生駒経済論叢　第5巻第2号　2007年10月

Concept of Unreasonable Restraint of Trade:

A Comparative Analysis between Japan and Bangladesh with Special Reference to Some Case Laws

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Abstract Restrain of unreasonable trade becomes a major concern in the developed countries like USA, Japan etc. where governments put a constant vigilance against monopolistic behavior of large corporations that might restrict competition in the market. Although developing countries like Bangladesh are usually lagging behind devising sophisticated laws against such unreasonable restraint, increased global trade and spread of multinational companies enhances the necessity for developed country companies to have a clear understanding about how common terms are given different legal effects in some other developing countries where they already have or intending to increase their private investment in the near future. Since investment of Japanese companies in Bangladesh is increasing steadily, this paper discusses about the concept of unreasonable restraint of trade that Japanese companies might face in Bangladesh when competition becomes more intensified in the future. It discusses about how the concepts of unreasonable restraint of trade is defined in the laws of Bangladesh and Japan, and what similarities and differences Japanese companies might expect while facing the unreasonable restraint of trade law in Bangladesh.

Key words competition, unreasonable restraint of trade, JAMA
September 25, 2007 accepted

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Introduction

Freedom of trade and commerce is a fundamental right protected by most of the Constitutions of different countries in the world. Just as the Legislature can not take away individual freedom of trade, so also the individual cannot barter it away by agreement. Generally the principle of law is,

> *"Public policy requires that every man shall be at the liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill or talent, by any contract that he enters into".*(1)

But in reality sometimes we find different kinds of practice or agreement restraining the free right to trade, which is of course, unreasonable and a violation of the law of the respective country.

While dealing with this issue, it is better to have a bird's eye view firstly over the notions of 'Fair competition' and 'Unreasonable restraint of trade' in general. Then we shall sketch the meaning and validity of unreasonable restraint of trade specifically under the laws of Japan and Bangladesh with special mention to some Case-laws concerning this issue and finally evaluate this concept under both the country's legal system.

Notions of "Free Trade", "Competition" and "Unreasonable Restraint of Trade"

The notion of '*Free Trade*' was devised in the eighteenth century by the British economist Adam Smith.(2) Free trade means the *voluntary* exchange of values between the two parties, toward their own *mutual benefit*.(3) Voluntary means that no force is initiated by either party; that both parties enter the trade of their own free-will. Mutual benefit means that both parties enter the trade of

(1) Per James, V. C. in Leather Cloth Co. Vs. Lovsont (1869) LR 9 Eq 345.
(2) Economic Development, Michael P. Todaro, 7th ed. Pearsona Education, Essex 2000, P. 464.
(3) Ibid.

their own free will, since they think they will be better off by making trade than if they do not. It is this freedom of trade that gives rise to capitalist *concept of competition.*

The term *'Competition'* under market economy can be understood as a process in which each participant in the market must compete with each other by offering more valuable conditions in respect of quantity, quality, price, etc. in order to ensure the market competitiveness of its products. In fact, competition is the core of free-market economy that serves consumer preference and makes and efficient allocation of recourses. More competition in all market means more choices for consumers.

However, when competitors engage in unfair competition, the competitive environment becomes distorted, giving unfair advantage to one competitor against the other.

Thus it can be said that competition is a double-faced factor for the social development which can be divided into —

1. Healthy Competition; and
2. Unfair Competition.

1. Healthy Competition

Healthy competition is understood as fair, equal, legal and moral competition, as the competition by capacity of a businessman himself and for his own benefits in the spirit of respecting the benefits of other businessmen, consumers and of the community. Some specific characteristics which can be seen as the basis to define the healthy competition are that manufacturers must maintain their reputation, explore the market, consult opinions of the consumers to correctly forecast new demand of the society, improve and renovate technology to enhance the quality of the product, reduce expenses, lower the price and provide good services to the clients.

