

Jurisdiction of Anti-monopoly Civil Litigation and Judicial Determination of Monopoly

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Along with anti-monopoly or antitrust civil litigation entering the judicial procedure,¹ the issues of jurisdiction of anti-monopoly civil litigations and judicial determination of monopolistic activities have been drawing wide attention from the academics and practitioners. This article is intended to probe into the two issues from the theoretical and practical aspects in the light of the pertinent law provisions and foreign legislation for the reference of those dealing with cases of the nature.

Jurisdiction of anti-monopoly civil litigation

Current research on the jurisdiction of anti-monopoly civil litigation needs to focus on the issues of necessity of the pre-administrative procedure of the courts' jurisdiction over the cases and the regional jurisdiction and level jurisdiction over civil cases of the kind.

1. Whether the courts' jurisdiction is required to go through the pre-administrative procedure

Under Article 108 of the Chinese Civil Procedure Law, one of the conditions for a lawsuit to be judicially admissible is: "it must be a civil suit acceptable by the People's Courts and subject to the jurisdiction of the People's Court". According to the law provisions, where a dispute should be resolved by any other relevant administrative agency, a plaintiff should be told to request the agency to handle it, and the court should not accept lawsuits of the nature.² As for the anti-monopoly civil litigation, the issue of controversy now is whether a civil litigation must go through the pre-administrative procedure for it to be judicially admissible.

Views are divided in the theoretical community on the issue of whether civil litigation may be directly instituted against a monopoliser as triggered by the provision regarding monopoliser to be held civilly liable of Article 50 of the Chinese Antitrust Law. Some believe that the legislation of Chi-

nese Antitrust Law aims at pre-position of the administrative proceedings, that is, only after the antitrust enforcement agency examines and decides on a monopolistic activity, can an interested party bring a civil suit against the monopoliser according to the decision made by the antitrust enforcement agency, or it or he does so according to the outcome of administrative reconsideration or litigation after it or he brought an administrative suit directed to a specific action of the antitrust enforcement agency. Such practice is on account of the nature of specialty and policy requirements of the Antitrust Law; the matters of specialty are to be first handled by special agency to prevent the possible blindness and confusion in implementing the Antitrust Law.³ Some with different views believe that a stakeholder should be allowed to directly bring civil lawsuit mainly for these reasons: (1) the demand for democratic judiciary in a nation under the rule of law should be satisfied; (2) the antitrust enforcement agency *per se* is limited; (3) monopolistic activities do not all end up in major or important lawsuits, and it is more reasonable and effective for stakeholders to litigate directly; (4) the pre-administrative procedure is not compatible with the international practice; and (5) it helps promote the effective implementation of the Antitrust Law as infringeers in the same industry are more sensitive to and familiar with the monopolistic activities than antitrust enforcement agency; civil suit makes up for the inadequate government enforcement and reduces the administrative costs.⁴

There are three approaches worldwide with regard to whether anti-monopoly civil litigation is required to follow a pre-administrative procedure. One is the US practice, with no pre-administrative procedure required. Under the US law provisions, anyone suffering from property or business injury because of any matter prohibited by the Antitrust Law may

sue in the court of the place where the defendant is domiciled, the act is discovered or an agent is based.⁵ Then, it is the practice in Singapore, by which an individual person cannot sue before the administrative procedure ends; in case of reconsideration, he is required to wait until the final result of the reconsideration comes out; and if no violation of the law provision is found, no civil suit should be brought.⁶ The third practice is found in Japan, where any infringer, because of an monopolistic activity, may sue in two ways for damages: litigate under the Antitrust Law and sue against infringement under the Civil Law.⁷ In Japan, if an interested party sues against infringement under the Civil Law, he must prove: (1) the infringer's subjective intention and fault; (2) reasonable connection between the infringer's act and the injury caused; and (3) the amount of damage. He or it may not prove the infringer's intention and fault, but must not make his or its claim until the corresponding examination is closed.⁸

For this writer, Article 50 of the Chinese Antitrust Law does not clearly address the question of whether going through the pre-administrative procedure is required for instituting the anti-monopoly civil litigation. While the people's courts have directly accepted some anti-monopoly civil litigations, they are mainly suits brought against businesses' abuse of their dominant position in the market. The matter of whether suits may be brought directly in the courts against monopolistic activity related to the matters of national importance requires further discussion and analysis.

