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Examining Two KFTC Cases under the AMA and Japanese Civil Law

1 Introduction

1.1 Unilateral refusal to deal

'Unilateral refusal to deal' includes the following actions:

(i) Refusal to deal with a new trading partner.

(ii) Termination or cancellation of contractual relation (including, but not limited to, mid-term termination).

(iii) Refusal to renew the contract.

The Posco (PChem) case falls under (ii).

The Pasteur Milk case is a **case of (i) after committing an act falling under (iii)**.

In this case, Pasteur Milk refused to renew a contract with a particular distributor and refused to enter into a new transaction with a potential transferee of the distributor's distributorship. Thus, the case also had the aspect of restriction/prohibition of transfer of distributorship through which Pasteur Milk made it impossible to transfer the distributorship to a potential distributor. Furthermore, Pasteur Milk had customarily permitted such transfer of such distributorships.

However, Pasteur Milk seemed to have still reserved the right to decide whether or not Pasteur Milk would accept transfer of dealership. In other words, it did not appear that the transferee could automatically become a distributor. This is also not the case under the Korean civil law. Therefore, I will mostly regard the restriction of transfer of dealership as only one of the factors to be taken into account and examine the case as a unilateral refusal to deal case.

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(*) There are no cases in Japan wherein either the JFTC or the courts have held prohibition or restriction of transferring dealership to be in breach of the AMA (TBC). In *Sankogan (civil)*, the plaintiff alleged that similar restriction was an ASBP, but the Tokyo District Court dismissed on the grounds that the restriction had not caused the plaintiff any disadvantage. Tokyo District Court, 15 April 2004 (Sankogan case) Ref: 2004WLJPCA04150005 . Meanwhile, the Civil Code Article 466 provides that 'a claim may be assigned; provided, however, that this does not apply if its nature does not permit the assignment' (para. 1), and that 'even if a party to a claim manifests the intention to prohibit or restrict the assignment of the claim, the validity of the assignment of the claim is not impaired.' (para. 2); the point briefly referred to in 3.2 below.

1.2 AMA and civil law in Japan

Civil remedies given in case of (suspected) AMA violations include:

(i) Damages under AMA Art. 25

The claim is possible only after the JFTC's cease and desist order has become final (AMA Art. 26).

(ii) Injunctions under AMA Art. 24

Violation of the AMA is necessary.

(iii) Damages under Article 709 of the Civil Code.

The requirements are: intentional or negligent conduct, **an act of infringement of rights or legally protected interest**, the occurrence of damage and a causal link. If there has been a violation of the AMA, there is usually an act of profit infringement of legally protected interest. However, such infringements and damage claims are also possible where there is no AMA violation.

Civil Code Article 709 A person that has intentionally or negligently infringed the rights or legally protected interests of another person is liable to compensate for damage resulting in consequence.

(iv) Nullification of legal acts (or judicial acts 法律行為 *horitsu koui*) based on Article 90 of the Civil Code (violation of public order and morality)

There are no provisions in Japan that invalidate legal acts in contravention of the AMA. According to the Supreme Court of Japan, whether a legal act in contravention of the AMA is invalid or not is determined on a case-by-case basis. In other words, legal acts in breach of the AMA are not necessarily invalid under Article 90. On the other hand, legal acts may be declared invalid as contrary to public order and morals, regardless of whether they violate the AMA or not.

Civil Code Article 90 公序良俗違反 Legal acts contrary to public order or good morals shall be null and void.

(v) Nullification or determining of invalidity of legal acts on the grounds of abuse of rights and breach of good faith, etc.

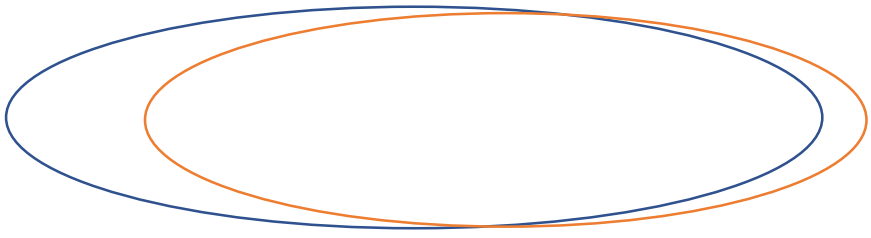
Under the Civil Code, abuse of rights is prohibited (Article 1(3)). Under civil law, the principle of good faith also exists. Legal acts, etc., may be considered impermissible for abuse of rights or breach of the principle of good faith.