Here it is pertinent to mention that the terms *'Fair Competition'* and *'Free Competition'* should not be amalgamated together. The objective of Fair Trade is

to establish equity in international trade. It aims to promote marginalized products and workers. Its objective is to move those marginalized traders from vulnerability to economic self sufficiency.(4)

So it is desirable to make a distinction between the two terms:

a. Free Competition; and

b. Fair Competition.

Free competition is one that

means one is free to take any action, unmolested by others, which does not violate the rights of others;

means that if one attempts to enter any trade, no one will physically interfere in ones business by threatening or otherwise;

does not mean that the seller, must serve the buyer's interest, if those interests are not his own and the vice-versa; and

does not mean that an 'equal playing field'. It does not mean that you will not face smarter competitors, faster competitors, competitors with more capital, competitors who are more productive.

Fair competition is the dual requirement for Free Enterprise; it means that competing parties must abide by rules of respect of each other and of the consumer, that law and justice should enforce whenever it is doable; it means that the overhead for obtaining information that helps choose among the competition should be reduced. This in particular that no information should be concealed to consumers, that no misinformation be spread among them, that there be actual competition.

2. Unfair Competition

According to the words of Article 10 of the Paris Convention, 1883,(5) since the

(4) Fair Trade, Wikipedia, http://en.wikipedia.org/wiki/Fair_trade, last visited September 8, 2007.

(5) Effective Protection Against Unfair Competition Under Article 10 of the Paris Convention of 1883. Year book 1994/Ⅱ, Pages 398-404.

modern concept of protection against unfair competition aims at protecting not only the competitors but also the consumers and the public in general, any act contrary to the honest (fair) business practices should be regarded as an act of unfair competition. Commonly, unfair competition can be seen through the activities of —

a. Private monopolization;
b. Unfair business practices;
c. Excessive concentration of economic power; and
d. Unreasonable restraint of trade.

As a matter of fact, the concept of "*Unreasonable restraint of trade*" is almost a common phrase in all the legal systems in the world. But its meaning may not be exactly the same from one country to another. For the convenience and relevance of discussion, the meaning and the concept of '*Unreasonable restraint of trade*' will be focused under the Japanese and Bangladeshi legal systems.

Concept of Unreasonable Restraint of Trade in Japan

Meaning of 'Unreasonable Restraint Of Trade' under the Anti-Monopoly Act, 1947[6]: In Japan, unreasonable restraint of trade refers primarily to cartels. Generally speaking, cartels are particularly damaging form of anti-competitive behavior.[7] Accordingly, agreements such as price-fixing, cut-back of production or market and consumer allocation are the most typical examples of cartels.[8] The Japanese Anti-Monopoly Act, hereinafter referred to as JAMA, defines unreasonable restraint of trade as "such business activities by which any entrepreneur, by contract, agreement or other concerted actions with other entrepreneurs, mutually restricts or conducts business activities so as to fix, maintain, or increase prices, or

(6) Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, 1947 (Act No. 54 of 1947).
(7) Modern Microeconomics, H. L. Ahuja, 12th ed., S. Chand and Company, New Delhi 2004, p. 575.
(8) Ibid, p. 577.

to limit production, technology, products, facilities or customers or suppliers, thereby causing, against the *public interest, substantial restraint of competition* in any particular field of trade".(9) This provision is mainly based on Section 1(10) of the *Sherman Act, 1890* of the USA.

Here it is notable to mention that *bid-ridding* which is said to be common in some industries, also falls within this category.(11) Out of a total of 960 cases decided between 1947 and 1994, 297 involved unreasonable restraint of trade by individual enterprises, and the great majority of 407 decisions against trade associations also involved unreasonable restraint of trade. It means that about 75% of total decisions involved cartels.

Validity of 'Unreasonable Restraint of Trade' and Some Case-Laws: The original JAMA dealt with cartels on "per se illegal rule" basing on Section 1 of the *Sherman Act* of the USA. But subsequently "*Rule of Reason*" was also introduced by the Supreme Court of USA(12) to interpret the concept of unreasonable restraint of trade. The rule of reason distinguishes "good" restraints from "bad" restraints. Recently, vertical restraints(13) tend to be examined under the rule of reason.

