Prudence J Smith and Mitchell O'Connell[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In 2010, the then assistant chief executive of the Competition Commission of Singapore (now renamed the Competition and Consumer Commission of Singapore (CCCS)), Mr Toh Han Li, stated that he expected private actions to be a trend to watch. However, to date there have been no private actions in Singapore for antitrust infringements. The only matter attempting to bring a private action was in 2010, in which a breach of Section 34[2] of the Singapore Competition Act was unsuccessfully raised to support a fair dealing argument, in a defence and counterclaim against copyright infringement proceedings – *Global Yellow Pages Ltd v. Promedia Directories Pte Ltd* [2010] SGHC 97.

Under Singapore law, the right to private action is contingent on a prior infringement decision. Accordingly, in order to bring about private actions through follow-on litigation, infringement decisions issued by the CCCS[3] are a prerequisite. In recent times, the CCCS has engaged in increasingly rigorous enforcement actions, which suggests that private enforcement activity through follow-on actions may reasonably be expected to increase in the future.

The CCCS's recent enforcement activity has been wide ranging and has included:

a an infringement decision against two ride-hailing firms, Grab and Uber, in relation to a proposed merger;

b prosecuting cartel conduct for seven years by 13 fresh chicken distributors. The conduct included coordinating the amount and timing of price increases, and agreeing not to compete for each other's customers in the market for the supply of fresh chicken products in Singapore;

c an action against four hotel operators for exchanging commercially sensitive information in relation to hotel room accommodation in Singapore supplied to corporate customers; and

d accepting voluntary commitments from a number of lift companies for refusal to supply spare lift parts for maintenance in public housing estates, which were alleged to be in breach of the prohibition against abuse of a dominant position.

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2 Section 34 prohibits agreements or concerted practices which have, as their object or effect, the prevention, restriction or distortion of competition within Singapore.

3 The CCCS was renamed effective from 1 April 2018 when it took on an additional function of administering the Consumer Protection (Fair Trading) Act. It was previously known as the Competition of Singapore.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Competition law in Singapore is governed by the Singapore Competition Act (the Act), and is enforced by the CCCS. The CCCS states that its mission is 'making markets work well to create opportunities and choices for businesses and consumers in Singapore' and its vision is 'a vibrant economy with well-functioning and innovative markets' to underscore that its work benefits both businesses and consumers alike.

Section 86 creates the statutory follow-on action as a right of private action in Singapore.[4] It appears that stand-alone actions are precluded by the Act, although there has never been any formal pronouncement of that position.[5] Pursuant to the Act, the express statutory right to private action arises in limited circumstances and requires three elements. Those elements are:

a a final determination;
b that an entity has infringed Section 34, 47 or 54 of the Act; and
c that the victims have suffered loss directly.

A final determination is an infringement decision that is not subject to any further right of appeal. A determination may be made by the CCCS but is subject to the entity's rights of appeal. A decision of the CCCS may be appealed to the Competition Appeal Board (CAB), which in turn is appealable to the High Court of Singapore, and from there to the Court of Appeal, within prescribed time limits.[6]

Additionally, the right to private action only arises when a final determination is issued stating that an operative provision of the Act has been infringed, including:

a Section 34, agreements that have as their intended objective or result in the prevention, restriction or distortion of competition within Singapore;
b Section 47, abusing a dominant position in a market in Singapore; and
c Section 54, where a merger with another entity results or is expected to result in the substantial lessening of competition in a market in Singapore.[7]

Finally, Section 86 of the Act provides for private actions offering remedies for victims of anticompetitive conduct for loss and damage suffered directly. As the Act explicitly refers to loss or damage suffered 'directly as a result of an infringement', it is unlikely that indirect purchasers will have standing to bring a claim. Therefore, by way of example, where there is conduct with an anticompetitive effect, such as a price increase that is passed along the supply chain, subsequent purchasers, including end-consumers, are unlikely to be afforded any recourse as their loss is not direct and therefore does not meet the requirement of the Act.

4 Cavinder Bull & Lim Chong Ki, *Competition Law and Policy in Singapore* (Singapore: Academy Publishing, 2nd Edition, 2009) p. 274.

