IN RE: KOREAN RAMEN ANTITRUST LITIGATION: A PANEL DISCUSSION WITH TRIAL COUNSEL

By Jill M. Manning[1]

This antitrust class action alleged a price-fixing conspiracy in Korea that raised the price of ramen noodles manufactured and sold in Korea. Plaintiffs, direct purchasers and indirect purchasers, alleged that the elevated prices in Korea had an impact on the prices of ramen noodles sold in the United States. Judge William H. Orrick certified the classes and denied summary judgment, stating, "there is ample, although hotly disputed, evidence of a conspiracy by the defendants to fix the price of Korean ramen in Korea that was fraudulently concealed from consumers."

After a five-week trial, a jury returned a verdict in favor of the defendants, answering only the first question on the verdict form: "Did Plaintiffs prove there was a conspiracy to fix the prices of Korean ramen noodles? No." How did the case progress from a court stating that there was ample evidence of conspiracy to a jury finding *no* conspiracy? From the reversal of fines levied by the Korean Fair Trade Commission to the exclusion of testimony from the plaintiffs' key witness, this case involved unique issues, twists and turns, and a few lighthearted moments. You will have to continue reading to find out more.

The Panelists

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- **Rachel S. Brass** was trial counsel for defendants Ottogi Co., Ltd. and Ottogi America, Inc. in the *Korean Ramen* litigation. Ms. Brass is a partner of Gibson Dunn & Crutcher LLP's Litigation Department where her practice focuses on investigations and litigation in the antitrust, labor, and employment areas. Ms. Brass has extensive experience representing international and domestic clients in high-stakes appellate litigation in the Supreme Court, as well as Federal and State appellate courts throughout the United States. Her antitrust and competition experience includes international cartel matters, mergers and acquisitions, grand jury investigations, and other antitrust investigations by governmental entities

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Case Background

MS. MANNING: We're going to jump right into the case. I'm just going to give you a little bit of background on the case before we start with questions. This was an antitrust case consolidated in the Northern District of California. The direct purchaser plaintiffs and indirect purchaser plaintiffs alleged a price-fixing conspiracy in Korea that raised the price of ramen noodles manufactured and sold in Korea. Plaintiffs alleged that the elevated prices in Korea had an impact on the prices in the United States. The case originated from an investigation by the Korean Fair Trade Commission. The KFTC ruled that Korean ramen manufacturers had conspired to fix prices and succeeded in raising prices to super competitive levels from 2001 through January 2010 and imposed fines totaling 125 million.

However, the Supreme Court of Korea overturned the KFTC's ruling, finding that the pricing patterns, pointed to as evidence of the price-fixing conspiracy, were actually explained by the structure of the market and the government's price controls, and it ordered all of the fines to be repaid.

Then, we have the federal litigation. Judge Orrick certified classes of direct and indirect purchasers. He denied the defendants' motion to decertify the IPP class and denied summary judgment. In his order denying summary judgment, he stated, "there is ample, although hotly disputed, evidence of a conspiracy by the defendants to fix the price of Korean ramen in Korea that was fraudulently concealed from consumers."

The indirect and direct purchaser cases were tried together before a single jury. The two defendants were Korean-based companies Nongshim and Ottogi and their subsidiaries supplying ramen noodle to the U.S. market. Most of the witnesses in the trial were located in Korea and beyond the Court's subpoena power. After a five-week trial, a jury ruled in favor of the defense, after three hours of deliberation, finding that plaintiffs had failed to prove a conspiracy to fix the prices of ramen noodles.

So how did the case progress from a Court stating that there was ample evidence of conspiracy to a jury finding no conspiracy? Let's find out.

Chris, this was a rare trial of an antitrust class action. Knowing that antitrust cases rarely proceed to trial, how did that affect your strategy in the case?

Parties' Trial Strategies

MR. LEBSOCK: I think it affected our strategy in a few ways, but for purposes of this question, what I want to focus on is *voir dire*. Because we represented wholesalers and distributors and we were trying this case in combination with consumers, indirect purchasers, we felt that we needed to get ahead of this idea that this was a class action. We had businesses who had substantial losses, but we also had consumers in the case who, when you broke down the damages, may have suffered 10 to 15 cents of overcharge on each packet of ramen. So we made a decision that we wanted to talk about the class action process with the jury, get their reaction just right away, writing a jury questionnaire and a *voir dire*, and actually spent quite a bit of time with the jury in the *voir dire* process talking about their views of class actions, and you had the full range of opinions from the venire. You had people who were very pro class action, understood it was a mechanism that was useful in bringing justice to people with small claims, and you had folks on the jury who were very anti class action. And then you had a range of people in the middle who talked about their experience with class action, including, you know, sending in the claims, getting a check for 15 cents or a dollar.