Following the subsequent development in the USA introduced by the Supreme Court, Japan also, through an amendment in 1953, introduced a conditional prohibition banning cartels that restrain "*competition substantially*", "*contrary to public interest*", while permitting depression cartels(14) and *rationalization cartels.*(15) These permissions mean that the JAMA also distinguishes between "good" cartels and

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(9) Article 2, Paragraph 2 of the Anti-Monopoly Act, 1947.

(10) Every combination, conspiracy, trust, agreement or contract is declared to be contrary to public policy, illegal and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter.

(11) ODA Hiroshi, "Japanese Law", Chapter 13. Anti-Monopoly Law, Oxford University Press, 2001, p. 313.

(12) Standard Oil Company of New Jersey Vs. United States, 221 US 1, 74–75 (1911).

(13) Continental T. V. vs. GTE Sylvania, 433 US 36, 58–59 (1977).

(14) Article 24, Paragraph 3 of the JAMA.

(15) Article 24, Paragraph 4 of the JAMA.

"bad" cartels and prohibits only the latter. In addition, there are many exemption legislations. At present, 62 different kinds of cartels are exempted from the JAMA in 40 Statutes.

So while determining the validity of unreasonable restraints of trade (or cartels), it's better to briefly discuss something on the following two terms. That is —

1. Public Interest; and
2. Substantial restraint of trade.

Public Interest: In combination with *Article 2 (6)*, *Article 3* of the JAMA provides that a cartel is unlawful if it restrains competition in a particular field of trade "*contrary to public interest*". A strict reading of this language suggests that a cartel which restraints competition will contravene the JAMA only when it is "*contrary to public interest*".[16] In this sense, the JAMA seems to deny a per se illegal approach as regard the restraint of trade and implies vertical restraint.

Not within the preview of the Article 3 and also Article 2 (6) of the JAMA. Whether or not the provision in Article 2 (6) only deals with "horizontal agreement"[17] or also the "vertical agreement"[18] is still now a matter of controversy.

The earlier decision of the Japanese Fair Trade Commission of Japan (hereinafter referred to as JFTC) seemed confirm this, after a judgment of the Tokyo Appellate Court in a case involving an arrangement by five newspaper publishers and twenty-two news agents on sales territory. This was an appeal against the JFTC decision which found this agreement to be a cartel.

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[16] MATSUSHITA Mitsuo, University of Tokyo, "Introduction to Japanese Anti-Monopoly Law", First edition, August 1990, Chapter 2, p. 16.

[17] A horizontal agreement is one entered into among enterprises engaged in the same business, that is, among the competitors.

[18] A vertical agreement is one entered into between or among enterprises whose relationship is necessarily competitive, but rather transactional in nature. An agreement between a manufacturer of a product and its wholesaler would be an example of this kind of relationship.

The Court ruled that cartels presupposed entrepreneurs in a mutually competitive relation and that the restriction should not be unilateral, and should be the same in all participants. Thus, the Court denied the existence of a cartel.[19] Since then, the JFTC has regarded resale price maintenance as an unfair trade practice, instead of an unreasonable restraint.

Substantial Restraint: Strictly speaking, although JAMA does not define "substantial restraint", it is generally agreed that competition is substantially restrained if an enterprise or group of enterprises can determine prices or other terms of business independent of market forces.[20]

There is no precise way of measuring a substantial restraint of competition. It is essentially a functional rather than a quantitative test. It depends on the facts of the every case. For example, unreasonable restraint of trade is unlawful when it results in substantial restraint of competition in 'a particular area of trade'.

'A Particular area of trade' is determined first of all by the product or service in question. In the ***Oil Cartel Case (Production Adjustment) case***, probably the most celebrated case in this regard, the marketing of oil products in general regarded as a particular area of trade.

