CHINA

Court proceedings in key jurisdictions

ICC COMPRENDIUM OF
ANTITRUST DAMAGES ACTIONS
This chapter is part of the ICC Compendium of Antitrust Damages Actions (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** Liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform a the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** A statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** A competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** Categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
Throughout the enforcement of the Anti-monopoly Law of the People’s Republic of China (the “Anti-monopoly Law”), the number of private enforcement cases stood far behind the ones related to public enforcement. In addition, due to the institutional design of the legal regime, in particular, the lack of class action for civil disputes caused by anti-competitive behaviours, the burden of proof on the claimant and so forth, claimants seeking damages from a monopoly or from cartel members seldom obtain rewards under the PRC anti-monopoly legal regime. The amount of the compensation that a victim can obtain, as a result of “antitrust damages”, seems relatively low in comparison to the overall cost for private enforcement, even when the court has identified a monopoly or a cartel.

The Anti-monopoly Law was implemented on 1 August 2008. Article 50 of the Anti-monopoly Law formulates that “undertakings that implement anti-competitive activities and cause others to suffer losses therefrom shall bear civil liability pursuant to the law.” This provision provides the basic legal foundation of the antitrust civil damage compensation litigations.

In order to handle cases of civil disputes caused by anti-competitive behaviours, prevent anti-competitive behaviours, protect and promote fair competition in the market, and safeguard rights and interests of consumers and the common interests of society, the Supreme People’s Court of the People’s Republic of China (the “PRC”) issued the “Provisions of Supreme People’s Court on Several Issues Relating to Laws Applicable for Trial of Civil Dispute Cases Arising from Monopolies” (the “Anti-monopoly Judicial Interpretation”) in 2012, which provides further guidance for antitrust civil litigation.

1. 

Jurisdiction

The Anti-monopoly Law of the PRC does not set the administrative enforcement proceedings as a precondition for civil lawsuits. Article 2 of the Anti-monopoly Judicial Interpretation stipulates that a claimant may file a civil lawsuit directly with a court or after a penalty decision of the Anti-monopoly Enforcement Authority (AMEA) takes effect. Therefore, the People’s Court will accept a lawsuit regardless of whether it is a stand-alone or a follow-on lawsuit.
Articles 3, 4, 5 and 6 of the Antitrust Judicial Interpretation specified the jurisdiction of antitrust civil litigations as follows:

1.1 Level Jurisdiction

Based on the professionalism and complexity of antitrust civil litigation cases, the first-instance of antitrust civil litigation cases shall be heard by the competent intermediate People’s Courts (IPCs). According to Article 3 of the Anti-monopoly Judicial Interpretation, the competent IPCs includes the IPCs of the cities where people’s governments of the provinces, the autonomous regions, the municipalities directly under the central government and the municipalities with independent planning status locate, and the intermediate people’s courts designated by the Supreme People’s Court. In addition, upon the approval of the Supreme People’s Court, the basic-level people’s courts may hear the first-trial monopoly civil dispute cases.

The Notice of the Supreme People’s Court on Issues Concerning the Jurisdiction of Intellectual Property Courts over Cases formulates that the intellectual property court shall have jurisdiction over cases of first instance regarding civil disputes over monopoly within the jurisdiction of the city where the intellectual property court is located. To date, there are 23 Intellectual Property courts throughout China, including the IP court in Beijing, Shanghai, Guangzhou, Shenzhen to name a few, are entitled to hear antitrust disputes.

1.2 Geographical Jurisdiction

The territorial jurisdiction of antitrust civil litigation cases shall be determined in accordance with the specific circumstances of the case and in accordance with the jurisdictional provisions of the Civil Procedure Law and relevant judicial interpretations concerning infringement disputes and contract disputes. The lawsuit relating to any antitrust civil litigation case shall be within the jurisdiction of the People’s Court of either the place where the infringement was committed or the place where the defendant resides. The lawsuit relating to any contract resulting in an antitrust civil litigation case shall be under the jurisdiction of the People’s Court of either where the defendant resides or the place where the contract was performed.

1.3 Transfer Jurisdiction

If (i) the case was filed by a non-monopoly dispute and (ii) the defendant files a defence or counterclaim on the grounds that the claimant was engaged in any monopolistic behaviour, the case shall be transferred to the People’s Court with jurisdiction on monopoly matters, provided that the defendant brings appropriate evidence and demonstrates that the judgment should be based on the Anti-Monopoly Law.

Therefore, even when a case is not initially a monopoly dispute, it should be transferred to a court with jurisdiction over monopoly disputes if (i) the defendant’s argument or counterclaim is on the grounds of the claimant’s monopoly behaviours and supported by evidence, or (ii) the case needs to be judged under the Anti-monopoly Law, but the first court has no jurisdiction over monopoly disputes.