Civil Code Article 1 (2) The exercise of rights and performance of duties must be done in good faith. 権利の行使及び義務の履行は、信義に従い誠実に行わなければならない。 (3) Abuse of rights is not permitted. 権利の濫用は、これを許さない。

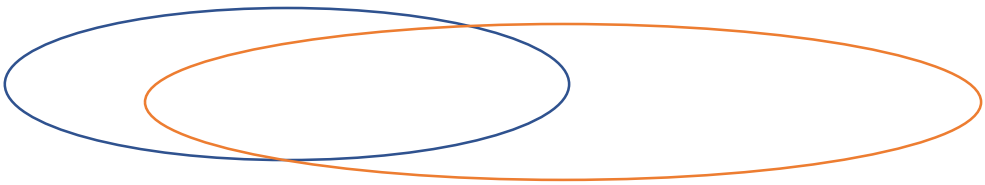
The relationship between AMA (or the remedies given based on the AMA particularly through the JFTC's law enforcements) and civil remedies will depend on the substance of the AMA and civil law as applied to a specific circumstance, but...

(Blue: AMA public enforcement; orange: civil remedies)

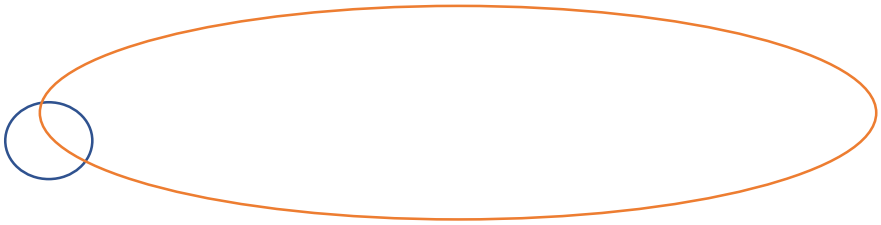
Cartel agreement.



Non-competes.



Unilateral termination and suspension or, or refusal to renew, the contract.



2 Unilateral refusals to deal under Japanese laws

2.1 The AMA and unilateral refusal to deal

(1) Outside ASBP (Regulation under AMA Arts 2(5) and 3 (private monopolisation) and AMA Art 19 and the first sentence of para 2 of the General Designation (GD) of Unfair Trade Practices (UTPs))

In light of freedom to select trading partners, the first sentence of para. 2 of the GD violation may be found only where:

(i) unilateral refusal to deal effectuates other AMA violation [such as unlawful resale price maintenance], or

(ii) unilateral refusal to deal is to achieve an unlawful purpose in light of AMA, such as excluding a competitor from the market.

(JFTC, Guidelines Concerning Distribution Systems and Business Practices; *Tokyo Star Bank*, Tokyo District Court judgment of 28 July 2011).

An exclusionary conduct that constitutes a private monopolisation may be found if the unilateral refusal to deal 'goes beyond reasonable limits in refusing to supply, make it difficult for a supplier who cannot easily find alternative supplier in the upstream market to conduct business in the downstream market, and adversely affect competition in the downstream market' (JFTC, The Guidelines for Exclusionary Private Monopolization under the AMA). In addition to this, the unilateral refusal to deal must have the effect of substantially restricting competition in a particular field of trade [= establishing, maintaining or enhancing market power].

◎ The two KFTC cases are unlikely to fall into either of these cases. **In the following, it is assumed that they do not fall into any of the cases above.**

(2) ASBP

Rejection of receipt and return of goods are explicitly listed in AMA Article 2(9)(v)(c).

Such practices constitute an ASBP unless there is a justifiable reason, such as a defect in the goods.

Otherwise, the JFTC or the court would assess unilateral refusal to deal in light of blanket phrase, namely 'otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty' under Article 2(9)(v)(c).

AMA Art. 2(9) (v) engaging in any act specified in one of the following by making use of one's superior bargaining position over the counterparty unjustly, in light of normal business practices: (c) *refusing to receive goods in transactions with the counterparty, causing the counterparty to take back such goods after receiving them from the counterparty*, delaying payment to the counterparty or reducing the amount of payment, or **otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty**.

The JFTC Guidelines Concerning ASBP under the AMA (ASBP Guidelines) do not refer to unilateral refusal to deal. There is neither a JFTC nor a court case in which unilateral refusal to deal itself was considered as ASBP.

In general, 'disadvantageous'-ness under AMA Art 2(9)(v) is determined by.

(i) whether the act imposes a **disadvantage that cannot be calculated** in advance, or

(ii) whether it imposes a **burden that exceeds a range that is deemed reasonable** in consideration of the direct benefits to be gained by the other party to the transaction and is detrimental to the other party.

