
Hughes Hubbard & Reed

U.S. Legal News for Japanese Companies - December 2023 Edition

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December 26, 2023 - This newsletter reports on U.S. legal matters relevant to Japanese companies. This edition covers U.S. court cases and cross-border transactions from the fall of 2023. Among other things, we discuss Sompo's attempts to enforce an arbitration award against former Nissan CEO Carlos Ghosn, a \$46 million arbitration award in favor of Daiichi Sankyo, and M&A deals for Denso, Mitsubishi Electric, Ajinomoto, and Nippon Steel. As this is our final newsletter of 2023, we also look ahead at what 2024 may bring for certain areas of the law, such as antitrust, export controls, and artificial intelligence.

Arbitration-Related Decisions

- [The Continuing Saga of Carlos Ghosn Comes to the U.S.](#)

The story of Carlos Ghosn's escape from Japan is legendary. In 2019, while placed under house arrest for financial improprieties, the former CEO of Nissan was smuggled out of the country in a music box. The next year, Ghosn commenced an arbitration against Sompo, seeking to recover defense costs under a Nissan D&O insurance policy. In response, Sompo argued that Ghosn's illegal flight invalidated the policy and required him to return certain monies that Sompo had already paid. A three arbitrator panel of the Japan Commercial Arbitration Association agreed with Sompo and awarded the insurance company the Japanese Yen equivalent of \$6.5 million plus interest.

Sompo is presently seeking to enforce its arbitration award against Ghosn's assets in the United States. On October 6, 2023, a U.S. federal court granted Sompo leave to serve writs of attachment on two Delaware companies owned by Ghosn. *Sompo Japan Ins. Inc. v. Ghosn*, No. 1:2023-cv-01041-RGA (D. Del. Oct. 6, 2023). Under a multilateral treaty commonly known as the New York Convention, non-U.S. parties may bring foreign arbitration awards to the U.S. and seek to enforce them against assets located in the U.S.

- [Daiichi Sankyo Wins \\$ 46 Million in Fees and Costs](#)

On November 14, Daiichi Sankyo Co., Ltd. ("DSC") won an arbitration award of nearly \$46 million in attorneys' fees and costs against Seagen Inc. after a sole arbitrator found that Seagen's claims were time-barred. Seagen commenced arbitration in 2019, claiming that DSC had misappropriated proprietary knowhow that Seagen had shared under a 2008 collaboration agreement. Seagen's CEO testified that he "paid little attention to DSC" until 2019 when he was informed

that a certain DSC product was likely to receive FDA approval and become a “significant competitor” to Seagen. Only then did he instruct his legal team to investigate whether the product fell under the collaboration agreement. The arbitrator found that Washington’s six-year statute of limitations for written contract disputes barred Seagen’s claim. *Seattle Genetics, Inc. (Seagen) v. Daiichi Sankyo Co., Ltd.*, ICDR Case No. 01-19-0004-0115 (Nov. 17, 2023). On December 1, Seagen filed a petition to vacate the award, arguing, among other things, that it could still bring a claim for quiet title. *Seagen Inc. v. Daiichi Sankyo Co., Ltd.*, Case 2:22-cv-01613-JLR (W.D. Wash. Dec. 1, 2023).

Antitrust Litigation

- Takeda Faces “Pay-for-Delay” Allegations

Takeda has recently been accused of entering into illegal “pay-for-delay” agreements with manufacturers of generic drugs. “Pay-for-delay” agreements refer to certain types of settlement agreements resolving patent disputes in which a generic drug manufacturer agrees not to bring its generic drug to market for a specified period of time. Plaintiffs often allege that this type of arrangement violates the U.S. antitrust laws.

On September 19, Takeda settled a pay-for-delay lawsuit in which AmerisourceBergen and other wholesalers alleged that Takeda had paid generic drug manufacturers to delay their launches of generic drug alternatives to Takeda’s gout drug Colcrys. As a result, AmerisourceBergen and the other wholesalers claimed that they paid prices for Colcrys that were 1,200% higher than they should have been. *Value Drug Co. v. Takeda Pharms. U.S.A., Inc.*, No. 2:21-cv-03500-MAK (E.D. Pa. Sept. 19, 2023).