So we explored all that with the jury right away, and I will say, on reflection, I'm not sure from my perspective that it was particularly useful to do it. You certainly put the issue front and center with the jury and then discussed it for quite a long time. It was a point of interest for everybody, but it's sort of hung in the discussion with the panel. And as I reflected back on who we struck: we struck the jurors who were anti class action, but they had other red flags, so I'm not sure that talking about it as extensively as we did was a particularly useful thing.

MS. BRASS: My client is Ottogi. We had an unusual situation representing Ottogi, which is by the time we got to trial, the lead senior associate who had been on the case from day one was still on the team, and everyone else was new. And one of the things that meant what we did for trial is really think about how we constituted the trial team. And my own bias, and I'm sure this is the best audience to say it to, is that antitrust lawyers can be a little precious about their ideas.

And so we very specifically constituted a team where we're the only antitrust lawyer, and we had one of our lead trial lawyers join the team, and the first antitrust case he had ever worked on, learned the case like a juror. And one of the heads of our Supreme Court practice joined the team to make a very aggressive record fight throughout the trial. We had a huge range of novel issues in this trial, from the duplicative recovery questions to *Hartford Fire* questions about conduct that happened exclusively outside the jurisdiction of the U.S. to other questions about things like market definition.

And in parallel, we had someone whose whole job is looking at appellate questions in a new way, not an antitrust specialist, thinking about the law and creative arguments we could press. I think one of the ones that he came up with that caught everyone off guard was a really clever argument about fraudulent concealment and diligence, and one of our arguments at the end of the trial was that none of the plaintiffs had testified to exercising

any diligence, not necessarily the kind of question that antitrust lawyers who are thinking about market definition and prices and regressions focus on, but a huge asset to us in getting a jury instruction that said, "was there evidence of diligence by the plaintiffs for the conduct outside the statute?", which was almost all of the conduct in all of the sales in the case.

The other thing we did was as that team worked up the arguments there were key arguments we did not put in trial briefs, and we did not use in depositions of the plaintiffs' experts because we wanted an element of surprise at trial, and I think that served us very well also.

MR. DOSKER: Good morning. My client was Nongshim, which is considered the market leader in Korea during the class period, more than 70 percent. You may have seen the Nongshim marked double-decker hop-on-hop-off tourist bus going around San Francisco. I will not comment on rumors that it first arrived during the selection of a jury. But as I thought about this question, the real answer to me was both because it's an antitrust case and it's one of the few that's proceeding to trial and because all of the events happened in Korea, and the question was, do they happen really the way it was alleged, and if so, do they affect the U.S. market?

My thought on this question is this. We really had to ensure that we developed plain English and clear understandable themes and advocacy that appealed to the common sense of the regular people who were going to be on the jury. That to us was crucial throughout, and it's easy as you go through hundreds and hundreds of Court filings and five years of litigation and all the precious thoughts of the antitrust specialists, it's easy to forget to go back to square one and make sure that you do that, but for us, that was hugely important, both in the runup and throughout the five-week trial.

MS. MANNING: One very unique aspect of this case, and a reason that makes it very interesting, is that direct purchasers and indirect purchasers tried their claims together before a single jury. Did that affect how the case was tried, and if so, how?

MS. BRASS: Certainly on the defense side, it did. The direct purchasers moved to bifurcate the trial, and we opposed that. Both because we thought it enhanced the possibility of duplicative recovery, and from a factual perspective, because in our view, the direct purchaser and indirect purchaser experts had testified in ways during their depositions that did not reflect complete alignment in their theoretical approach to damages. And we thought that was something we could very much exploit at trial.

Because so much of the testimony was by video or through interpretation, we knew the plaintiffs' experts would be a critical witness in summarizing and retelling the plaintiffs' story. And our goal was to make the jury incredibly skeptical of the reliability of the plaintiffs' experts by really leaning into what we saw as fundamental inconsistencies between their testimony. We also decided early on that any attack on passthrough would not be credible to a consumer jury.

So we made very little attack on the indirect purchaser expert's testimony, and instead planned from the beginning what would be for trial is to use his testimony to attack the methodology of the direct purchaser's experts. And if at the end of the day, the jury were to decide that both of those experts, and even the defendant's expert were unreliable, then

we thought we had a win. Because we thought we had the far better of the percipient witness testimony, and we thought we had the critical common sense argument.