For that matter, we may weigh upon the pros and cons of establishment of the pre-administrative procedure. The practice allowing a person to directly sue with no pre-administrative procedure established "specially suits those nations equipped with adequate judicial system, possessing powerful judicature and having rich social resources at their disposal".⁹ But absence of such a procedure is likely to cause abuse and waste of the judicial resources. The pre-administrative procedure is good to make the civil suit more relevant and efficient, and save judicial and other social resources. But its drawback is that failure to promptly resolve the problem in the administrative procedure would adversely affect the right of civil party to litigate. Besides, whether there is the need for the pre-administrative procedure has something to do with the advantages and disadvantages of the private and public enforcement of the Antitrust Law, which have their own advantages and disadvantages, each working better in some aspects not the other. Still in some other areas, both overlap and work together.¹⁰ In principle, when benefits from enforce-

ment are more than the costs of the enforcement, the private enforcement is worthwhile, otherwise, the public enforcement is extremely necessary¹¹. Lawsuits handled with private enforcement concentrate in cases where the market players have the obvious economic influence and discovery is easy. In unfair competition cases, bundle sale, exclusive trade and refusal to trade relatively fall into this circumstances.¹²

From this analysis, the writer is for the adoption of "dichotomy" on the matter of whether pre-administrative procedure should be required before anti-monopoly civil litigation, that is, for some accused monopolistic activities, such as the conclusion of monopoly agreements between businesses and their abuse of their dominant position in the market, the pre-administrative procedure is not necessary, and an interested party may directly bring a civil suit; but the pre-administrative procedure is necessary in case of concentration of businesses that precludes or restricts competition or might do so. In other words, if an interested party believes that the concentration of businesses inflicts injury to it or him, a civil suit may be instituted only after the matter is administratively handled, and the interested party has no right to directly prohibit the concentration of businesses mainly for these reasons.

Examination of businesses concentration involves complicated factors and requires special expertise. It is technically more demanding to determine whether businesses concentration jeopardises competition. Hearing antitrust civil cases involving businesses concentration requires relatively more special expertise, better adjudicative proficiency and better command of the policies.¹³ Besides, the businesses concentration involves national security examination and industrial policy review. For example, Article 31 of the Antitrust Law provides that where foreign acquisition of an enterprise in the territory of China or otherwise joint in businesses concentration involves the national security, besides the examination the businesses concentration conducted under this Law, the national security examination shall be performed under the pertinent law provisions. To date, there is no law that defines the important matters, such as the meaning of national security, factors and area having impact on the national security, and the procedure and agency responsible for the national security examination.¹⁴ The courts obviously do not have the relevant expertise and responsibility for making the examination in this regard. Some businesses concentration requires industrial policy examination because businesses of large scale are in a position to monopolise the market composition, and thus inhibit market creativity.¹⁵ The courts also obviously

have no professional command of the industrial policy.

Additionally, while the Antitrust Law has set forth express provisions, it is sometimes necessary to interpret the law provisions with economic theory, ascertain facts about monopolistic activities with economic analysis,¹⁶ and definite the scope of market and determine market share with efforts on the part of professionals; hence, in the anti-monopoly examination of businesses concentration, the administrative procedure may address many issues the courts find it hard to cope with.

It is not necessary to have much command of the macro-national policy, in cases involving conclusion of monopoly agreements between businesses and their abuse of their dominant position in the market, relative to cases of businesses concentration, for it is easier for interested parties to adduce evidence, and the courts have accumulated some experience from their trial of contract cases and unfair competition (essentially anti-monopoly civil litigation) cases¹⁷. Therefore, interested parties should be allowed to directly bring civil suit.

