Introduction

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.
Glossary

**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 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.
In Japan, private antitrust litigation is subject to the jurisdiction of the judicial court. These antitrust cases include both claims based on the Antimonopoly Law (“AML”) that follow government enforcement actions and stand-alone claims based on Civil Code as general tort. The claims based on the AML are granted benefits that reduce the claimant’s burden of proof. Although there have not been as many antitrust cases in Japan as there are in other jurisdictions where those cases are prevalent, the number has been growing gradually. While bid-rigging cases have been dominant, cases based on other types of infringement, including abuse of a dominant bargaining position, have been increasing in recent years. Injunctions could also be granted if a claimant’s interests are infringed upon or likely to be infringed upon by the defendant’s conduct, and the claimant is thereby suffering or likely to suffer extreme damage.

1. Jurisdiction

The primary authority in charge of enforcing the Antimonopoly Law (“AML”) in Japan is the Japan Fair Trade Commission (“JFTC”). However, the JFTC is only competent for administrative enforcement. Meanwhile, private damage actions are subject to the jurisdiction of the judicial court.

A court having jurisdiction over an antitrust claim for compensation for damage depends on its legal ground: an AML Article 25 action (“AML Article 25 action”), which builds on a JFTC order, or a stand-alone action based on Civil Code Article 709 as general tort (“Civil Code Article 709 action”) (see section 2(1)).

The AML provides that an AML Article 25 action is subject to the exclusive jurisdiction of the Tokyo District Court. A Civil Code Article 709 action, however, is subject to basic jurisdictional rules provided by the Civil Litigation Code. The Civil Litigation Code stipulates that, in principle, actions are subject to the jurisdiction of the local district court which has jurisdiction over the location of a defendant’s principal office/domicile. At the same time,  

1 Article 85-2 of the AML.  
2 Article 4(4) of the Civil Litigation Code.
the action can also be brought to the local district court which has jurisdiction over the location of the AML violation.\(^3\)

With regard to an antitrust injunction action (AML Article 24 action, see section 2(2)), in addition to a local court having jurisdiction based on the above jurisdictional rules provided under the Civil Litigation Code, the action can also be brought to a local district court in the location where a high court is located (i.e. Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takamatsu).\(^4\)

If more than one court has jurisdiction over the claim at issue, the claimant may choose the court where the claims are to be heard, in principle.\(^5\)

2. Relevant legislation and legal grounds

The AML and the Civil Code are the relevant legislation which provide legal grounds for private antitrust litigation and damage actions.

1) Legal grounds for compensation for damage

There are two types of legal grounds for compensation for damage caused by an AML violation: (i) claims building on a JFTC order (AML Article 25 action) and (ii) stand-alone claims (Civil Code Article 709 action).

Under Article 25 of the AML, parties (companies and business associations) that were found to be engaged in, or a party to, private monopolisation\(^6\), unreasonable restriction of trade\(^7\), or other unfair trade practices\(^8\) are liable to indemnify those injured by such parties (AML Article 25 action). However, the claimant is allowed to allege this claim only after the Japan Fair Trade Commission orders that either a cease-and-desist order, a surcharge payment order (a fine payable to the State of Japan) or a tribunal judgment is finalized\(^9\) (see Sections 5 and 10 for more details).

An AML violation can also be claimed as general tort, a violation of Article 709 of the Civil Code. It stipulates that persons who violate the rights or legally protected interests of another person must pay the damages resulting from their actions; this is recognised as including anti-competitive acts (Civil Code Article 709 action). This could be claimed even in the absence of preceding JFTC orders.

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3 Article 5, Item 9 of the Civil Litigation Code.
4 Article 84-2(1) of the AML.
5 Although the parties to a contract can designate an exclusive jurisdiction, which includes foreign courts, by agreement, that agreement could be challenged by arguing that the agreement violates the regulation against the abuse of a superior bargaining position, if the agreement might impose excessive disadvantages on one party (Tokyo District Court, 15 February 2016 and Tokyo High Court, 25 October, 2017).
6 As defined in Article 2(5) and prohibited in Article 3, former part of the AML.
7 As defined in Article 2(6) and prohibited in Article 3, latter part of the AML.
8 As defined in Article 2(9) and prohibited in Article 19 of the AML.
9 Article 26(2) of the AML.
2) Legal grounds for injunction