You heard Chris say an overcharge of 15 to 16 cents a package. My client Ottogi has a product that is the most popular, and over the course of the class period to the largest direct purchaser in the class, its product rose in price a penny. And we thought the jury would really struggle to find a 15- to 16-cent overcharge in the penny increase in over a decade in the price of ramen. And if the jury did not care one bit about the wonderful testimony of our expert economist, we thought that was just fine, because the jurors understand pocketbook economics, and we are going to have a real problem with that. So it was just critical to us to have both of the experts in the courtroom at the same time so that we could pivot them against each other, and I thought that worked well for us.

MR. DOSKER: Yeah, the small addition I would make to that is at the end of the cross-examination of the indirect purchaser plaintiffs' expert, Rachel did a lovely job. I should have taken a transcript and excerpted it here, but she did a lovely job of basically showing, well, so the chances that the direct purchaser plaintiffs' conclusions are right is like one in 68 million, based on your math. Because they had different conclusions, not 180 degrees, but lots of millions of dollars and lots of other subordinate points, and so our presentation at some level was they can't both be right. You can't believe either one of them.

MR. LEBSOCK: Well, it's a disputed fact, Rachel, as to whatever your client's product went up by one penny during the class period. But setting that aside, it is true that what Rachel said. I think it had an impact. I don't know what would have happened at the end of the day. I mean, our view of Dr. Cox's testimony, I know he's here, but was that his model was fundamentally flawed, and it was too simplistic. It didn't really account for the realities of this marketplace. But setting that aside, one thing I do agree with is that the defendants did play the card of comparing the experts' analysis.

And I can say that I begged those indirect purchasers to just follow our lead on this. You know, surprisingly, they didn't do it. But at the end of the day what happened here is, the indirects had a much larger overcharge at the direct level. And then they did a passthrough analysis from that. And during trial, they abandoned their overcharge methodology and the direct purchaser level, and then accepted what our expert had done, but of course, the damage had been done at that point because their expert had rendered opinions, and so Rachel and Mark and others were able to successfully point out to the jury that you get two experts on the plaintiffs' side with maybe $50 million difference in their overcharge analysis. At the end of the day, did that matter? We will never know because the jury only answered the first question and answered that no.

MS. MANNING: This was a long, five-week trial. Mark, what strategies do you employ to keep a jury's attention during such a long trial?

MR. DOSKER: Well, to set the table, I would note that not only was it a long trial, five weeks, started just before Thanksgiving. Everybody wants to be in trial at that time. The vast majority of the fact witnesses of things that really mattered were by deposition and were taken in Korea several years earlier, and with interpretation. And even the majority of the live witnesses who did come over, likewise, testified in Korean through

interpretation. So how did we keep their attention? For starters, it's like making a movie or a stage production. You got to choose what are you going to do by video, what are you going to do by live. You have to pick dynamic video clips. You have to overcome the fact that you have depos of people speaking in another language and interpretation. So that means while you're hearing English from the interpreter, the witness is sipping his water or looking away. His lips aren't moving because it's the interpreter off stage whose words are being heard by us in the courtroom. So there is that disconnect to begin with. You know, he's looking at his watch, scratching his head, whatever.

You've got to select carefully what you're going to do by video, what you're going to do live. On video, get some dynamic clips. We liked some of the testimony of some of the lower level people who described the quasi torture and interrogation tactics that the KFTC used to squeeze statements out of them, which a number of us said that's not true. They tried to protest. They tried to print their name instead of signing their name as a symbol of—this is your statement, Mr. Investigator, that's not my statement. And these are very low-level people being, in their view, being crushed by a really serious investigative government agency. Some of those are dynamic.

Always stay on theme. Time your examinations to the theme in plain English and appeal to common sense. And also, I think to help make a long trial bearable, use our whole team. Don't just have one or two people doing examinations. Have the junior-most people. Have the middle-level people. Have everybody do a couple of witnesses. Because then the jury gets to hear different people and different styles and different mannerisms and different generational approaches. That was great.

MS. BRASS: We all—everyone—had associates, young associates, handle witnesses in front of the jury, and every time one of those young people got up, the jury sat up straight, because they were so excited to get to see them do something. It helped everybody.

MR. DOSKER: Right. And, you know, have some of the junior colleagues move to the front of the table. Have some of the senior colleagues pull back during certain witnesses. It all helps. And, finally, I do give big credit to Judge Orrick in addition to running an efficient schedule with an 8:00 a.m. start time, a 1:00 p.m. finish, so people had their afternoons free. In addition to doing that, having appropriate breaks. He watched like a hawk, and if people's eyelids in the jury box began to droop, he would stop the proceedings and ask everyone to stand up just to have a stretch break, not a regularly scheduled break, but stretch your arms and your back and your legs and wake up. And those were the things that, as I thought of this question, I think helped the jury stay quite focused and quite vigilant throughout the trial.