5 Cavinder Bull & Lim Chong Ki, *Competition Law and Policy in Singapore* (Singapore: Academy Publishing, 2nd Edition, 2009) p. 274.

6 Act Section 86(2) and (3); CCCS Guidelines on Enforcement of Competition Cases 2016 Paragraph 5.2.

7 Act Section 86(1); CCCS Guidelines on Enforcement of Competition Cases 2016 Paragraph 5.1.

i Timing of private action

Due to the requirement of a final determination, third parties have to wait until an entity exhausts all its rights of appeal before they are permitted to pursue a private action. A private claim for damages arising from an infringement of the Act must be brought within two years from either the time that the infringement decision is made or from the determination of any such appeal, whichever is later.[8]

Of course, the application of this rule is straightforward where there is only one addressee to an infringement decision. However, increasingly, and particularly in the case of cartels or anticompetitive contract cases, involving more than one entity or party complications may arise. A difficulty is likely to arise where one party appeals the infringement decision but a private applicant seeks to claim against a defendant who does not appeal. By operation of Section 86 of the Act, a private action is prohibited in the period when a right of appeal remains. It would therefore appear that an appeal by any of the parties who are subject to an infringement decision triggers the temporal restriction on commencing a private action.

III EXTRATERRITORIALITY

The Act explicitly extends the prohibition on anticompetitive conduct beyond Singapore. The CCCS has exercised this extraterritorial jurisdiction over a number of foreign-registered companies.

In order for a private action to be pursued against foreign-registered companies, an applicant requires the leave of court to effect service of process out of Singapore. As an initial matter, pursuant to the Supreme Court of Judicature Act 1999 and the Subordinate Courts Act 1999 there must be a legal connection between a case or the defendant and Singapore. In its application for leave, the applicant must satisfy the court that the Singapore court is the most appropriate forum to hear the dispute. This may pose difficulties with increasingly globalised commerce and increasingly cross-border competition law breaches such as an international cartel.

Sections 33 and 34 of the Act provide jurisdiction to regulate anticompetitive behaviour with effects or consequences in Singapore. Accordingly, a claimant who has suffered loss in Singapore as a result of an infringement established by the CCCS is likely to establish that a Singaporean court is the appropriate forum for the application. One final matter is that Section 86(7) provides that a final determination of an infringement decision is binding on the Singapore court, reducing some burden on an applicant in establishing the competition law breach.

IV STANDING

Singapore's private action regime means that the prerequisite CCCS action will be critical to whether a victim of anticompetitive harm can bring a private action. Assuming a final determination, only a person who suffers loss or damage directly as a result of anticompetitive conduct prohibited by the Act can bring an action. In this way, the victim is within the class of persons intended to be protected by the Act, and the damage falls within the scope of the protection of the Act.

8 Act Section 86(6); CCCS Guidelines on Enforcement of Competition Cases 2016 Paragraph 5.3.

As there have yet to be any private actions brought in Singapore for breaches of the Act, it is yet to be determined whether umbrella damages are also a basis for standing for private claimants against an entity in Singapore. Umbrella damages are mainly experienced in relation to a price-fixing cartel, where a loss is experienced by persons dealing with a non-conspiring industry participant who sets its price just under the umbrella of the cartel. The customer of the non-conspiring firm suffers the overcharging in a similar fashion to the customers of the cartel members. Clearly the question for such an applicant will be establishing the 'direct loss', given that such loss arguably only shares an indirect causal relationship with the infringement.

V THE PROCESS OF DISCOVERY

Order 24 of the Rules of Court provides the procedures for discovery in civil proceedings in Singapore. The rule provides that parties to the proceedings will be required to provide discovery of documents in their possession, custody or power, that are relevant to and necessary for the fair disposal of the proceedings and the saving of costs, unless the documents are privileged.

Relevant documents include any that:

a the disclosing party relies or intends to rely on;

b could adversely affect its own or another party's case; and

c could support another party's case.