Under Article 24 of the AML, a private claimant may, in addition to seeking damages, seek an injunction (provisional as well as permanent) against certain unfair trade practices\(^{10}\) (such as price discrimination, restrictions on resale pricing, below-cost sales and anti-competitive divisions of territories) in order to restore the injured party to the position held prior to the commencement of the violation ("AML Article 24 action"). The defendant must be engaged in the relevant unfair trade practices at the time as an AML Article 24 action is commenced. On the other hand, an AML Article 24 action cannot be brought based on unreasonable restriction of trade, which includes cartels and bid-rigging, and private monopolisation, although some unfair trade practices overlap with unreasonable restriction of trade and private monopolisation.\(^{11}\) In order for injunctions to be granted, a claimant is required to prove that its interests are being infringed upon or are likely to be infringed upon by the defendant’s conduct and it is thereby suffering or likely to suffer extreme damage.

3) Legal grounds for recovery of unjust enrichment

A claimant can seek monetary redress for violations of the AML on the basis of the doctrine of unjust enrichment pursuant to Articles 703 and 704 of the Civil Code.

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

Any person who suffered damage due to conduct that constitutes an unreasonable restraint of trade, a private monopolisation or an unfair trade practice in violation of the AML is entitled to bring an action seeking compensation for damage.

1) Unreasonable restraint of trade

An "unreasonable restraint of trade" refers to business activities where enterprises mutually restrict or conduct their business activities in a way which causes a substantial restraint of competition in a particular field of trade, *i.e.* relevant market.\(^{12}\) Cartels and bid-rigging are typical examples, and agreements that cover topics such as price fixing, production limitation, and market and customer allocation are typical examples of cartels. The AML applies to international cartels that have anti-competitive impact on the Japanese market.

2) Private monopolisation

The AML also prohibits a "private monopolisation".\(^{13}\) This refers to such business activities by which an enterprise excludes or controls the business activities of other enterprises, thereby causing a substantial restraint of competition in any particular field of trade.

3) Unfair trade practice

Even in cases where a substantial restraint of competition is not caused, certain types of

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\(^{10}\) Article 19 of the AML (for conduct of trade associations, Article 8, Item 5 of the AML).

\(^{11}\) In cases where an Article 24 action is not available (e.g. unreasonable restriction of trade or private monopolisation, which cannot be deemed to be unfair trade practices), injunctions based on general tort may theoretically be possible, although such cases should be very limited.

\(^{12}\) As defined in Article 2(6) and prohibited in Article 3, latter part of the AML.

\(^{13}\) As defined in Article 2(5) and prohibited in Article 3, former part of the AML.
conduct that are designated by the AMl as “unfair trade practice” still violate the AMl if they impede fair competition. These types of conduct include, among others: (i) price discrimination, (ii) collective boycotts, (iii) restrictions on resale pricing, (iv) below-cost sales, (v) anti-competitive divisions of territories, and (vi) abuse of a superior bargaining position.

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

Claimants may request to compensate damages under Article 25 of the AML or under general tort provisions of the Civil Code: (i) they may also seek an injunction under the AML; (ii) in addition to this, specific provisions may provide a framework for compensation to shareholders; (iii) while general principles of Japanese law allow claimants to request for the invalidity of anti-competitive agreements; (iv) compensation for unjust enrichment; (v) or interim measures, (vi) punitive or treble damages are not available in Japan.

1) Damage claims pursuant to Article 25 of the AML and Article 709 of the Civil Code

As mentioned above, any person who suffered damage due to conduct that constitutes a violation of the AML (see Section 3) is entitled to a claim for compensation for damages on the grounds of either (i) Article 25 of the AML, or (ii) general tort under Article 709 of the Civil Code.

With regard to a Civil Code 709 action, a claimant is required to prove: (i) the illegality of the defendant’s conduct; (ii) intent or negligence of the defendant; (iii) the amount of damages; and (iv) the reasonable causation between the defendant’s conduct and the damages.

In contrast, when claiming damages based on Article 25 of the AML, a claimant need not prove intent or negligence of the defendant ((ii) above). The court may also request the JFTC to provide its opinion regarding the amount of damages (see also Sections 5 and 10).

Even indirect purchasers have legal standing to file a lawsuit to claim damages arising from a cartel in violation of the AML.

With regard to bid-rigging, citizens of a local government may request their local administration to file a claim against infringing companies.