Concept of Unreasonable Restraint of Trade in Bangladesh

Meaning of 'Unreasonable Restraint of Trade' under the Contract Act, 1872[21]: *Section 27* of the said Act provides that: "Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void." In fact, most of the laws of Bangladesh, including the *Contract Act*, originated from the laws of England. That's why, in order to get a full-

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(19) Judgment of the Tokyo Appellate Court, December 14, 1993 (Hanta 840-81; Bid-rigging on Social Insurance Agency Procurement Case).
(20) Tokyo High Court Decision, 9th December 1953, Kosaiminshu, Vol. 6. No. 13, p. 868.
(21) The Contract Act, 1872 (Act No. 9 of 1872).

fledged meaning of *'Unreasonable restraint of trade'*, it is better to discuss some part of this concept under the laws of England.

In England, the law relating to restraint of trade was elaborately considered by the House of Lords in Nordenfelt Vs. Maxim Nordenfelt Gun Co.[22]

> *The case involved sale of goodwill by an inventor and manufacturer of guns and ammunition who agreed with the buyer company: (1) not to practice the same trade for 25 years, and (2) not to engage in any business competing or liable to complete in any way with the business for the time being carried on by the company. He afterwards entered into agreement with another manufacturer of guns and ammunition and the company brought an action to restrain him.*

It was held that the first part of the agreement was valid being reasonably necessary for the protection of the purchaser's interest. But the rest of the covenant by which he was prohibited from competing with the company in any business that the company might carry on was unreasonable, and therefore void. *Lord Macnaghten* lay down:

> *"The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with the individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and, therefore void. That is general rule. But there are exceptions. Restraint of trade . . . . . may be justified by special circumstances of a particular case. The only justification is that the restriction should be reasonable — reasonable in reference to the interest of the parties and reasonable in reference to the public interest."*

Validity of Restraint of Trade With Special Reference to Some Case-Laws: As a matter of fact, restraint of trade is not all the time void in the English law. Following the English law, there are some exceptions created under the Bangladeshi law. These are:

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[22] [1894] AC 535.

a. **Proviso to Section 27 of the Contract Act:** The latter part of Section 27 stated that

> "*One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the court reasonable, regard being had to the nature of the business.*"

Apparently, the object is to protect the interest of a purchaser of goodwill. "It is difficult to imagine that when the goodwill and trade of a retail shop were sold, the vendor might the next day set up a shop within a few doors and draw off all the customers."[23] Therefore, some restriction on the liberty of the seller becomes necessary. Where a person sold his boat business and agreed not resume it for three years, the agreement was held to involve sale of goodwill. Where the aim of an agreement is preventing of competition, it will be void even if its nakedness is concealed behind the "imposing façade of a sale" of goodwill.

b. **Partnership Act[24]:** There are some provisions in the Partnership Act which validate agreements in restraint of trade; these are:

I. ***Section 11*** enables partners during the continuance of the firm to restrict their mutual liberty by agreeing that none of them shall carry on any business other than that of the firm.

II. ***Section 36*** enables them to restrain an outgoing partner from carrying on a similar business within a specified period or within specified local limits. Such agreement shall be valid if the restrictions imposed are reasonable.

c. **Trade combinations under the Judicial Interpretation:** It is now almost a

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[23] Parasullah Malik Vs. Chandrakanta Das (1917) 21 CWN 979. In appeal Chandrakanta Das Vs. Parasullah, ILR (1930) 48 Cal 1030 PC.
[24] Partnership Act, 1932 (Act No. 11 of 1932).

universal practice for traders or manufacturers in the same line of business to carry on their trade in an organized way. Combinations of this kind are often desirable in the interest of trade itself and also for the promotion of public interest. They bring about standardized goods, fixed prices and eliminate ruinous competition.

After discussing these exceptions to restraint of trade, it can be said that the difference between England and Bangladesh is that in England a restriction will be valid if it is reasonable, but in Bangladesh it will be valid if it falls within any of the statutory or judicially created exceptions.