In addition, the JFTC **requires the "spread-ness" (extensiveness)**, i.e. that '[1] when the party having superior bargaining position organizationally imposes a disadvantage on a large number of transacting parties, or [2] when the party having superior bargaining position imposes a disadvantage only on a specific transacting party, but the degree of disadvantage is high or such act, if left unaddressed, is likely to be carried out to other transacting parties' (JFTC, ASBP Guidelines).

In most (all?) JFTC cases in which the JFTC took the measure formally, the actor has systematically disadvantaged a number of counterparties.

Furthermore, ASBP is regulated from the viewpoint of impeding transactions based on the free and independent judgment of the other party (undermining the foundation of free competition). The JFTC understands that the ASBP is prohibited also because the other party is left at a competitive disadvantage in relation to its competitors, while the actor may gain a competitive advantage in relation to its competitors.

* See 3.1 as to whether ASBP would be found in the two KFTCs.

2.2 (Pure*) Civil law jurisprudence on termination of business relationships

* Implying that there is no ASBP claim, or the court assesses the termination in relight of general civil law principles and precedents without referring to ASBP at all.

For continuing contractual relationships (e.g., lease/tenants, dealership and franchise agreements that run for a long period of time), there are legal principles restricting their dissolution, such as the breach **of trust doctrine, or continuing contracts doctrine.**

> **The breach of trust doctrine (信頼関係破壊の法理）:** In light of need to protect the interest of parties in recovering its investment, in a continuing contract based on a high degree of trust, unilateral dissolution of the contractual relationship is **not permitted unless the trust between the parties has been broken**,

> **The continuing contracts doctrine (継続的関係の法理）**: Termination of a continuing contract is **not permissible unless there are compelling reasons.**

The courts assess breach of trust and compelling reasons on a case-by-case basis.

Furthermore**, the scope of the doctrine is debated, and the lower courts takes various positions**, which include the position to regard that the cancellation and termination is permissible if:

- at the end of expressly agreed contract term (period);
- if a reasonable notice and notice period is given;
- if the damage caused by the termination is compensated, etc.

On the other hand, the lower courts have found the abuse of rights or breach of good faith in case where continuing nature of contractual relationship is not clear.

☆ Issues relating to provision of services

Japanese civil law does not provide a category that would broadly covers contracts to provide services; instead such contracts are regarded as, e.g., contracts for work (請負 *ukeoi*), mandates (委任, *ininn*) and quasi-mandates (準委任、*jun ininn*). For these, the Civil Code sets out special provisions in relation to cancellation.

(Cancellation of Mandate)
Article 651
(1)A mandate may be cancelled by either party at any time.
(2) In the following cases, a party that has cancelled a mandate pursuant to the provisions of the preceding paragraph must compensate for damage suffered by the other party; provided, however, that this does not apply if there was a compelling reason for the cancellation:
(i) if the party cancels the mandate at a time that is detrimental to the other party; or
(ii) if the mandator cancels the mandate for which the purpose includes the interests for the mandatary (excluding the profit to be obtained exclusively by receiving remuneration).

(Quasi-Mandate)
Article 656
The provisions of this Section apply *mutatis mutandis* to entrustments of business that do not constitute juridical acts.

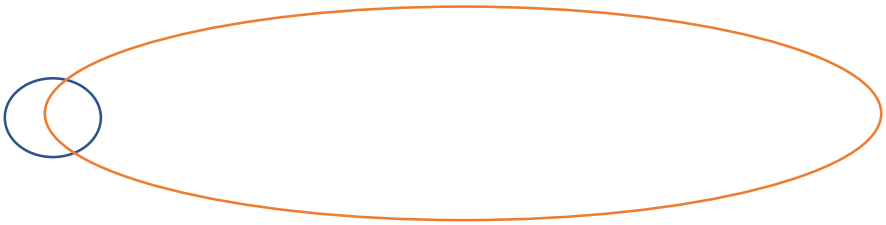
(Cancellation of Contract by Party Ordering Work)
Article 641
The party ordering work may cancel the contract at any time whilst the contractor has not completed the work by paying compensation for loss or damage.

Thus, according to these provisions, cancellation/termination is possible if the damage is compensated (mandate and quasi-mandate) or until the work is completed (contract for work).

However, these provisions are considered not mandatory, and the above provisions may not be inapplicable if the nature of the contract and relationship indicate the application is inappropriate. In any case, an abuse of

rights or breach of good faith, general principle of Japan's civil law, may be found in relation to quasi-mandate, etc.