On November 20, the Massachusetts federal district court dismissed a pay-for-delay lawsuit against Takeda relating to Amitiza, a drug for treating constipation. *Premera Blue Cross v. Takeda Pharm. Co.*, No. 1:23-cv-11254-MJJ (D. Mass. Nov. 20, 2023). The court dismissed Premera’s claims, finding that neither Alaska nor Washington allowed indirect purchasers, such as Premera, to bring antitrust claims. (U.S. federal antitrust law generally permits only direct purchasers to sue for overcharges, but certain states permit indirect purchasers to sue under their own antitrust laws.) On November 30, Premera filed a new complaint against Takeda and its affiliates in the same court, making substantially the same allegations, but under the laws of twenty-six other states and the District of Columbia. *Premera Blue Cross v. Takeda Pharm. Co.*, No. 1:23-cv-12918-MJJ (D. Mass. Nov. 30, 2023).

On December 13, Walgreen Co., The Kroger Co., and other retail stores that sell prescription drugs also sued Takeda in the Massachusetts federal district court concerning the same Amitiza settlement agreement. *Walgreen Co. v. Takeda Pharm. Co.*, 1:23-cv-11057-MJJ (D. Mass. Dec. 13, 2023).

Intellectual Property Litigation

- TV Tokyo Uses a “Schedule A” Filing to Stop Alleged Infringers

On September 29, TV Tokyo Corporation, creator of the anime *Naruto*, brought a trademark infringement suit against certain online merchants for allegedly selling counterfeit *Naruto*-branded goods. TV Tokyo proceeded through a “Schedule A” filing in the Northern District of Illinois. *TV Tokyo Corp. v. Individuals Identified on Schedule A Hereto*, No. 1:23-cv-14286 (N.D. Ill. Sept. 29, 2023).

A “Schedule A” filing refers to a plaintiff filing intellectual property claims against a group of online merchants in a single complaint, listing the defendants on a Schedule A. Proceeding in this manner eliminates the need for the plaintiff to bring (and pay a filing fee for) a separate complaint against each merchant. While there has been criticism of this procedure, it has proven to be effective. A plaintiff can sometimes obtain a quick injunction against the entire group of merchants or even a default judgment, since the merchants are often located outside the United States and fail to defend the action. In the United States, the Northern District of Illinois has become a popular venue for Schedule A filings because of its generally favorable treatment of plaintiffs.

Cross-Border Transactions

While global M&A activity decreased 4.9% in Q3 compared to Q2 (*Quarterly M&A Report, Q3 2023*, Berkeley Research Group, LLC), Japanese companies made some notable U.S. acquisitions in the fall.

On October 10, Denso Corp. and Mitsubishi Electric Corp. each announced that it had agreed with Coherent Corp. to invest \$500 million in Coherent's Silicon Carbide LLC, which manufactures SiC wafers (semiconductors). Upon closing, expected in the first quarter of 2024, each of Denso and Mitsubishi will hold a 12.5% equity stake in Silicon Carbide LLC, with Coherent retaining the other 75%. In addition, Coherent entered into long-term supply agreements with Denso and Mitsubishi to supply silicon carbide substrates and epitaxial wafers (both semiconductor materials).

On November 13, Ajinomoto Co., Inc. announced that its subsidiary Ajinomoto North America Holdings, Inc. had entered into a definitive agreement to acquire Ohio-based Forge Biologics Holdings, LLC, a gene therapy company, for approximately \$554 million. Upon closing, expected in December 2023, Forge is to become a wholly-owned subsidiary of Ajinomoto North America Holdings, Inc.

On December 18, Nippon Steel Corporation agreed to purchase United States Steel Corporation for \$14.9 billion in cash. The deal will require approvals from U.S. Steel's shareholders and U.S. regulators. Upon closing, Nippon Steel would become the world's second-largest steel producer and one of the top steel suppliers to the U.S. auto industry.

Japan-U.S. Economic Policy Consultative Committee

On November 14, Japan's Minister of Foreign Affairs, Japan's Minister of Economy, Trade and Industry, the U.S. Secretary of State and the U.S. Secretary of Commerce met in San Francisco for the second annual meeting of the Japan-U.S. Economic Policy Consultative Committee. At the meeting, Japan and the U.S. discussed decarbonization efforts and achieving global net-zero greenhouse gas emissions by 2050, cross-border data privacy, and artificial intelligence. The two nations also reaffirmed their commitment to the Indo-Pacific Economic Framework for Prosperity, which includes 13 Indo-Pacific countries and focuses on: (1) trade; (2) supply chains; (3) clean energy, decarbonization, and infrastructure; and (4) tax and anti-corruption.