MR. LEBSOCK: I don't have much to add on this, other than to say I think, what was it, six weeks I think we tried the case, and it was at 8:00 a.m. to 1:00 p.m., and I guess a couple things I noticed when we started mid-November and we finished right before Christmas time. The jury was paying attention definitely up to Thanksgiving. And then we took a week's break, and I got to tell you, they came back and there was a definite change in the energy level of those jurors, unfortunately. When you combine that with the fact that we probably could have gotten an extra 50 percent in if we had gone 8:00 a.m. to 4:00 p.m. I felt like it would have been better if we had just had full days, push that jury through. Because after a certain period of time, and especially after that break,

and then you're heading into the holidays, I just didn't think that the jury really wanted to be there, you know, the last few weeks of the trial.

Turning Point During Trial

MS. MANNING: There were a lot of interesting things that happened during the case, but was there a turning point that occurred during the trial, and if so, what was it and when did it occur?

MR. LEBSOCK: To me the big turning point in this case came right before trial, and that is that there was a company called Samyang that also manufactured ramen there. They were the amnesty applicant in Korea. And they came to us early, and we settled with them. And they were going to bring a couple of witnesses. One of the witnesses that we really liked in this case was the president of the company. Her name was Mrs. Kim, and it's sort of an unusual story in that it was her husband's dad's company. She was a very, very sharp lady, and was the president of the company, really running operations. Unfortunately, she was indicted in Korea, and then we got a little delay in the case, six or eight months. And by the time we were ready to go, she was convicted, like within a couple of days of us going to trial.

MS. BRASS: What was she convicted of, Chris?

MR. LEBSOCK: Embezzlement.

MS. BRASS: How much did she embezzle, Chris?

MR. LEBSOCK: I don't know.

MS. BRASS: $80 million. Very clever woman.

MR. LEBSOCK: So the problem with this is, you've got a witness who is going to be impeached, and the judge in all of his wisdom, just excluded her testimony. She was the key link to the origins of the conspiracy and could put the conspiracy at the executive level, and without her, we were left with witnesses who were lower-level people who could talk about information exchange, and we also had her junior, who was a nice enough fellow, but he didn't have her charisma. And, I mean, she seemed like a very honest person. I got to tell you. But, you know, the replacement was far inferior to her testimony. So we entered this case with a handicap, which is that we lost the origin story as to how this thing got started. That it was at a high level. It was the executives that got together and meet, and what we had was lower-level people talking about information exchange, and that was an unfortunate situation for us.

MR. DOSKER: If I may, I would say two things. First, on the four corners of the question, was there a turning point during the trial, if so, what and when, I don't see that as the turning point. I see it, from my perspective, as more of a long inexorable march to a clear conclusion. And with great respect, no disrespect to our colleagues on the plaintiffs' bar, certainly not Chris, you know, there is a case selection here. This leniency applicant took their leniency application to the KFTC and it was rejected as inadequate. It didn't have any story about any specific agreement involved, and so they went back and they did a new leniency application. And only then did this witness say, "Oh, yeah, I remember

double hearsay from a dead man." That was her story, and she was a very smart person, but she's there in that company, not just because she's smart, because it's her family and their money bailed that company out of bankruptcy. And when the dawn raids happened, if they hadn't come up with a story that would stick and last, they would have gone back into bankruptcy.

And more to the point as we learn later, being a leniency applicant, if your application is accepted, which in Korea, investigations of you stop. And the more dawn raids that were happening and the more agents were crawling over those ports, they're going to find her embezzlement. Soon they did. They didn't find her for about ten years, but they found her eventually.

So I viewed no particular turning point in the trial, because in my view, even if she had come to trial and even though the revealing of her embezzlement didn't occur until a couple years after we deposed her, we would have had a field day on cross with her. So I don't think her presence or absence changed the course of trial, but I think it was an interesting basis on which to build a big case.

MS. BRASS: And I'm sort of in the middle. I'm very sympathetic to Chris. That made the trial much harder for the plaintiffs. As Mark said, we were pretty confident in our case regardless, but that helped, and I thought it helped in two ways. One, it just took another live person out of the room. I know Chris thinks right after Thanksgiving is when jurors lost interest, but that's when the defense started putting on its case, and we saw that a little differently. And one of the big reasons is all of sudden there were live witnesses every day in the courtroom. And I thought the jury was really interested in them and paid close attention to their testimony, and when they were hearing not assembled together deposition testimony, but direct examination that told more of a narrative, I think that also was a critical turning point in the slow march Mark describes.