Based on the above, the scope of unlawfulness/remedies under the AMA and civil law regarding the termination of contract is probable ... (AMA/ASBP-blue circle, civil law-orange circle).



Furthermore, there may be special rules restricting the termination and cancellation as in the case of employees and freelancers.

Labour Contracts Act

(Dismissal)

Article 16

If a dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is invalid.

(解雇は、客観的に合理的な理由を欠き、社会通念上相当であると認められない場合は、その権利を濫用したものとして、無効とする。)

(Dismissal During the Contract Term)

Article 17

(1) With regard to a labour contract that has a fixed term (hereinafter referred to in this Chapter as a "fixed-term labour contract"), **an Employer may not dismiss a Worker until the expiration of the term of such labour contract**, unless there are unavoidable circumstances.

(2) With regard to a fixed-term labour contract, an Employer must give consideration to not renewing such labour contract repeatedly as a result of prescribing a term that is shorter than necessary in light of the purpose of employing the Worker based on such labour contract.

"Freelance Protection Act" (enacted 28 April 2023) *deepl translation.

(Act on the proper conduct of business transactions with specified fiduciary undertakings)

Article 16.

(1) The specified service provider shall cancel the contract for the continuous service contract (including the case where the contract is not renewed after the expiry of the contract term....).
(2) In the event that the Specified Consignment Business Operator intends to cancel a contract pertaining to continuous outsourcing (including the case of non-renewal after the expiry of the contract period), **it shall give at least 30 days' notice** to the Specified Consignment Business Operator, which is the counterparty to said contract, pursuant to the provisions of an Ordinance of the Ministry of Health, Labour and Welfare. However, this shall not apply in cases where it is difficult to give notice due to disasters or other unavoidable reasons, or in other cases specified by an Ordinance of the Ministry of Health, Labour and Welfare.

Additionally, even in relation to the contracts that do not fall in an employment contract, the courts are expected to apply the above rule *mutatis mutandis*, assess termination under the stringent standard and find breach of good faith where the reality of the business relationship requires such assessment, or determination.

The other legislations such as the Act on Improving Transparency and Fairness of Digital Platforms (Transparency Act) and the Subcontract Act also restrict dissolution of contractual relationships to certain extent.

Consumer law, on the other hand, tends to ensure that the consumer is not bound to the contract; it tends to have special rules that enable consumers to cancel and terminate contracts easily.

Overall, the civil courts tend to examine termination of the contract and assess an abuse of rights and breach of good faith from the standpoint of securing fairness and balance between the parties involved, which include the interest in recovering the capital invested (TBC).

2.3 Termination of contracts: the AMA and civil law

In cases where the find the courts an abuse of rights or breach or good faith, there will be ‘disadvantage that is a burden that exceeds the scope of what is deemed reasonable’ and thus a disadvantage that would justify finding of ASBP. Furthermore, because the civil courts take into consideration the process leading to the termination - whether there are express contractual terms or not, notices with sufficient notice period, etc. - there will be also a ‘disadvantage that cannot be calculated in advance’. **Since redress under civil law is available, one could argue that there is little point in also asserting a claim based on ASBP.**

However, as noted earlier, the scope of the broken-trust doctrine is not clear. It is also not clear under what circumstances the civil courts will find an abuse of right or breach of good faith. There seems to be trend (among the lower courts (TBC)) to narrow the scope of broken-trust, or continuing-contracts, doctrine. There seems to be also several cases in which abuse of rights and breach of good faith are not easily found. Given the need to provide protection of business users of (dominant) digital platforms, gig-workers, franchisees and freelancers and other sole-traders and sub-contractors who are economically dependent on their trading partners, it may be useful to acknowledge that, in certain cases, termination of contracts can constitute an ASBP and clarify the assessment criteria as well as factors to consider through, e.g., the JFTC ASBP guidelines.

In/before doing so, there are a few issues to consider. (It is of course also possible to argue that the termination should not constitute an ASBP under any circumstances at all.)

First, if viewed as an ASBP, the JFTC will impose an administrative fine (surcharge). Note that the JFTC has no discretion not to impose a surcharge; whenever it issues a cease-and-desist order, the JFTC must order to pay administrative fine.

Second, what about “freedom of choosing trading partner”? Note that the JFTC's position in this is not clear as it has never dealt with a unilateral refusal to deal in light of ASBP (TBC). Meanwhile, the courts do not dismiss the claim on the ground of such freedom, and they conduct a case-specific analysis.