1.4 Consolidate Trial

Articles 6(2) of the Antitrust Judicial Interpretation formulates that “where two or more claimants filed a lawsuit separately with different People’s Courts with jurisdiction for
the same monopoly act, the People’s Court which accepts the lawsuit later shall, upon becoming aware of the earlier case filing by the relevant People’s Court, rule within seven days that the case shall be transferred to the People’s Court which has accepted the lawsuit earlier. The People’s Court which accepts the transferred case may process the lawsuits together. The defendant shall take initiative to provide the people’s courts with relevant information about their involvement in other lawsuits for the same act during the defence stage.”

2. Relevant legislation and legal grounds

The Antitrust Judicial Interpretation, issued by the Supreme People’s Court, is formulated in accordance with the relevant provisions of the Anti-monopoly Law, the Tort Liability Law, the Contract Law and the Civil Procedure Law. Provided that the defendant violates the relevant provisions of the Anti-monopoly Law and implements a monopoly agreement or abuse of market dominance, the claimant may file a lawsuit and require the defendant to compensate for the loss based on the Anti-monopoly Law, Article 52 of the Contract Law and Article 3 of the Tort Liability Law.

According to Article 1 of the Antitrust Judicial Interpretation, a natural person, a legal person or other organization that has suffered a loss due to monopolistic behaviour and a violation of the antitrust law due to the contents of the contract or the association’s articles of association may file a civil lawsuit before the People’s Court. This is the specific application of Article 119 of the Civil Procedure law in monopoly dispute cases. Accordingly, a purchaser (including the direct and indirect purchaser) may file an antitrust civil lawsuit if he/she has suffered a loss due to monopolistic behaviour.

3. What types of anti-competitive conduct are damages actions available for?

Article 1 of the Antitrust Judicial Interpretation clearly formulates that “the scope of civil disputes caused by monopolistic behaviours, including natural persons or legal persons who have suffered losses due to monopolistic behaviours and disputes over the antitrust law, such as the contents of contracts and the associations of trade associations, or other organizations, civil lawsuits brought to the People’s Courts. The causes of actions in the antitrust civil lawsuits in the Notice of the Supreme People’s Court on the Promulgation of the Revised Regulations on Cases of Action for Civil Cases issued by the Supreme People’s Court in 2011 includes:

- disputes over anti-competitive agreements: (i) disputes over horizontal agreements; (ii) disputes over vertical agreements;
- disputes over abuse of dominant market position: (i) disputes over monopoly pricing, ii) disputes over predatory pricing, (iii) disputes over refusal to deal, (iv) disputes over restriction of trading, (v) disputes over bundle trading, and (vi) disputes over differential treatments;
- disputes over concentration of undertakings;
Generally speaking, from 2008 to 2018, the proportion of disputes over abuse of a dominant market position among antitrust lawsuits was the highest, and the proportion of disputes over monopoly agreements was lower.

4. What forms of relief may a private claimant seek?

The main purpose of antitrust civil compensation is to compensate the claimant rather than to impose punitive damages on the defendant. The liabilities formulated in Article 14 of the *Antitrust Judicial Interpretation* include cessation of an infringement and compensation for the losses, among others. At the same time, the people’s court may include the reasonable expenses paid by the claimant for investigating and preventing the monopolistic or collusive behaviour into the scope of compensation for losses upon the request of the claimant.

The *Antitrust Judicial Interpretation* does not clearly specify the forms of liability, e.g. separate liability or joint and several liabilities. The claimant shall submit their claims in accordance with the *General Rules of the Civil Law, the Tort Law and the Contract Law*.

5. Passing-on defence

There is no explicit provision in Chinese law for the pass-on defence. However, as (i) compensation for infringement in China is generally limited to the actual losses suffered by the claimants and (ii) indirect purchasers are allowed to sue as claimants in monopoly disputes, defendants can file pass-on defence in the monopoly disputes. However, in general, it can be said that, according to the general rules of the China’s Civil Procedure Law, the parties are liable to provide evidence for their own claims. The rules of evidence shall also be applicable to issues related to the pass-on defence issues where there are no special provisions.

6. Pre-trial discovery and disclosure, treatment of confidential information

There is no discovery procedure in China at the moment. Article 64 of the Civil Procedure Law of the PRC provides that the basic rule of proof in the field of civil litigation is “Litigants shall be responsible for providing evidence for their assertions”. The general rules of proof for civil litigation cases are applicable to the antitrust damages actions. In order to alleviate the burden of proof for the claimant, Article 7, 8, and 9 of the *Antitrust Judicial Interpretation* have provided specific guidance, as follows:

- When the anti-competitive behaviour for which a lawsuit is filed is a horizontal agreement between or among undertakings, the defendant shall bear the burden of proof to show that the said agreement does not exclude or restrict competition.

- When the anti-competitive behaviour for which a lawsuit is filed is an abuse of market dominance, the claimant shall bear the burden of proof that the defendant has dominance in the relevant market and has committed abuse of market dominance. Where the plea of the defendant is based on the legitimacy of its action, the defendant shall bear the burden of proof.
When the anti-competitive behaviour for which a lawsuit is filed is an abuse of market dominance by a public utility enterprise or any other undertakings which has monopolistic status pursuant to the law, the People’s Court may rule that the defendant has dominance in the relevant market in accordance with the specific details of market structure and competition, except where there are contrary evidences to reverse the judgment.