2) Injunctions pursuant to Article 24 of the AML

Under Article 24 of the AML, any person whose interests are infringed or are likely to be infringed by a violation of Article 8, Item 5 (i.e. activities by a business association that cause a member company to employ unfair trade practices) or Article 19 (i.e. unfair trade practices by a company) is entitled to demand suspension or prevention of such infringement from

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14 As defined in Article 2(9) and prohibited in Article 19 of the AML.
15 Article 25(3) of the AML.
16 Article 84 of the AML.
17 The Tsuruoka Kerosene case, Supreme Court, 8 December 1989.
18 Article 242 of Local Autonomy Law. Since the amendment of the Local Autonomy Act in 2002, citizens have not been able to file a claim directly against infringing companies.
a company or a business association if such person suffers or is likely to suffer material damages by such conduct.

For claims for injunction based on Article 24 of the AML, a claimant must prove that: (i) the defendant’s conduct falls under certain types of unfair trade practices in violation of Article 8, Item 5 or Article 19 of the AML; (ii) the claimant’s interests have been infringed or are likely to be infringed; and (iii) the claimant suffered or is likely to suffer “material” damages by such conduct.

In the event that an action for the aforementioned injunction is filed pursuant to Article 24 of the AML, the court shall send a notice to the JFTC and may request the JFTC to provide its opinion on the application of the AML and other necessary matters. In order to avoid an abuse of the right to injunction, the court may order the claimant to furnish an adequate security deposit at the request of the defendant.

On 30 March 2011, the Tokyo District Court issued the first decision in which a private claimant prevailed in an Article 24 injunction case. The case involved a claimant seeking an injunction against a competitor that actively sought to obstruct the dry ice business of the claimant. In addition, Utsunomiya District Court issued a permanent injunction in 8 November 2011 against a local bus company to cease providing bus operation services for free on the grounds that it constituted predatory pricing.

3) Derivative shareholder actions under the Corporation Act

Although this is not exactly private antitrust litigation, derivative shareholder actions under the Corporation Act may have an impact on companies violating the AML. Under Articles 423 and 847 of the Corporation Act, if a company has been found liable under the AML, the Civil Code or other laws, its shareholders may sue the directors of the corporation for their intentional or negligent acts, if the corporation does not implement its own lawsuit against its directors within 60 days of receipt of the shareholders’ request. Thus, if the corporation is given a surcharge payment order by the JFTC, or is liable for damages under an AML Article 25 action or a Civil Code Article 709 action, the shareholders of the corporation may file a derivative shareholder action against the directors of the corporation.

Although the number of these actions has been limited, for instance, a shareholder of Sumitomo Electric Industries, which was imposed a JPY 8.8 billion (about US$ 80 million) surcharge payment by the JFTC for its engagement in an optical cable cartel, brought derivative shareholder actions to the Osaka district court. This case was settled in 2014 with payment of JPY 520 million (about US$ 4.7 million) from the directors to the company.

19 Article 79 of the AML.
20 Article 78 of the AML.
21 The Tokyo High Court reversed this judgment in 17 April 2012 based on a finding that the defendant had already ceased its predatory pricing and thus there was no need to order an injunction.
22 A notable example of such derivative shareholder actions is the Nomura Securities case, Supreme Court, 7 July 2000.
23 A shareholder must continuously hold a corporation’s shares for a period of six months in order to file a derivative shareholder action.
4) Civil litigation alleging invalidity of contacts violating the AML

Although this is also not exactly private antitrust litigation, if contracts are deemed to be in violation of the AML, a party may allege invalidity of such contracts pursuant to Article 90 of the Civil Code, which is a general provision invalidating any legal conduct violating public policy and morality, in civil litigation.

Unlike EU law, Japanese law does not have a specific provision which stipulates that agreements that violate antitrust law are void. However, courts can reach the same conclusion on the basis of Article 90 of the Civil Code.

5) Actions for recovery of unjust enrichment

A private action to recover unjust enrichment may be available based on Articles 703 and 704 of the Civil Code, depending on the circumstances. A party may bring a claim for recovery of profits gained by the defendant through conduct in violation of the AML.

6) Interim remedies

A claimant may file with a district court a petition for preliminary injunction to suspend or prevent the conduct that violates or is likely to violate the AML pursuant to the Civil Code and the Civil Preservation Act.

5. Burden of proof/Passing-on defence

The burden of proof in private enforcement of antitrust rules depends on the remedy and the procedures described above.