A closely related question is whether it is appropriate to actively regulate termination of contracts where it does not fall within the two exceptional cases mentioned at the beginning of this presentation, given that it is rare such practice leads to substantial restriction of competition and market power. The termination of contract and unilateral refusal to deal is also not easy to intervene effectively.
On the other hand, if there is a disparity in bargaining position, the freedom to terminate the contracts work as “fear factor” and exacerbate disparity of bargaining position.

Given these, there needs to be certain **"limiting principles"** or a fair assessment framework, if the JFTC and civil courts in Japan are to broaden the ASBP to cover termination or unilateral refusal to deal. Such principles may :

- be prudent assessments of superior bargaining position.
- limit the ASBP to the circumstance where relation-specific investment is made.
- find an ASBP only in case of termination of continuing contracts.

- involve careful assessment of the process leading to termination, which covers express contractual provision, the notice, the period of notice, and how the reason for termination has been assessed.

- find an ASBP only where the damage has not been compensated (or requires serious damage to the counterparty)

- find an ASBP only where termination causes the counterparty a damage that cannot be calculated in advance and sets the high bar for un-calculability (un-foreseeability).

- find an ASBP only where there is a breach of contract, or the contract term is not expressly provided in the contract.

- find only termination and cancellation may constitute an ASBP: never in case of new contract.

- take a position that the unilateral refusal/termination has to be one of two exceptional cases indicated at the beginning of the presentation.

Of course, one may argue that the termination/unilateral refusal to deal should never be an ASBP. (One may further argue that Japan should abolish the ASBP regulation altogether).

On the other hand, examining a **"less inequitable alternative (LIA)" (LIA test,** Lim and Nam, 2022), namely assessing whether a less damaging measure could not have been taken to address the circumstances, would be useful in the assessments. The civil courts in Japan may have been engaging in similar assessment in assessing compelling reasons to terminate the contracts (TBC).

At the moment, I can only say that what is unknown is unknown.

3 Assessing KFTC cases in light of Japanese law

3.1 *Posco (PChem)*

A superior bargaining position would be found in Japan, too.
It also seems clear that the parties were in a continuous contractual relationship.
Furthermore, PChem violated the contractual term.

(i) The JFTC will take no (formal) action as there is no spread-ness.

(ii) The court (ASBP); unknown.

(iii) The court (an abuse of right, or breach of good faith):
According to the provisions of the Civil Code (Arts 651 and 656), the contract seems a quasi-mandate contract, which enables the party to cancel it at any time by making up the damages. However, PChem seems

not have compensated the damage, although it may have given the notice and took measures to mitigate the damage.
Furthermore, an abuse of right may be found anyway given X and PChem are in a continuous contractual relationship. X appears to have been PChem's control, which gives further reason not to apply Art 651 of civil code and the court may think that cancellation is permissible unless there is compelling reason. With this regard, the court may conclude that there was no compelling reason as PChem could have simply reduced the order and cancellation was not necessary.

Meanwhile, the fact that X reduced the workforce to mitigate the damage, which could have inhibited PChem's business, may be considered compelling reason - thus, it would ultimately depend on further fact finding.

Just for clarification, the courts in Japan would not accept the civil injunction claim to stop diversion of the business to the new contractors. In general, the civil law is reluctant to issue an injunction to prevent a contract from being taken (stolen) by a third party.

3.2 *Pasteur Milk*

It only lasted for two years, and the continuing nature is not very clear. On the other hand, certain investments have been made in entering into contracts, although it is not clear if that was relation-specific (it may have been).

(i) The JFTC will take no (formal) action as there is no spread-ness. It may also find that the PChem has no superior bargaining position in relation to potential transferees as they have not been in transaction with PChem at all.

(ii) The court (ASBP); unknown.

(iii) The court (an abuse of right, or breach of good faith):
Distributorship agreement in Japan is often called *Hanbai ten keiyaku* (販売店契約, or tokuyaku ten keiyaku 特約店契約), which is either a framework agreement under which the dealer buys from Pasteur Milk and then sells to its customers (contracts for sale (売買契約 *baibai keiyaku*）), or agent agreements under which the distributor deliver products as instructed by a manufacturer. At present case, legal nature of the contract is not clear: contracts for sales (for which Civil Code Arts 651 and 656 are not appliable), or agency agreement (for which Civil Code Arts 651 and 656 may apply - although the court finds them inapplicable as explained

earlier.). It was noted that "failure to fulfil milk orders from 5 customers notified by Pasteur Milk" was considered one of the reasons for non-renewal, which may be suggesting that it was an agent agreement.