There is also limited scope for pre-action and third-party discovery in appropriate circumstances. A party can also apply to the court for specific discovery if it has reason to believe that an incomplete list of documents has been furnished.

Applications for discovery can also be made against non-parties such as the CCCS after the commencement of an action. However, the ability of private applicants to apply for discovery against companies or the CCCS to obtain documents – such as confidential versions of decisions, proffers and leniency materials – is unprecedented and is likely to be met with some resistance, possibly requiring special disclosure regimes including strict confidentiality. An exception to this would be where the proffers are cited in the CCCS's determination.

The process of discovery by private parties is a recognised threat to the global practice of regulators to offer leniency or immunity regimes to parties engaging in anticompetitive conduct to come forward in exchange for immunity, including from third-party actions. Equally, the need for the private applicant to obtain necessary evidence to advance its claim is recognised by courts and is a basis for discovery processes. Balancing these tensions is a significant matter of public policy. In recognition of this, the CCCS has provided that access to a leniency corporate statement is only granted to addressees of a provisional infringement decision, provided that the addressee undertakes not to make any copy by mechanical or electronic means.[9] While yet to be tested, it appears that the effect of this guideline is to quarantine leniency documents from claimants in private actions.

9 CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016, Paragraph 9.2.

VI USE OF EXPERTS

Expert evidence is common in proceedings in Singapore and evidence law in Singapore admits the opinion of an expert witness in order to assist the court in reaching a proper conclusion on a matter which requires the application of special skill or knowledge. Parties will often seek to appoint their own expert rather than rely on a single joint expert. Expect evidence must be given in a written report signed by the expert and exhibited in a sworn or affirmed affidavit, unless otherwise directed by the court. The court[10] can limit the number of expert witnesses who can be called at trial. These expert reports are also required to contain a statement that the expert understands that in making a report, their paramount duty is to assist the court on matters relevant to their expertise and they certify that they have complied with that requirement.

Additionally, Singapore's civil procedure rules[11] provide for a concurrent expert evidence procedure, which allows for expert witnesses to question each other, answer questions from the judge and be cross-examined together.

VII CLASS ACTIONS

Singapore does not have a class action regime. However, Order 15, Rule 12 of the Rules of Court provides for representative actions. Under this regime, claimants who wish to pursue a claim as a representative action must agree to do so; that is, opt in.

There is no formal requirement to certify a class in a representative action under the rules.[12] However, the Singapore Court of Appeal[13] has held that for a representative action to be brought, the class of represented persons must be capable of clear definition and identification. Additionally, the represented claimants must have the 'same interest' in the proceedings, and even where this requirement is satisfied, the court has the discretion to refuse to permit proceedings to continue as a representative action if it finds that they are not suitable.

As a representative action for a breach of the Act is yet to proceed, it remains to be seen whether a representative action will provide a satisfactory route for group litigation of infringements of competition law in Singapore, especially since each claimant must still individually establish that it has suffered the loss directly as a result of the infringement as required by the Act.

VIII CALCULATING DAMAGES

It is unlikely that the Singapore courts will award exemplary or punitive damages in relation to a private action for a competition law contravention. This is because the result might be that the offender is punished twice, owing to the earlier finding of the CCCS. Additionally, it is arguable that the Parliament did not intend Section 86 to include exemplary damages as they had been removed during the bill drafting process. Additionally, as there are as yet no private actions in Singapore, it is as yet unclear whether a court would award restitutionary

10 Order 40A Rule 1, Rules of Court.

11 Order 40A Rule 6, Rules of Court.

12 Order 15 Rule 12, Rules of Court.

13 *Koh Chong Chiah and others v. Treasure Resort Pte Ltd* [2013] 4 SLR 1204 at Paragraph 78.

damages or an account of profits. Section 86(1) of the Act empowers the court to grant 'such other relief as the court thinks fit'; however, in Singapore, damages are assessed on compensatory principles to cure the harm or loss directly suffered.