Whether the pre-administrative procedure is needed also determines the courts' scope of jurisdiction over anti-monopoly civil litigation. According to the practice of the various nations, there are generally three types of admissible anti-monopoly civil litigations: claim for damages due to unfair competition agreements, litigations against abuse of dominant position in the market, and other claims for protection under the Antitrust Law.¹⁸ Thus, infringees are allowed, in China, to directly litigate against acts of conclusion of monopoly agreements and abuse of dominant position in the market, but civil suit can be brought only after acts of suspected monopolistic businesses concentration go through the pre-administrative procedure. This practice harmonises with those in many other nations.

2. Issues relating to courts' jurisdiction over anti-monopoly civil litigations

The Jurisdiction over anti-monopoly civil litigations involves two issues: regional and level jurisdiction.

1) Regional jurisdiction over anti-monopoly civil litigations

Determination of regional jurisdiction is closely related to the cause of anti-monopoly civil litigations. The universal cause of anti-monopoly civil litigations may be claim for damages, that is, an infringer suffering from a monopolistic activity seeks monetary relief judicially. The litigation causes may further be divided into contractual or infringement disputes.

A monopolistic activity, *per se*, may have been performed under a contract, so contractual dispute may be the cause of action. For example, Article 329 of the Chinese Contract Law provides: "any technical contract that unlawfully monopolises technology, impedes technological progress, or infringes others' technical achievements is invalid." The provision is specifically interpreted in Article 10 of the Supreme People's Court's Interpretation of Several Issues Relating to Application of Law to Trial of Cases of Technical Contractual Disputes as of 2004. If a plaintiff claims that an act of the other party to a contract it concluded therewith contravenes said provision, the act is one of monopoly, and the cause of action is contractual dispute. In case like this, such cases should be under the jurisdiction of the court as determined under Article 24 of the Chinese Civil Procedure Law, that is, under the jurisdiction of the court of the place where the defendant has its or his domicile or where the contract is executed. Where the interested parties have agreed on the jurisdiction under Article 25 of the Civil Procedure Law, the jurisdiction of the court should be determined as agreed provided that the agreement is not contrary to the law provisions.

An monopolistic activity *per se* is an infringement; hence jurisdiction should be determined under the general principle concerning the regional jurisdiction in connection with infringement cases, that is, a case involving such monopolistic activity is under the jurisdiction of the court of the place where the infringement act is found (including the place where the infringement takes place and the place where the results of the act are found¹⁹) or where the defendant has its or his domicile.²⁰ As for how to determine the place where an infringement takes place in an anti-monopoly civil litigation, if businesses seek together to fix the price of some products, the place where the products are marketed is such place; but if an intermediate business purchases the products and retails them in good faith, whether the place of retail or the place where an act of using the products takes place is the place where the infringement takes place needs to be further probed into in practice.

2) Level of jurisdiction over anti-monopoly civil litigations

Except nations like Canada, Poland and Germany where special courts or tribunals have been set up for hearing anti-monopoly civil litigations, most other nations do not establish such special courts to handle anti-monopoly civil litigations.²¹ Anti-monopoly civil litigations, often involving relatively complicated legal and factual matters and relatively influential, are usually put under the jurisdiction of courts of a higher level.

For instance, in the United States, under the Elkins Acts, anti-monopoly suits involving the Government as the plaintiff may be instituted directly in the US Supreme Court. As cases of being relatively complicated, anti-monopoly civil litigations are tried by intermediate or higher people's courts in the first instance under Article 19 of the Chinese Civil Procedure Law. To date, provisions have been set out in some places regarding the issue of jurisdiction over anti-monopoly civil litigations to define the level jurisdiction over cases of the nature. For example, regarding cases of IP disputes it is provided in paragraph two (3) of Article 2 of the Provisions on the Level of Jurisdiction in the Beijing Courts system as issued by the Beijing Higher People's Court on 3 June 2008, that cases of IP disputes involving monopoly should be under the jurisdiction of the intermediate people's courts.

For the level of jurisdiction, this writer believes that since we are now still in the early stage of coping with the anti-monopoly civil litigations and there are now not many such cases yet, it is advisable to put the cases under the jurisdiction of a few designated courts for them to accumulate experience with a view to improving the antitrust enforcement mechanism compatible with the practical situation in China. But such intermediate courts should not be so few, or it would make it inconvenient for interested parties to litigate.