In any case, however, if the court finds it a continuing contract (or find it necessary to protect the interest in distributor's recouping its investment) and that the party cannot refuse to renew the contract without compelling reason, it is possible that the court finds non-renewal breaches good faith.

The court will examine if the following were compelling reasons: absence from the meeting, no attendance to the factory tour, bad performance, and failure to deliver the milk to five customers as indicated by Pasteur Milk. If the court chooses to examine these facts carefully, it may find it necessary to examine the importance of the meeting and tour, reasons and backgrounds of poor performance, and how the dealer failed to deliver to the potential customers and how damaging it was for Pasteur Milk.

It was a non-renewal case only after the expiry of the contract period of two years and it may look fair. However, the court may take into account whether Pasteur Milk explained the above facts to the dealer in advance and allowed it to correct their behaviour, whether the notice was given well in advance of non-renewal (and rejection of acceptance of transferee); it may conclude that Pasteur Milk has abused its rights.

In relation to prohibition of transfer itself, the Civil Code Article 466 may mean distributorship may be transferable (assignable) irrespective Pasteur Milk's objection, although the court may find otherwise having determined that it is not assignable given the nature of contract. (Personally, it seems the case for me, but I am not sure.).

> Article 466 (Assignability of Claims 債権の譲渡性)
>
> (1)A claim may be assigned; provided, however, that this does not apply if its nature does not permit the assignment.
> (2)Even if a party to a claim manifests the intention to prohibit or restrict the assignment of the claim, the validity of the assignment of the claim is not impaired.

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Appendix:

How the ASBP and civil claims work at the civil courts in Japan: a few examples (deepl translation)

[1] (ASBP - Tort)

Tokyo High Court Judgment, 30 December 2008 (*"Slapping" Subcontractor*)

Ref: 2018WLJPCA12136008

X was established for the purpose of subcontracting work from Y. 100% of its sales were from Y. The representatives of X and Y were a married couple.

Y subcontracted work equivalent to approximately 90% of the work ordered to X and gave preferential treatment to X by setting the unit price of the order higher than the general subcontracting price.

Y went from a surplus to a significant deficit in the year ending October 2008, and its tax accountant pointed out that the reason for this was the high unit price of orders to X. Y was advised to reduce the unit price of orders to X and to reduce the volume of orders Y followed this advice and stopped giving preferential treatment to X and reduced the unit price of orders.

Around the same time, the staff working for X decreased from five to two.

Thus, **Y significantly reduced the volume of orders placed with X** and reduced the unit price of the orders accordingly.

Y explained the reasons to X for the above reduction, and X's representative agreed to the reduction, although she was dissatisfied.

Subsequently, there was an argument between X's representative, Y's representative and A. The complainant's representative slapped A twice in the face and the complainant's representative was reported to the police, which led to Y giving notice on 2 September of the same year that it would cease doing business with X and terminated the agreement.

X alleged that Y unlawfully terminated the transaction.

The Court found that "Y's decision to reduce the unit price of the order to X and to reduce the volume of the order was a measure taken for reasonable business reasons in order to eliminate a significant deficit and to ensure the completion of the work ordered". The court also found that the process of reducing the unit price of the order, etc., was not unreasonable, as it had been explained to X and his consent had been obtained. Furthermore, the court assessed that X's termination was triggered by the X representative's assault on X, and that the relationship of trust between X and Y was lost at this point.

On this basis, the Court continued to state as following as to whether an abuse of a superior bargaining position (ASBP) in contravention of the Antimonopoly Law could be found.

"X argues that measures to reduce the unit price of the order, to reduce the volume of the order and to discontinue the transaction constitute a tort against X as an ASBP in a continuing contractual relationship", and asserts that, in order for Y to take such measures, there must be a serious reason why it is difficult to expect the continuation of transactions, such as a breakdown of the relationship of trust between Y and X due to circumstances attributable to X. **Certainly, it is not impossible to envisage cases in which it would be unlawful for the ordering party to arbitrarily reduce the unit price of an order, decrease the volume of an order, or discontinue transactions with a subcontractor who has been in an almost exclusive position continuously for a long time, or without any reasonable reason.**

However, in the present case, Y reduced the unit price and volume of order was based on reasonable business reasons to eliminate a significant deficit and to ensure the completion of the work ordered, and thus was not unfair. Furthermore, the relationship of trust had been broken by the time when Y terminated business with X.