Using Experts in A Jury Trial

MS. MANNING: Rachel, how do you choose and prepare experts differently in a jury trial versus a bench trial?

MS. BRASS: We have experts on roughly three different topics in the trial. We had the economist that we've already talked a little bit about. We had experts on Korean corporate governance and a construct that may or may not exist in Korea. That was due to the fact, called a chaebol, which are certain types of family-owned businesses. And we also, on the defense side, had an expert on alter ego liability. On the defense side, we focused first and foremost, of course, on sound analysis, but really on juror appeal. And when I say that, I mean are they likable people? They are going to be on the bench for a long time. Can they teach? When they teach, can they show what they are saying, not just tell what they are saying? That meant pointing to a lot of specific places in the record, knowing the record incredibly thoroughly.

We spent, in particular, my colleague Joanne Klondock, who I know is somewhere here in the audience, spent a good part of the year working on demonstrative exhibits for the jury on economic issues, both for cross-examination and for direct. And making sure as we picked them that they could turn very complicated economic concepts into kitchen table analogies. Because we knew in a case about food, if you got it to the kitchen table,

that would support our narrative of the story, and that's really what we worked on on the defense side throughout the process. I mean, we had all of the fights on Daubert motions about the ins and outs of the economic analysis.

And I do really want to emphasize the likability point. It was so important to us that all of the experts were the same people, whether I was examining them or Chris was examining them. Because we thought that really mattered to the jury. And I would say that in my view, the expert's ability to do that in the trial was not consistent across the experts.

MR. DOSKER: Persuasively explain complex topics in plain English. To me, that's it, from start to finish. And if they can be likable while they do it, all to the better. But persuasively explain complex topics in plain English. And we'll get to it later, to the makeup of this jury, but that ability was key in my view.

MS. BRASS: I know Chris mentioned Dr. Cox, who is here, and so I couldn't say otherwise, but he was incredibly likable on the stand. When Chris made a hit, and it was correct, he admitted it, and was like, yeah, that is correct. Admitting your faults, being humble. I think modesty in the experts went a long way with the composition of the jury that we had, and that just was not consistent.

MS. MANNING: Since you opened the door for the jury question, why don't we move on to that one. Rachel, describe the makeup of the jury and how that helped or hurt your case. I think we know it helped.

MS. BRASS: Well, we won. So in that way, it helped. Mark had said this. I completely agree. They were exceptionally diverse. We had four people on the jury with graduate degrees, including two with Ph.D's. We also had someone who worked full time at Panda Express. We had someone who had driven for UPS. We had someone who worked at Amazon. We had the head of land use for Marin County. He was juror number one. And we were confident from the point of jury selection, he would be the chair of the jury. He was. And we looked for people in *voir dire*. We did love Chris' questions about the class because they helped us eliminate people, but what we looked for more than anything else was who looked like they were listening during *voir dire*. Because if you didn't listen during a five- to six-week trial, where most of the witnesses were testifying in Korean, we were in real trouble. And I think we got a jury that listened very hard.

MR. DOSKER: Except for the male-female balance, which was a little heavier on one than the other, it was incredibly diverse. Different generations, and quite senior people, some quite junior people. One young person, couldn't quite tell if she was listening a lot or not, for sure. At one point when someone, might have been the judge, was struggling with how to pronounce the name of some particular flavor of ramen, she just shot up and called it out. Like a kid in class, I know the answer. And she did. The jurors behaved that way with each other in ways that were visible to us, and what I took from that, in very different life experiences, in different cultures, ethnicities. I think it helped a lot, because collectively, they understood, I'm convinced, what individually some of them might missed, had missed. And isn't that the very goal of a jury to collectively as the eyes and ears of the community to collectively understand and discern the truths of it. I think

they fulfilled that role beautifully, and I'm convinced it was their diversity, in all respects, that helped them do that.

MR. LEBSOCK: I guess not to repeat, there was one prospective juror that was very familiar with regression modeling. Did it every day as part of his job. And I really liked that guy. I wanted him to be on the jury because one of the concerns that we always have is how to communicate well what these experts are doing when they come up with their overcharges. And I mentioned earlier, we thought that Dr. Cox, who, by the way, was a very nice witness on the stand. He was excellent. But he had a very simplistic model that was measuring what happened before the conspiracies started and then trying to extend that for eight years into the conspiracy period in a market that was rapidly changing, and what it did is it essentially preordained a no overcharge result. And I really wanted that guy on the jury so that we could explain that to somebody who would know exactly what we were talking about and be able to communicate that in a jury room, but the folks to my right struck him.