Courts' determination of monopolistic activities

In civil lawsuit, a court's determination of a monopolistic activity undoubtedly lies in the heart of the issues in a case. Article 3 of the Chinese Antitrust Law says that the monopolistic activities include conclusion of monopoly agreements between businesses, their abuse of their dominant position in the market, and concentration of businesses that is likely to preclude or restrict competition. Besides, Chapter 5 of the Antitrust Law expressly prohibits acts of abuse of administrative power to remove or restrict competition, namely administrative monopolistic activities. Of the above four monopolistic activities, the acts of conclusion of monopoly agreements between businesses and abuse of their dominant position in the market fall into some specific monopolistic activities. Article 13 of the Antitrust Law has defined the monopoly agreements as covering five acts, such as those for fixing or altering the prices of goods, controlling the amount of production and sales of goods, with an additional monopoly agreement provided in the embrative prescription on authorisation, that is, "the other monopoly agreements as determined by the antitrust enforcement agency under the State Council". Similar legislative arrangement can be found in the provision of

Article 17 of the Antitrust Law concerning "abuse of dominant position in the market".²² This mode of legislation gives rise to a question: in trying an anti-monopoly civil litigation against conclusion of monopoly agreements between businesses or abuse of dominant position in the market, is the court empowered to establish acts as monopoly that are not specified in the Antitrust Law? Or, say, does it have a power identical with that vesting in the antitrust enforcement agency to establish other types of monopolistic activities?

As is literally shown in Articles 13 and 17 of the Antitrust Law, the law-makers do not give courts such power. The two provisions seem to support the academic view that the administrative procedure is taken as the premise of anti-monopoly civil litigations. In other words, what acts constitute monopoly should be determined first by the antitrust enforcement agency; only after the monopoly is established, is the infringer allowed to bring a civil suit. However, as some scholars argued, determination of whether cases involves illicit acts as defined in the Antitrust Law or whether the new doctrine the antitrust enforcement agency applies to its enforcement is compatible with provisions or the legislative aim of the Antitrust Law should be made judicially.²³

This writer agrees to this view. As mentioned above, anti-monopoly civil suit instituted against monopoly agreement or abuse of dominant position in the market is not required to go through the pre-administrative procedure, nor is it required that the administrative procedure is taken as the premise of anti-monopoly civil litigations in the documents issued by the Supreme People's Court.²⁴ In case like this, if a court is empowered only to determine monopolistic activities provided for in the law provisions, and does not have the power to establish monopolistic activities at its own discretion, it is obviously contrary to the jurisprudential theory, and is not conducive to achieving the legislative aim of the Antitrust Law. In the area of unfair competition law that also relates to competition law, while the law expressly provides more than ten unfair competition acts, the people's courts still have the power to decide that other acts constitute one of unfair competition at their own discretion under the provisions of principle as set forth in Article 2, paragraph one, of the Unfair Competition Law and the definition of the unfair competition acts made in paragraph two thereof.²⁵ But similar provisions of principle cannot be found in the Antitrust Law. As a result, the courts have to seek law basis in establishing monopolistic activities not mentioned in the Law. That is, under what law would a defendant be found to have committed an act of monopoly?

For this writer, the courts, in case like this, have to seek law basis in the General Principles of the Civil Law, a basic civil law in China. Article 4 thereof provides for the principles of fairness and good faith, and the principle in Article 7 that any civil activity should not impair public interests and disrupt socio-economic order. These provisions may serve as the bases on which to establish monopolistic activities of defendants. In the judicial practice of the unfair competition, the law provisions under which courts establish acts of unfair competition not specified in the law often include, in addition to Article 2 of the Unfair Competition Law, the principle of good faith mentioned in Article 4 of the General Principles of the Civil Law. For that reason, Articles 4 and 7 may also apply to cessation of monopolistic activities. This shows, from a different aspect, the problem with Articles 13 and 17 of the Chinese Antitrust Law. The power-granting or embracive terms in the two provisions should not apply only to the “antitrust enforcement agency under the State Council”, and the people’s courts should also have the empowerment. ■

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¹ As in the Tangshan City Renren Information Service Co., Ltd. v. Beijing Baidu Network Information Science and Technology Co., Ltd., a case involving antitrust dispute, which was accepted by the Beijing No.1 Intermediate People’s Court and for which an open court session was held on 22 April 2009.