In a private action, it is fundamental that the party claiming damages must prove the actual damages suffered from the contravention of the Act. This is consistent with the general approach that damages are intended to compensate the party for its losses, which include:

a lost profits on actual and potential sales;

b lost sales (due to consumers turning to available substitute goods);

c lost market share;

d interest;[14] and

e to restore a litigant to the position they would have enjoyed had the contravening conduct or breach not occurred. The level of compensatory damage would depend on the remoteness of the loss of the applicant to the infringement.

In this respect, the assessment of the counterfactual, or the application of the 'but for' test, will be relevant. The counterfactual will identify the difference between the counterfactual scenario where the infringing activity did not occur and the actual scenario created by the anticompetitive behaviour, and thereby provides the measurement of damages. Identification of the most appropriate counterfactual can on occasions be tricky and the CAB has accepted that a counterfactual is not a legal requirement in assessing an abuse of dominance.[15]

As the right to private action arises only as a follow-on action, it is unlikely that there will be a substantial challenge to the conduct in question. Accordingly, proof of the damage is likely to be a substantial area of focus of the applicant and of the defence. However, in *Robertson Quay*, the court held that '[t]he law, …, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered'.[16]

The court noted that in relation to proof of damages 'a plaintiff cannot simply make a claim for damages without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages. On the other hand, where the plaintiff has attempted its level best to prove its loss and the evidence is cogent, the court should allow it to recover the damages claimed.' As in other jurisdictions, when seeking to prove loss from a competition law violation, complex economic evidence will likely form a substantial component of the applicant's evidence and may, in the end, be an exercise in estimation as opposed to establishing the precise quantum.

IX PASS-ON DEFENCES

There is no established pass-on defence in Singapore. The defence has clear application in jurisdictions where compensation is a primary purpose. As victims who suffer indirect loss are not eligible for compensation in Singapore, the court may need to consider the competing considerations of over-compensating the claimant and under-penalising the infringing party.

14 Section 12 of the Civil Law Act.

15 *In the matter of: Notice of Infringement Decision issued by the Competition Commission of Singapore, Abuse of a Dominant Position by SISTIC.com Pte Ltd*, Case No. CCS 600/008/07 (SISTIC) 4 June 2010 at [315].

16 *Robertson Quay Investment Pte Ltd v. Steen Consultants Pte Ltd and another* [2008] SGCA 8.

The court is also likely to need to consider the question of mitigation of losses. When awarding damages, the court may also have to take into account effects that result from the conduct of the claimant. In particular, that the claimant ought to have taken reasonable steps to prevent or reduce the loss arising from the wrong that the defendant committed.

X FOLLOW-ON LITIGATION

Only after the CCCS has found a party to be in breach of Singapore's competition laws and after the expiry of any applicable appeal period, can third parties bring an action. This approach is likely in recognition of the fact that a generalist court is not always the best qualified to undertake determinations of alleged contraventions of competition law that often involve very technical analysis. Additionally, as noted above, Section 86 of the Act specifically states that the right to private action is only available to 'any person who suffers loss or damages directly as a result of any infringement'.

XI PRIVILEGES

Singapore recognises the concept of legal professional privilege with two limbs, legal advice privilege and litigation privilege. Documents that are protected by legal professional privilege are exempt from disclosure requirements and will not be required to be produced to another party through compulsory court process.[17]

Singapore law recognises legal advice privilege. Under legal advice privilege, communications for the purposes of obtaining legal advice are protected from disclosure. The main sources of Singapore law for legal advice privilege are several provisions in the Evidence Act. Legal advice privilege applies to correspondence between the party and its solicitor and extends to communications with in-house counsel.[18]

Litigation privilege is intended to maintain the confidentiality required by parties to prepare their case and strategy in litigation. The main source of Singapore law for litigation privilege is common law and has been explicitly recognised in past Singapore Supreme Court cases.