The above measures cannot be regarded as being due to the deterioration of the marital relationship between X and Y, or as being based on the personal feelings of Y's representative, **nor can they be regarded as arbitrary acts or ASBP.** Under the circumstances described above, there is no reason to assume that there must be a serious reason attributable to X for Y to review the content of the transactions or to discontinue the transactions for reasonable managerial reasons.

In this way, even taking into account the fact that X was established for the purpose of subcontracting Y's work and that the business relationship continued for a long time afterwards, Y's reduction in the unit price of orders, reduction in the volume of orders and discontinuation of business with X cannot be considered to constitute an unlawful act."

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[2] (ASBP and Breach of good faith - Tort and Default)

Tokyo District Court Judgment 5 November 2012 (*Massage Business*)

Ref: 2012WLJPCA11058002

(Excerpts from the Tokyo District Court's Ruling.)

[On ASBP] "The plaintiff claims that the defendant's refusal to renew the contract is without reasonable grounds and constitutes an ASBP, which is contrary to the rule of fiduciary duty and unlawful.

In this regard, it is acknowledged that, according to the facts stated in Section 2.2, **the plaintiff has repeatedly renewed the massage outsourcing contract with the defendant for 39 years since 1971. In view of these circumstances, it is understood that even if this outsourcing contract is a single-year contract, ... certain reasonable grounds are necessary.**

According to the facts noted in Section 1, the defendant had conventionally outsourced the massage operations of each of the hotels in question to separate contractors, and when the treatment centre d, to which the c hotel was outsourced, offered not to renew its contract for the following year, the defendant decided to outsource this to a single contractor from the following year, thereby **integrating the massage reception operations of the hotels in question as a whole, controlling the arrangement of masseurs, reducing the loss of opportunities for reservations, saving on labour costs and improving operational efficiency. Such defendant's aims were reasonable. Furthermore, there were reasonable grounds for defendant to renew the service contract in question**, according to the facts noted in Section 1, which include that, in terms of securing the manpower of masseurs, **the plaintiff was not always able to increase the number of masseurs sufficiently** even though the defendant asked for an increase in the number of masseurs, such as days when the number of masseurs was not sufficient. In addition, **in terms of hospitality and quality in the massage business, there were complaints from customers due to various inadequacies, and these complaints were repeated."**

[**On breach of good faith**] "In addition to these points, **the business of the plaintiff is not of a nature that particularly carries inventory or makes a large amount of capital investment,** and the plaintiff itself, as noted in the section 1 above, is a company with sales offices in various regions, with a total of about 200 employees and contractors, and in the Tokyo area alone, it is a company with more than 20 hotels, including famous luxury hotels. In view of these circumstances, it cannot be said that the defendant's refusal to renew the business contract in question is impermissible in breach of faith."

"The plaintiff argues that the defendant's refusal to renew the service contract in question has no reasonable grounds and is illegal, and constitutes a default or tort, **but as discussed as above, the defendant's refusal to renew the service contract in question should be considered reasonable and cannot be assessed as illegal**."

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[3] (Breach of good faith or abuse of rights - Tort and Default)*

Tokyo District Court Judgment 26 October 2005 (*Car Dealer*)

Ref: 2005WLJPCA10260010

(Excerpts from the Tokyo District Court's Ruling.)

"The defendant argues that, from the principles of private autonomy and freedom of contract, it is naturally permissible to set a term of one year for the dealership contract in question and to include a clause to the effect that the contract will naturally terminate if the defendant expresses an intention to terminate the contract within a certain period. **However, in the dealership contract in question, it is acknowledged that the Dealer is required to make various investments** in order to maintain the aforementioned dealer standards, such as setting up showrooms, service plants and parts storage facilities, and that it is **necessary to make a considerably large investment for this purpose. Therefore,** when terminating the dealership contract in question, the dealer's loss due to unilateral or short-term termination must be taken into account, and **termination should require a *compelling reason*, such as a *breakdown of the relationship of trust."***

(In the present case) "it is found that at the plaintiff, as acknowledged above, since 2000, **not a single car has been available for display and no demo car has met the dealer standard." In addition, "the Plaintiff had sales performance of only 47 to 60 per cent of its sales target in successive fiscal years 2001 and 2002.** Furthermore, **the Plaintiff has made around eight late payments between January 2001 and February 2002,** which is hardly a simple careless mistake in light of its frequency, frequency and amount. Furthermore, it is found that the plaintiff drew up a written confirmation of agreement with the defendant when the defendant pointed out the problems and **expressed its intention not to renew the agreement after 31 January 2003, and that this agreement agreed that if the plaintiff did not make certain improvements within the period indicated by the defendant, the dealer agreement in question would be terminated. As a result, the plaintiff failed to fulfil his promise**, it is unavoidable that the contract should be terminated in accordance with this written confirmation of agreement."