1) Damage claims pursuant to Article 25 of the AML

In an AML Article 25 action, the claimant need not prove the defendant’s intent or negligence as to the harmful acts. Furthermore, although the JFTC’s finding does not legally bind the courts, the relevant court will rely on the JFTC's findings from the order or JFTC tribunal judgment. The claimant would, however, need to prove the amount of its damages and the reasonable causation between the defendant’s conduct and the damages. The court may, therefore, request the JFTC's opinion on the scope of damages, pursuant to Article 84 of the AML (see also Section 10).

Under the AML, unlike US law, the defendant is free to allege that no damages should be granted to the claimant where the claimant has already passed on the amount of the damages to its own customers. It would not be a factor when considering the issue of standing however; instead, it can be argued in the context of the scope of damages. This means that under the AML, an award for damages must compensate for the injury “actually” suffered by the claimant. Thus, if a direct purchaser passed on the amount of the injury to its own customers, it may have difficulty showing the existence of an injury or proving the

24 The Naigai-Nipro case, Tokyo High Court, 21 December 2012.
25 In practice, it is questionable whether opinions of the JFTC for AML Article 25 actions are actually effective, because such opinions are generally templates based on a ‘before and after analysis’.
26 Tokyo High Court, 19 September 1977, Tokyo High Court, 17 July 1981 and Supreme Court 2 July 1987.
full amount of the damages, and thus the amount of damages they can recover would be correspondingly reduced (see also Section 10).

2) General tort claims under the Civil Code

A claimant in an Civil Code Article 709 action faces a higher burden of proof than a claimant in an AML Article 25 action claimant, especially when there is no preceding finalized JFTC order. It must prove (i) the illegality of the defendant’s conduct, (ii) the intent or negligence of the defendant, (iii) the amount of the damages, and (iv) the reasonable causation between the defendant’s conduct and the damages. In practice, however, the burden of proof with regard to the intent or negligence of the defendant is not deemed important because violations of the AML are normally associated with, at minimum, negligence of the violators.

3) Injunctions pursuant to Article 24 of the AML

The claimant needs to prove that the defendant was engaged in unfair trade practices resulting in or threatening to cause “extreme” damages, which is a higher standard than the ordinary level of damages for claimants to prove, as well as the reasonable causation between the unfair trade practice and the extreme damages. However, the claimant does not need to prove the defendant was negligent or intended to engage in the conduct.

An interim injunction is also available. For the interim injunction to be granted, the claimant is required to prove that the interim injunction is necessary in order to avoid any substantial detriment or imminent danger.

4) Derivative shareholder actions under the Corporation Act

The claimant shareholders need to prove the intent or negligence of the defendant directors, the amount of damages, and the reasonable causation between the defendant’s conduct and the damages.

5) Civil litigations alleging invalidity of contracts violating the AML

In order for a contract to be invalidated, the claimant will need to prove the relevant facts underlying the violation of the AML, e.g. a price fixing contract constituting a cartel or a sales contract that was concluded due to abuse of a supplier’s superior bargaining position.

6) Unjust enrichment

A claimant can seek monetary redress for violations of the AML on the basis of the doctrine of unjust enrichment pursuant to Articles 703 and 704 of the Civil Code. The claimant must prove that the defendant received benefit without any legal cause and thereby caused loss to the claimant.

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

There is no US-style mandatory document production or extensive discovery system in Japan, except when a court order for submission under the Civil Litigation Code is issued.
The statutory scope of the court order has been expanded in recent years. Under the Civil Litigation Code, courts can issue an order to submit documents not only to the counterparty, but also to third parties if a claimant identifies the requested document by providing the court with the title and subject of the document that it wants disclosed. The scope of the court order to third parties has been expanded in a recent private antitrust litigation, where a court ordered the submission of documents retained by the JFTC, such as interview records prepared by the JFTC and reports produced by the defendant in response to requests for information by the JFTC. Even leniency submissions to the JFTC could be subject to the court submission order, although it is expected that the JFTC will resist such an order to disclose.

Under the Civil Litigation Code, if the court so orders, the relevant party must comply and submit requested materials. If the ordered party does not submit the relevant evidence, then the other party, as well as the court, is generally entitled to deem such other party’s allegations related to the content of such materials as true. There are several exceptions, such as (i) documents subject to confidential obligations of public servants or professionals, (ii) documents created exclusively for self-use, and (iii) documents relating to the right to remain silent under criminal procedure.