MS. BRASS: We did all for not for that reason. We thought he would also be troubled by the fact that there were six conspiracy periods within the regression. Because if you just used one, you wouldn't get an overcharge. We thought that was significant, but for other reasons, we struck him.

MR. DOSKER: It had to do with clarity, in my view. Our strike panelists had to do clarity of communication between the expert and the jury. I didn't want to have cross-currents or no-ways or whatever, which I'm hearing perhaps is exactly what Chris was hoping for, but yeah, you know, nice guy, but we were very happy to see him go.

Presenting Evidence to A Jury

MS. MANNING: In the case, plaintiffs relied on both direct and expert evidence to approve a conspiracy, and in his order denying summary judgment, Judge Orrick stated there is ample, although hotly disputed, evidence of a conspiracy by the defendants to fix the price of Korean ramen in Korea. Chris, why do you think the jury reached a different conclusion?

MR. LEBSOCK: Well, Mrs. Kim wasn't there. And, you know, Mark referenced it a little bit earlier, but there was a proceeding and an investigatory proceeding by the KFTC that proceeded this. We disagree about how heavy-handed these investigators were, but the net result of it was that there were these witness statements by a number of witnesses, especially the Samyang folks, who clearly had their lawyers help write these things. So there was some very compelling facts in them, but then they would be summed up with legal words, and, you know, things like the word "conspiracy," and people don't talk like that when they are giving a narrative of what happened. So while there was plenty of evidence to deny summary judgment, the way that that played out actually was difficult for us. We actually tried to deemphasize it a little bit because we were very concerned about the efforts on the defense side to show that these witnesses were basically bullied into testifying in the way that they did.

So I think those are two big reasons. I think the third one is that we had some former Samyang employees that we had to get hate testimony from, and that took a long time, but we were not allowed to examine those witnesses. Korean lawyers had to do that in a

courtroom in Korea, and the lawyers that were involved in doing that examination are not sophisticated antitrust lawyers. They are not even really particularly familiar with cross-examining people because there is no discovery process in Korea like there is in the United States, and the testimony was a mess. So there was plenty that the defense liked and plenty that we liked, but at the end of the day when you're a plaintiff and you have a burden of proof, I'm not sure that that testimony was, at the end of the day, that convincing.

MS. BRASS: Yeah, I mean, there were little things, I think, along the way that where the evidence in front of Judge Orrick was not the same as it was in front of the jury. The most expensive part of this litigation might have been the translation of the documents and the thousands of hours spent on translation disputes. So the translated version of certain things that were in the summary judgment record is not what was in front of the jury during trial. You know, often was the elimination of more inflammatory language in an agreed upon translation dispute resolution process, but I think that helped us quite a bit. I think the although hotly disputed part of this is important, because that's the way summary judgment—you just don't have witnesses placing information into context in the same way that you do in trial. And I think live witnesses putting things into context really helped the defendants.

MR. DOSKER: For many people who came up in American culture, ramen is a convenient quick snack thing that the teenagers might like separately. In Korea, ramen is what saved South Korea from mass starvation after the war. It's a national dish, a national icon, and if you mess with the price of ramen without government approval in advance, there is hell to pay, and there was on the one instance that happened here.

So part of the translation was not just between the two languages, it was between the two cultures. And explaining and helping the jury understand that even when the cost of raw ingredients go up, so you've just got to raise your prices because the wheat, the palm oil, the seafood, everything has gone up. You have to go and informally get government approval in advance, and the one time that my client, who was the market leader, did not do that was in the 2008 financial crisis when commodity prices went through the roof. They didn't feel they had time. There was a new administration in the Korean Blue House. They didn't know who to go to exactly, and so in our view, when we tried to lay it out for the jury, this whole investigation, everything that came was a political payback for not going first to get permission for the price increase.

That kind of translation, that kind of cultural translation, is something that doesn't happen in summary judgment. You can't really do that. So that's, I think, what I would add on to that point.

Impact of Foreign Tribunal's Decision

MS. MANNING: Mark, how did evidence of the Korean Supreme Court's decision and overturned in the KFTC's conspiracy findings and fines affect the outcome of the case?

MR. DOSKER: Not much. And here's why I think that is the right answer. I think it basically put the two sides back on a level playing field. Like, okay, the KFTC found against us, but the Korean Supreme Court overturned that, and the other thing was that Judge Orrick was scrupulous in not letting anybody say much about that. There was a jury

instruction that had been set. You could refer to the jury instruction, but if you strayed past that, you know, heaven help you.