"According to the above, it is found that there were compelling reasons on the part of the defendant to terminate this dealership agreement with the plaintiff, and since this was based on the agreement between the original defendant and the defendant in the written confirmation of the agreement, this termination cannot be found an abuse of rights."

*ASBP claim made, but related to a different issue.

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[4] ("General civil law (Breach of good faith or abuse of rights) - Claim for Confirmation of Position)*

Tokyo District Court Decision 15 April 2004

(*Sankogan* 三光丸 - medicine left by a salesperson, and paid for when used 置き薬)

Ref: 2004WLJPCA04150005

(Excerpts from the Tokyo District Court's Ruling.)

"**In a contract for the continuous supply of goods, as a result of the repetition of the business relationship over a long period of time**, it is easy to assume that an expectation arises between the parties that the business relationship will be maintained in the future, and such an expectation itself deserves legal protection in light of the principle of good faith, which is the main principle that governs contractual relationships. This expectation itself deserves legal protection in light of the rule of faith, which is the main principle governing contractual relations. In addition, as acknowledged above, the plaintiffs' business of placement and sales relies heavily on the brand image of Sankogan, and Sankogan is a core product for the plaintiffs in conducting their sales activities, and the proportion of the products handled by the plaintiffs is quite high and their dependence on the defendant in terms of business transactions is also acknowledged. It is also clear from the above that the **plaintiffs have invested a considerable amount of capital based on the expectation** that the trade of Sankogan will be maintained in the future, and that, in terms of the proportion of Sankogan in the products handled by the plaintiffs, it cannot be denied that the cessation of trade itself could literally be a matter of life and death for the plaintiffs [in general].

In such a case, in terminating a continuous supply contract such as the existing contract in question, **it should not be permissible to terminate unilaterally without taking into consideration the other party's right to expect and the business interests of the other party in the contractual relationship. It should be understood that, in order to terminate a contract, there must be a reason for the request for termination that does not violate the rules of good faith and that a reasonable period of grace is required in consideration of the other party's interests in the contractual relationship.** ... For example, the plaintiffs should be allowed to terminate the contract for a reasonable period of time in a case where the defendant, a pharmaceutical manufacturer, has demanded that the plaintiffs, as distributors, follow a certain reasonable sales policy from the viewpoint of sales promotion of the product and maintenance of the brand image of the trademark and the product, but the plaintiffs have not complied with this demand, the defendant should be allowed to terminate the contract for a reasonable period by making it clear that the certain sales policy it has indicated has reasonableness or rationality. ... [T]he length of the reasonable period or the content of the opportunity should vary depending on the strength or weakness of the reasonableness of the termination of the contract and the specific economic benefit on which it is premised."

"In this case, **the contractual relationship between the plaintiffs and the defendant has continued for decades to nearly one hundred years**, [**the grace period of two years] cannot be said to have been sufficient time** for the defendants to recover their investment or to change their product range to other products and is therefore ineffective at this time".
"(**Bearing in mind the example of plaintiff X7, for example, who has been trading with the defendants for more than 100 years, is highly dependent on them and has a small scale of business, it should be understood that a period of at least 10 years after the request for cancellation is necessary.")."**

[On the other hand], as to whether there are "justifiable reasons for the plaintiffs to destroy the relationship of trust with the defendants", etc. in relation to one of the plaintiffs, " After the dispute, the plaintiff "has taken measures to switch to [the competing product] (膽肚羅丸) as an alternative to Sankogan", and "there is room to recognise this as a breach of trust against the defendant". Furthermore, the plaintiff's "corporate scale is the largest among the companies engaged in the placement and sale of Sankogan, and even excluding the sales of Sankogan, it is recognised that it has annual sales of more than 200 million yen, and that such a company has taken measures to switch to the aforementioned [rival's product]. We consider that the fact that the plaintiff "has taken measures to switch from Sankogan to other gastrointestinal medicines can be regarded as an indication that it is possible [for this plaintiff] to take such measures." If this is the case, "even if it were difficult to find justifiable grounds for termination on the grounds of breach of trust, in light of the size of the company, the two-year grace period until 30 November 2003 indicates that sufficient time has elapsed to change from Sankogan to other gastrointestinal medicines. It can be accepted that, with the expiry of this grace period, the termination of the existing contract in question based on the termination application has had the effect of terminating the contract."

*ASBP claim made, but not directly related to termination.

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