The 2009 Amendments of the AML introduced a special rule for such a court order relating to an Article 24 action, similar to the rule in intellectual property litigation. The relevant party is entitled to request that the other party submit materials as ordered by the court, except for cases in which there is a justifiable reason to reject submission of the requested materials, pursuant to Article 80 of the AML. This rule expands the scope of documents to be disclosed since it targets all documents except for those with a justifiable reason not to be submitted. However, this special rule does not apply to materials held by a third party and applies only to an Article 24 action. Even if a document necessary to establish the violation contains trade secrets, the court may order disclosure of the document. However, in that case, the disclosing party may seek a protective order, pursuant to Article 81 of the AML. Such a protective order prohibits the party that obtains the discovery, as well as any attorneys or agents of that party, from using the information in the documents for any purpose other than the lawsuit. Violations of the order will result in criminal sanctions.

A claimant in an antitrust litigation can also obtain access to documents held by the JFTC that could be evidence in the litigation by petitioning the court to commission the JFTC to send the document voluntarily. Unlike an order to submit documents, the JFTC is not obliged to respond to the request of the court. However, its notice stipulates that, among documents that are collected or produced in the course of its antitrust investigations, the JFTC will submit the documents that are relevant to the existence of illegal conduct, the amount of damages and the causation between the illegal conduct and the damages, if requested, while taking the secrets of enterprises and personal privacy into consideration.

28 For example, Goyo Kensetsu case, Tokyo High Court, 16 February 2007 and Osaka District Court, 15 June 2012.
29 Article 223 of the Civil Litigation Code.
30 Article 224 of the Civil Litigation Code.
31 Article 220 of the Civil Litigation Code.
32 Article 226 of the Civil Litigation Code.
Moreover, access to documents held by the JFTC can also be requested on the basis of the Administrative Information Disclosure Act.

7. Limitation Periods

An AML Article 25 action by a private claimant must be brought within three years from the date on which the relevant JFTC order becomes final.\footnote{Article 26(2) of the AML.} As a recent example, in 2009, some of the franchisees of a convenience store filed a lawsuit based on Article 25 of the AML against the convenience store franchiser at the Tokyo High Court\footnote{The Tokyo High Court had exclusive jurisdiction of AML Article 25 Actions before the amendment of the AML in 2013.} for its abuse of its superior bargaining position, for which the JFTC issued a cease-and-desist order on 22 June 2009. In this case, damages caused by the defendant's conduct more than three years before the filing of the lawsuit, which could not have been indemnified under a Civil Code Article 709 action, were upheld to be indemnified.

On the other hand, a Civil Code Article 709 action must be brought either within three years from the date the possible victim or claimant becoming aware of the conduct that caused the damages or within 20 years from the execution of such conduct.

Under Article 167(1) of the Civil Code, derivative shareholder actions and the lawsuits pursuant to Articles 703 and 704 must be brought within ten years from the date of the harmful act.

With regard to civil litigation alleging the invalidity of contacts violating the AML, there is no legal limitation period.

8. Appeal

An AML Article 25 action may only be brought before the Tokyo District Court, whose judgment can then be appealed to the Tokyo High Court.\footnote{Article 85-2 of the AML.}

Filing Civil Code Article 709 actions is more convenient for parties located outside Tokyo because they can be brought before their local district courts, while an AML Article 25 action can only be filed with the Tokyo District Court. The judgment of the local district court can be appealed to the local high court and finally to the Supreme Court.

An AML Article 24 action can initially be brought before a local district court, the Tokyo District Court or a local district court in the location where a high court is located.\footnote{Article 84-2 of the AML.} A district court's decision may be appealed to a high court, and a high court decision may be appealed to the Supreme Court.

Derivative shareholder actions are filed with the local district courts.

34 Article 26(2) of the AML.
35 The Tokyo High Court had exclusive jurisdiction of AML Article 25 Actions before the amendment of the AML in 2013.
36 Article 85-2 of the AML.
37 Article 84-2 of the AML.
Civil litigation alleging the invalidity of contacts violating the AML is filed with the local district courts.

9. Class actions and collective representation

Class actions are not available in Japan.