Article 64 of the Civil Procedure Law delegates to the People’s Court the power to investigate and gather evidence, which stipulates that “where a litigant and his/her/its agent ad litem are unable to gather evidence on their own due to objective reasons, or in the case of evidences deemed by the People’s Court to be necessary for trial of case, the People’s Court shall investigate and gather the evidences”.

Therefore, the Court may, when deemed necessary, investigate and gather evidence. In respect of protection of commercial secrets and sensitive information, Article 11 of the Antitrust Judicial Interpretation stipulates that “for evidence which involves State secrets, commercial secrets, personal privacy or any other contents which should be kept confidential pursuant to the law, the People’s Court may, according to their official powers or the application of a party concerned, adopt protective measures such as private hearing, restriction or prohibition of replication, showing to attorneys only, being ordered to execute letter of confidentiality undertaking, etc.”

However, there are no specific provisions that mandate antitrust enforcement agencies to disclose information about anti-monopoly conducts before the People’s Court (especially when the investigation programme is still in progress). Neither is there any rule regarding whether antitrust enforcement authority may disclose the evidence that the parties submitted in the application for leniency or in the commitment.

China’s anti-monopoly civil litigation is independent of the anti-monopoly administrative law enforcement in terms of procedure. Therefore, the evidential capacity, probative value of the penalty and the obligation to disclose the facts stipulated in the penalty decision have become the key issues for the connection and coordination between the two mechanisms. There is no specific provision that helps resolve these issues at this moment. Despite the fact that Article 114 of the Interpretations of the Supreme People’s Court on Application of the Civil Procedural Law formulates that “matters stated in documents prepared by State agencies or any other organizations with social management functions pursuant to the law within the scope of official powers shall be presumed to be true”, there is no existing rules regarding whether anti-monopoly administrative penalty decisions can be used as evidence in civil proceedings. In judicial practice, however, courts do refer to administrative penalty decisions when adjudicating cases.

### Limitation Periods

The General Principles of Civil Law stipulates that “the limitation of action of an application to a People’s Court for protection of civil rights are three years”.

The limitation of action for a lawsuit to seek compensation of damages arising from an anti-competitive behaviour shall commence from the date on which the claimant becomes aware or should become aware that its interests are harmed.
Where the claimant reports an anti-competitive behaviour for which a lawsuit is filed to the antitrust enforcement agency, the limitation of action shall be suspended until the investigation has been revoked terminated.

Where the alleged anti-competitive behaviour has taken place for more than two years consecutively at the time of filing the lawsuit by the claimant, and the defendant raises a limitation of action plea, compensation of damages shall be computed up to two years before the date of filing of the lawsuit by the claimant to the People’s Court.

8. Appeal

China’s civil procedure is subject to a two-tier judicial system. In the antitrust civil litigation, provided that a party (or parties) refuses to accept the judgment of the first instance, it may appeal to the higher court, and the second instance court will examine the relevant facts and the application of the law in the appeal request. After a court decision that has already taken effect, the parties may also apply for retrial in a higher court. Article 200 of the Civil Procedure Law lists the circumstances in which the people’s court should retry the cases.

On 1 January 2019, the Provisions of the Supreme People’s Court on Several Issues Concerning Intellectual Property Tribunal came into force. Appellate cases on monopoly disputes shall be heard by the Intellectual Property Tribunal of the Supreme Court.

The Intellectual Property Tribunal, based in Beijing, is a standing judicial body established by the Supreme Court to take charge of hearing of appellate cases of patent and other intellectual property requiring specialty. The judgments and decisions rendered by the Intellectual Property Tribunal are rulings of the Supreme Court.

9. Class actions and collective representation

Articles 53 and 54 of the Civil Procedure Law stipulate the representative action. Under the representative action where a person who is elected by a large number of parties to facilitate litigation and conduct litigation on behalf of their interests. The representative action is divided into two types according to the number of people represented:

- **Definite population representative lawsuit:** In the case of a joint action where there are multiple litigants who are parties to the lawsuit, the litigants may elect a representative to participate in the proceedings. The litigation actions of the representative shall be binding upon the litigants he/she represents;

- **Indefinite population representative lawsuit:** Where the subject matter of the litigation is common, there are multiple persons who are parties to the lawsuit, but the number of persons is not definite at the time of filing of the lawsuit, the People’s Court may issue a public announcement, stating the facts of the case and the claims, and notify the rights holders to register with the People’s Court within a stipulated period. The said judgment or ruling shall apply to unregistered rights holders who have filed a lawsuit within the limitation of action.

Consumers whose interests are damaged by anti-competitive behaviour can file a lawsuit directly with the court or jointly select representatives with other consumers.
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