² Article 111 of the Chinese Civil Procedure Law.

³ Shi Jichun, *Understanding and Application of the Antitrust Law*, China Legal System Publishing House, 2007, P.305.

⁴ *Ibid.*, Pp.305-306.

⁵ §7 of the US Sherman and §4 and 4C of the Clayton Act.

⁶ Article 86 of the Competition Law of Singapore.

⁷ Liu Ningyuan (ed.) *Study on Chinese and Foreign Antitrust Law Implementation System*, Peking University Press, 2005, P.174.

⁸ *Ibid.*

⁹ See *supra* 7, P.23.

¹⁰ Wang Jian and Zhu Hongwen, *Construction of Private and Public Co-ordinated Antitrust Implementation System*, Anhui University Law Review 2008, Volume 1.

¹¹ See Michael Tebilcock, Ralph A. Winter, Paul Collins, Edward M. Iacobucci, *The Law and Economics of Canadian Competition Policy*, Uni-

versity of Toronto Press, 2002, P.739.

¹² See R. Jack Roberts, *International Comparative Analysis of Private Rights of Access*, A Study Commissioned by Industry Canada & Competition Bureau, Pp. 3,164.

¹³ See *supra* note 3, P.313.

¹⁴ Shi Jianzhong, *Antitrust Law: Comments on Code and Exploration of Jurisprudential Origin*, the Remin University of China Press, 2008, P.7.

¹⁵ Liu Jifeng and Aying, *Ten Years for Making One Sword: The Pros and Cons of Antitrust Law*, *The People’s Court Daily* on 3 August 2008, P.5.

¹⁶ Wu Hanhong, *Role of Economics in Anti-monopoly Civil Procedure*, carried in the *Proceedings of the Symposium on Issues of Anti-monopoly Civil Procedure* sponsored by the IP Tribunal of the Supreme People’s Court in Tianjin in October 2008.

¹⁷ See the Beijing No.1 Intermediate People’s Court’s Civil Judgment No. Yizhongminchuzi 2876/2003, in which the plaintiff Sai’en (Tianjin) New-tech Co., Ltd. accused the China Huabei Power Group Corporation Beijing Power Supply Corporation of unfair competition.

¹⁸ Wang Xiaoye, *Several Issues of Anti-monopoly Civil Procedure*, carried in the *Proceedings of the Symposium on Issues of Anti-monopoly Civil Procedure* sponsored by the IP Tribunal of the Supreme People’s Court in Tianjin in October 2008.

¹⁹ Article 28 of the Supreme People’s Court’s Opinions on Several Issues Relating to Application of the Civil Procedure Law of the People’s Republic of China.

²⁰ Article 29 of the Chinese Civil Procedure Law.

²¹ See *supra* note 7, Pp. 27-28.

²² Article 17, items 1-6 of paragraph one, of the Antitrust Law provides for six acts of abusing dominant position in the market, and item 7 further provides for the other acts of abusing dominant position in the market as determined by the antitrust enforcement agency under the State Council, which are also prohibited under the Law.

²³ See Mark Whitener, *Perspectives on Antitrust Litigation*, carried in the *Proceedings of the Symposium on Issues of Anti-monopoly Civil Procedure* sponsored by the IP Tribunal of the Supreme People’s Court in Tianjin in October 2008.

²⁴ Notice on Studying and Implementing the Chinese Antitrust Law issued by the Supreme People’s Court on 28 July 2008.

²⁵ Article 2, paragraphs one and two, of the Unfair Competition Law of the People’s Republic of China A business operator shall, in his market transactions, follow the principles of voluntariness, equality, fairness, honesty and credibility, and observe the generally recognised business ethics.

“Unfair competition” mentioned in this Law refers to a business operator’s acts violating the provisions of this Law, infringing the lawful rights and interests of another business operator and disturbing the socio-economic order.