Comparison and Conclusion

Comparison of the concept of 'Unreasonable restrain of trade' between Japan and Bangladesh: While evaluating the concept of '*Unreasonable restraint of trade*' under these two systems, it is better to make a comparative study between the two. The comparative study between Japan and Bangladesh as to the 'concept of unreasonable restraint of trade' can be focused through identifying some similarities and dissimilarities between these two systems. Such as:

1. In Japan, the term '*Restraint of Trade*' is placed under the Anti-Monopoly Law[25] which categorically stated that its goal are 'to promote free and fair competition, to stimulate creative initiatives by entrepreneurs, to enhance business activities, to increase the level of employment and the real income of the people, and thereby to ensure the interests of consumers and to promote the democratic and healthy development of the national economy'. In order to achieve these goals, the Law 'prohibits private monopolization, unreasonable restraint of trade, and unfair trade practices as well as the excessive concentration of economic power'.[26] On the

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(25) One of the most comprehensive publications on the Anti-Monopoly Law in English is H. Iyori and A. Uesugi, "The Anti-Monopoly Laws And Policies of Japan", New York 1994.

(26) Article 1 of the Anti-Monopoly Act.

other hand, in Bangladesh, '*Restraint of Trade*' is defined and placed under the Contact Act, and there is no separate law to deal with this concept.

2. In Japan, the agency in charge of implementing the Anti-Monopoly Law, including the acts of unreasonable restraint of trade, is the Japanese Fair Trade Commission (JFTC). They are guaranteed independence in the exercise of their duties.[27] The JFTC was modeled on the US system of administrative commissions. But in Bangladesh, there is no administrative body regulating the acts of unreasonable restraint of trade.
3. If unreasonable restraint of trade is found by the JFTC, it has vested the power to pronounce both civil remedy by way of surcharges and criminal penalty on the wrong doers. But in Bangladesh, if any unreasonable restraint of trade is done, then the Court can only pronounce for civil remedy by way of compensation, and there is no place of imposing any criminal penalty on the wrong doers.
4. The concept of '*unreasonable restraint of trade*' in Japan is wider than that of Bangladesh. In Japan, '*unreasonable restraint of trade*' refers primarily to cartels. But *bid-rigging*, which is said to be common in some industries, also falls within this category. In Bangladesh the concept of unreasonable restraint of trade is narrower referring to only '*certain unfair trade Practices*'.
5. Unreasonable restraint of trade in Bangladesh can be compared with two kinds of '*unfair practices*' in Japan. They are:

   a. Dealing on restrictive terms: General designation No. 13 provides that dealing with the other party on conditions which unjustly restrict any transaction between the said party and his other transacting party or other business activities of the said party.
   b. Dealing on Exclusive terms: General designation No. 11 provides that if a party prohibits the other party to a transaction from dealing with the farmer's competitors and thereby unduly reducing business

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[27] Article 28 of the Anti-Monopoly Act.

opportunities for said competitors.

Conclusion: The JFTC has vigorously eliminated anti-competitive activities, including the unreasonable restraint of trade and unfair trade practices, since such activities hinder the sound function of market mechanism and thereby prevent consumers from enjoying benefits derived from the fair and free competition. Moreover, as the deregulation is furthered, the areas of the JAMA expand. Therefore, in order to strengthen the deterrence of the JAMA, the JFTC has taken series of measures, including series of calculation rates of surcharges and maximum amounts of criminal fines, reinforcement of investigation departments and improvement of investigators' ability. The JFTC will continue to actively and vigorously eliminate the JAMA violations, including more criminal accusations. Like JFTC, it is also expected that in Bangladesh, the Government of Bangladesh will take an initiative to establish a regulating body which will regulate and control the conduct of the enterprises in the market as well as give enough attention on the protection of the rights of the consumers for ensuring a healthy and fair environment in this field.