XII SETTLEMENT PROCEDURES

In respect of private civil claims, an offer to settle can be made (and accepted) at any time before the court finalises the matter.[19] There is no requirement for leave of the court to be obtained before accepting an offer to settle. Where an offer is accepted, the court can incorporate any of its terms into a judgment.[20]

An offer to settle is not filed with the court and no statement of the fact that such an offer has been made will be contained in any court document. Where an offer to settle is not accepted, no communication in respect of the offer can be made to the court until all questions of liability and the relief have been determined.[21]

17 Sections 128 and 131, Evidence Act, Chapter 97.

18 Section 131, read with Section 128A, Evidence Act.

19 Order 22A, Rule 6(3), Rules of Court.

20 Order 22A, Rule 6(3), Rules of Court.

21 Order 22A, Rule 5, Rules of Court.

XIII ARBITRATION

A party may apply to the court for an order referring all or part of the proceedings to mediation or arbitration and to have the proceedings stayed. If the court orders that the parties proceed to arbitration, then either party may apply to the court to have an arbitrator appointed and make orders about how the arbitration is to be conducted, including how the arbitrator's fees will be paid and when the arbitration must be completed. If the arbitration is successful, the parties may apply to the court to make an order in terms of the award set out by the arbitrator. Of course, as there have yet to be any private actions for breaches of competition law, it is an unresolved question whether arbitration would be popular for private competition law litigation in Singapore.

XIV INDEMNIFICATION AND CONTRIBUTION

A private litigant can bring a claim for a breach of the Act against any person named in the CCCS's determination and that caused his or her loss or damage.

XV FUTURE DEVELOPMENTS AND OUTLOOK

As the right to private action is contingent on a prior infringement decision of the CCCS, the likelihood of such a claim arising is inevitably linked to the number and frequency of infringement decisions issued by the CCCS. Increasing activity is also dependent on the awareness of third parties of their right to private action, and the degree to which the conditions for bringing a civil claim for private damages are attractive to a plaintiff.

The CCCS takes the view that cartels are one of the most harmful forms of anticompetitive conduct, and that cartels will remain a high enforcement priority. Accordingly, the most likely avenue for private actions is actions arising out of cartel conduct.

Appendix 1

ABOUT THE AUTHORS

MATTHEW J SKINNER

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Matthew J Skinner is a leading practitioner based in Singapore and has also practised in London and Sydney. He has extensive experience representing clients in legally complex and sensitive disputes. These include joint venture, licensing, construction and post-M&A disputes. Matt understands the business dynamics and strategic issues impacting the dispute resolution process, enabling him to provide solution-driven, commercially focused advice and effectively guide his clients through the litigation or arbitration process. Matt also advises and assists clients in investigations and prosecutions, including conducting internal investigations for clients. He also has experience in various forms of alternative dispute resolution, including adjudication and mediation. Matt is a Fellow of the Chartered Institute of Arbitrators and a panel arbitrator at SIAC (Singapore International Arbitration Centre).

SUSHMA JOBANPUTRA

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Sushma Jobanputra is based in Jones Day's Singapore office and is permitted to practise Singapore law (commercial, finance, and corporate). She has over 30 years' experience advising clients in London, Toronto, Paris and Singapore. She regularly represents clients before the Competition and Consumer Commission of Singapore including in relation to significant and complex merger clearances and joint ventures, including many cross-jurisdictional transactions.

PRUDENCE J SMITH

Jones Day

Prudence J Smith's practice is focused on competition and regulatory law. Drawing on her many years as an officer within the Australian competition regulator, she advises and represents clients in Australia, New Zealand, Singapore (with locally registered Jones Day lawyers), and throughout the Association of Southeast Asian Nations (ASEAN). Prudence advises clients on a broad range of competition law issues, including cartel and anticompetitive conduct investigations, authorisations, and notifications. She also regularly advises on significant and complex merger clearances and joint ventures, including many cross-jurisdictional transactions. She has in-depth experience in complex competition and consumer litigation and is regularly sought out by clients that are facing significant and complex private litigation issues involving competition law (such as private actions for anticompetitive conduct, including refusal to deal or misuse of market power) or misleading and deceptive conduct representations.

MITCHELL J O'CONNELL

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Mitchell J O'Connell has experience in a range of commercial matters across a broad spectrum of competition law issues, including in merger clearance and regulator investigations in different industries. He also has worked on matters involving regulatory issues with other regulators, including foreign investment regulators and has experience in disputes in both the Federal Court of Australia and the Supreme Court of Queensland.

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