Outlook for 2024

As 2023 draws to a close, we describe some significant legal developments that can be expected next year.

- Antitrust

The U.S. government is strengthening the U.S. antitrust rules and guidelines. On June 27, the Federal Trade Commission ("FTC") proposed a revised premerger notification process under the Hart-Scott-Rodino Act ("HSR"). If adopted, the new HSR rules would require the submission of additional or new information on, among other things, (1) areas of actual or potential competition, vertical supply relationships, and the strategic rationale for the transaction; (2) acquisitions by each of the parties going back ten years where there is horizontal overlap; (3) internal documents analyzing the transaction; and (4) labor market data. Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (proposed June 27, 2023) (to be codified at 16 C.F.R. pts. 801, 803).

On December 18, the Department of Justice and the FTC jointly issued Final 2023 Merger Guidelines. Among others, the new Guidelines lower the threshold for the presumed illegality of horizontal mergers. The agencies generally measure concentration levels using the Herfindahl-Hirschman Index ("HHI"). Now, a merger is presumably illegal if (1) the post-merger HHI is greater than 1,800 and the change in HHI is greater than 100, or (2) the merged firm's market

share is greater than 30% and the change in HHI is greater than 100. U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines (Dec. 19, 2023).

- Export Controls

The U.S. Department of Commerce ("DOC") is expected to continue—in conjunction with Japan and other countries—to restrict Russian access to cutting-edge technologies that can be put to military use. In a notice dated October 24, 2023, the DOC's Bureau of Industry and Security announced that, working with Japan and other countries, it had identified forty-five "common high priority items" posing a heightened risk of being diverted illegally to Russia to support its war efforts. The list includes electronic integrated circuits that have been found in Russian missiles and drones and machines for the reception, conversion and transmission or regeneration of voice, images or other data. Japanese companies will need to have a rigorous compliance program in place to avoid the potentially significant penalties that could result from even inadvertently violating U.S. export controls or sanctions laws.

- Committee on Foreign Investment in the U.S.

The Committee on Foreign Investment in the U.S. ("CFIUS"), which reviews foreign investments that could pose national security risks to the United States, is expected to revise and strengthen its review process and enforcement efforts. On September 14, CFIUS announced that, within the next year, it would be issuing one or more notices of proposed rulemaking to (1) improve the efficiency and effectiveness of reviews; (2) update its penalty and enforcement authorities; (3) sharpen and enhance its tools relating to non-notified transactions; and (4) "broadly ensure the Committee's tools and processes are best aligned to the current landscape."

- Bankruptcy

On December 4, the United States Supreme Court heard oral argument in *Harrington v. Purdue Pharma L.P.*, No. 23-124. The case arises from the Chapter 11 filing of Purdue Pharma, the manufacturer of OxyContin. As part of the plan of reorganization, the bankruptcy court approved a settlement in which the individual owners of Purdue Pharma—members of the Sackler family—would pay \$6 billion in exchange for broad releases of liability, even though the Sacklers had not themselves filed for bankruptcy. A majority of the U.S. Courts of Appeals have held that the U.S. bankruptcy code authorizes a bankruptcy court to approve such a settlement as part of the reorganization process. If, as some commentators predict, the Supreme Court reads the bankruptcy code to the contrary, it could change current U.S. bankruptcy law and make certain chapter 11 reorganizations more difficult.

- Artificial Intelligence

Artificial intelligence ("AI") has been a hot topic in 2023, and this trend shows no signs of abating. In terms of regulating AI, the U.S. is behind the EU, which recently reached a political agreement on the Artificial Intelligence Act. But regulation and/or legislation is expected in the U.S., especially with respect to disclosure requirements, use restrictions and prohibitions on content.

On October 30, President Biden signed an "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence." Among other things, this order (1) requires developers of AI systems posing a serious risk to national security, economic security or public health and safety to share certain information with the U.S. government; (2) directs the National Institute of Standards and Technology to set rigorous standards for AI testing to ensure safety before public release; and (3) directs the Department of Commerce to develop guidance for watermarking to label AI-generated content. Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

- Facial Recognition Technology

The U.S. Congress is continuing to debate facial recognition technology in the context of individual privacy. For example, the currently pending "Traveler Privacy Protection Act of 2023" would prohibit the Transportation Security

Administration (“TSA”) from using facial recognition technology at airports and would require the TSA to dispose of already collected facial biometric data. S. 3361, 118th Cong. (2023).

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