Certified consumer groups may, however, seek injunctions for certain types of lawsuits, for example, cases under the Consumer Contract Law. In relation to antitrust lawsuits, a consumer group established in the Hyogo prefecture has filed a lawsuit seeking an injunction for the abuse of a superior bargaining position. In addition, certified consumer groups are also entitled to seek injunctions under Article 10 of the Act Against Unjustifiable Premiums and Misleading Representations. However, those certified consumer groups cannot seek damages.

On the other hand, the new two-step system for consumer group litigation in relation to suits for damages arising out of consumer contracts was introduced in 2016. In that consumer group litigation system, the consumer groups certified by the government are allowed to be the claimants in litigations for damages caused by violations of the AML, but that claim should be based on the Civil Code.

In the course of the discussions regarding the recent amendments to the AML, there was debate as to whether collective actions should be introduced in private antitrust litigation (i.e. AML Article 25 or 24 actions) in order to accelerate the use of private antitrust litigation and protect consumers’ interests. However, such amendments were not adopted because it was thought that it would be difficult for public consumers to prove violations of the AML, as they are often conducted in a secretive manner.

The Civil Litigation Code allows for the “appointed party” system, in which each claimant or defendant can appoint another claimant or defendant as its representative. This is different from a class action as the appointed party does not represent a “class”. Also, Article 38 of the Civil Litigation Code sets out a mechanism for joint actions, although that is not really a mechanism to pool a large number of claims, rather it is a regular action with a large number of claimants.

Furthermore, derivative shareholder actions in Japan are also different from class actions because damages are recoverable only by the company, not by the claimants.

39 Article 30 of the Civil Litigation Code.
40 The appointed party system was actually used in Tsuruoka Kerosene case, Supreme Court, 8 December 1989.
10. Key issues

Selection of an AML Article 25 action or a Civil Code Article 709 action

As mentioned above, compared to a Civil Code Article 709 action, an AML Article 25 action provides a claimant with the following benefits:

- Actions are subject to exclusive jurisdiction of the Tokyo District Court, which is expected to have higher expertise in dealing with antitrust litigation.
- The claimant need not prove the defendant’s intent or negligence as to the harmful acts. However, this benefit is not substantial given that the burden of proof with regard to the intent or negligence of the defendant would not be large because violations of the AML are normally associated with, at minimum, negligence of the violators.
- Although the JFTC’s finding does not legally bind the courts, the relevant court will rely on the JFTC’s findings from the finalised order or JFTC tribunal judgment in practice.
- The court may request the JFTC’s opinion on the scope of damages.
- A claimant can file the case within three years from the date on which the relevant JFTC order becomes final. A claimant can therefore claim indemnification for damages that cannot be claimed on the grounds of a Civil Code 709 action, which require a claimant to file the case within three years from the date the claimant becomes aware of the illegal conduct.

Those benefits make it reasonable for claimants to choose an AML Article 25 action rather than a Civil Code Article 709 action as the method to sue infringers in many cases where there are finalized JFTC orders. However, a claimant would bring an antitrust case on the grounds of Civil Code Article 709 in cases where, for instance, there is no preceding JFTC order or a claimant wants to sue for a defendant’s conduct that is not included in the subject of a preceding JFTC order or to sue an infringer that is not included in the addressees of the order.

Alleviation of burden of proof on amount of damages

A claimant often faces difficulty in proving the actual amount of damages caused by a defendant’s conduct which violates the AML. To address this challenge, the Code of Civil Procedure stipulates that, if it is extremely difficult to prove the amount of damages that have been incurred, the court may reach a finding on the amount of damages that is reasonable, based on the entire import of oral arguments and the results of the examination of evidence. This provision provides the court with broad discretion in deciding the amount of damages, alleviating the claimant’s burden of proof. The amount of damages in many antitrust cases has been determined on the grounds of this provision.
Documents containing attorney-client confidential communications

In December 2020, the JFTC introduced a new practice in antitrust investigations, which states that investigators will not access documents containing confidential communications between the suspect enterprise and its independent attorneys regarding legal advice in relation to the conduct concerned. Although such documents are temporarily kept by the JFTC in order for the determination officer to decide whether they fall under the scope above, the JFTC may not submit them to the court even when it is requested by a court, given that those documents cannot be used for antitrust investigations to prove the existence of an illegal conduct (see also Section 6).
ABOUT THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 100 countries. ICC’s core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world’s leading companies, SMEs, business associations and local chambers of commerce.