So I don't think they really cared so much for that, and no waiver here, and the trial is over, so there's no appeal, but I'll just note—but, of course, you wouldn't notice—but I would just note that in the mock jury sessions, at one point, when we, you know, raised the Korean Supreme Court, our clients watched through the one-way mirror, two-way mirror while one of the mock panelists said, "oh, Korean Supreme Court, everybody knows they're corrupt." And, wow, what are you going to do with that, right? So I think it just leveled the playing field and it got everybody back to square one, and, okay, let's not obsess over the procedural history of what happened in the Korean court system.

MS. MANNING: I'm guessing Chris might have a different opinion on that.

MR. LEBSOCK: That's ridiculous. To have the court tell the jury that there was this investigation in Korea, that there was a fine imposed, the defendants were allowed to try this case in terms of telling the jury how heavy-handed those investigators were, and then to have the judge say, you know, and that was reversed, what those guys found was wrong. It was devastating, and it was raised many, many times.

Now, it's true that Judge Orrick would remind the jury each time it was raised that they shouldn't use that in their deliberations, but when you hear the fact that that fine was reversed, I think it has an effect.

MS. BRASS: We thought the plaintiffs made a choice here. They chose to use the KFTC witness statements as evidence. And they choose to make a huge deal about what my client did in response to certain questions from the KFTC investigators, you know, accusing us of a massive forgery. I had a witness on the stand for two days. Bonnie cross-examined him for more than two hours about one document he supposedly forged. And what the plaintiffs were proposing is tell the jury you were accused of rape, but don't tell them you were acquitted.

And not surprisingly, Judge Orrick did not think that decision would withstand appeal and gave an instruction and didn't allow us to argue any more broadly about what the KFTC or the Korean Supreme Court had found. But the idea that so much of the evidence at trial should be documents created solely by the KFTC or for the KFTC investigation, but one should not be able to find out that you were not punished as a result of that investigation is outrageous.

MR. LEBSOCK: For a little context, when the KFTC conducted its raids in early June of 2008, we saw email communications between these employees of these companies, up to the end of May 2008. And what ended up happening in our view is that the raids happened. The investigators went to the wrong department when they raided, and so that gave the defendants 30 days before the investigators caught on to what was going on, to delete documents, and in our view, the two defendants that remained did a very thorough document dump and modifying documents. That's what Rachel was talking about. And we were going to show that to the jury that the reason the KFTC was relevant in this case is because the fraud was on the KFTC. Although there was zero evidence that the KFTC ever caught on to what had happened to them as a result of this document dump and this alteration of these documents.

MR. DOSKER: One of the subsidiary issues which Chris now brings up that we had to explain to people is, again, on a cross-cultural translation, the amount of storage capacity in people's systems at that time. Twelve to fifteen years ago in South Korea compared to American companies. It was tiny and nothing. There was no dump. Stuff just had to be deleted or you couldn't use your email account. You couldn't use your e-mail account if you had too many emails in your inbox, so you just deleted stuff

MS. BRASS: I do think it helped us in terms of composition of the jury that we had a lot people who worked in businesses and people who worked in technology. And so, we reminded the jury of things, for example, that most of this case happened before, for example, the iPhone was invented. We have a perception of what electronic communication looks like based on being lawyers in the world we live in, but very few people, when this lawsuit was filed in 2014/2015 had their emails from 2001 as a business? And the business people understood record retention policies. They understood 45- or 30-day auto delete functions. And we had an expert come in, whose opinion was uncontested, a judge from Korea who had practiced and specialized in KFTC proceedings and had worked with the KFTC, who said there is no document retention obligation in Korea, even when you're subject to a KFTC investigation. And I think that testimony as well as personal experience of people on the jury–and we found this in jury research–they did not care about this ablation issue, which we knew was going to be a huge part of the jury presentation.

Impact of Using Interpreters on Live Witnesses

MS. MANNING: Most of the witnesses in the case were located in Korea and beyond the subpoena power of the Court. Mark, did this lack of live witnesses have an impact on the case, and the witnesses who did testify live used an interpreter? Describe how that affected the direct and cross-examinations.

MR. DOSKER: It made it slow. Imagine the back-and-forth and the rhythm that you can establish as the examiner or not. Because everything has to be twice, first in English into Korean and from Korean back to English. So it made it slow. Having your pacing and your timing be in a way to be persuasive to the listener was quite different. So that did affect it.

And you had to also, I think, use an opportunity. We used this, and I think it was successful. Because as the market leader, my client was the one, who in Korean practice, was expected to go in and talk to the government in advance to get approval for any price increases. And that's a long dull process. The witness from our company who gave that testimony was someone who, as Chris and Rachel recall, you ask him a question and he will answer for like 30 pages without taking a breath. All about the government officials he met, who he talked with, and what they did to get through this process.

And so, we used a live witness, to tee up a particularly long and potentially dry video clip or set of video clips. Use that person's lieutenant to come in live and talk in a relatively short examination about what he and his boss did and then watch the more senior person testifying at great length. So we used that. It affected the examinations in that way.

And I would also say more so than, you know, almost any other trials I've seen over the decades, the importance of practice sessions. Now, obviously, we couldn't practice

with the same interpreter who came in the courtroom, but we had others, and I have colleagues who speak Korean, and the number of practice sessions even for a scripted set of questions and answers that's only going to be seven to ten pages on paper, not that long. Because this is, again, a different–a different culture, and I think that the cultural aspect of the difference and how it affected what we did, I think was really pervasive throughout the trial.

MS. BRASS: And the only thing I will add to that is beyond the ordinary slowness, there are significant ways that English and Korean just do not match well onto each other, and that made translation even more difficult and more cumbersome. We ultimately agreed on a translator for trial who was excellent, but it was just remarkably slow, and because we were all on the clock, it wasn't like, well, it took 50 percent longer. It took 70 or 80 percent longer. And it really meant you had to scale back the size and scope of your case because of how slow the translation was.

MR. LEBSOCK: Yeah, we had an excellent translator that we all agreed on. He was translating before you even finished your sentence. That's how good he was. And that helped, but I think, from my perspective, how did this affect the trial? It might not surprise you that the defendants did bring their witnesses who did a terrible job in Korea. They left them there, and one of the things that we wanted was to argue missing witness. That if the defendants didn't have the courage to bring these people over and have them sit in front of a jury, that we, or the judge, would alert the jury to this fact, and defendants brought a motion on that point, and actually, they prevailed. I think that was wrong.

MS. BRASS: The motion was limited to former employees or people otherwise outside the defendant's control. So I sort of think it was right.

MR. LEBSOCK: No, Yon Han Ng [phonetic spelling] who had to be the worst witness in the world but I was not allowed to say that Mr. Dosker wouldn't bring that fellow to trial so that I could cross-examine him.

MR. DOSKER: That young junior and nervous gentleman has a human right not to be dragged across the Pacific Ocean. He's not a manager or anything close to it. And I know you think your case is important, Chris, but he has a human right to stay at home with his spouse and his young child.

MR. LEBSOCK: That's right. And that's what he did.

Anecdotes During Trial

MS. MANNING: We only have a few minutes left. If you'd like, could you describe a funny moment that occurred during the trial?

MS. BRASS: I'm going to start with one that wasn't funny, but it was utterly shocking to me, and I think it underscores a lot of the things that we've been talking about. We had a witness in the Ottogi case who was the head of finance for a company called Ottogi Ramen, which was not one of the defendants. It is the factory that makes the ramen. And he handled all procurement and finance for all the ingredients that went into the ramen and testified about that. He was not deposed. He's a gentleman in his 60's. We knew he was going to be—we liked to joke with him when we got ready that he was our secret

weapon, because he was very nervous about testifying and he had not been deposed. So he had no experience with this. And he comes into the courtroom, and he bows to the judge, and then he turns a perfect turn and bows to the jury. And then turns another perfect turn and bows to Chris. None of which I knew was coming. And I'm putting him on, and then walks up to the witness stand. And if you have ever wanted a witness to capture the jury's attention before their surprise secret weapon testimony, as well as leave their own counsel's jaw sort of hanging over as they tried to regain their composure at the podium, Mr. Yu did an excellent job of that.

MS. MANNING: Chris, why don't we give you the final word, a funny moment.

MR. LEBSOCK: Jill told me she was going to ask this question. I think my perspective is colored on the fact that we lost the case. So I had to go down to Stephanie Cho's office, who is one of my associates who worked with me, and I said, "Stephanie, what was funny?" She's very perceptive. In the Ottogi opening, they have a little doll. A roly-poly doll. I think is how that is translated into English, and so they had this doll that they brought up. Everybody had ramen. We had it all scattered everywhere. But they brought this doll up, and Rachel's partner says to the jury, "now, we're like this doll. You know, you punch us, you pop right back up." And he's shaking it around, and it's jingling, and I remember sitting there going, that is the most ridiculous thing. But we end the case; the goes back to deliberate, and within a few minutes, they ask one question, and the question is, can we have the doll.

MS. BRASS: We did send them all a doll after the deliberation was over and a box of ramen.

MR. LEBSOCK: So, and that's when I knew we were cooked. That's my funny moment.

MS. MANNING: And on that note, please join me in thanking our panelists.