Anti-Monopoly Disputes Are Not Arbitrable According to Chinese Court

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On August 29, the Jiangsu Provincial Higher People's Court ruled that an arbitration clause did not apply to an anti-monopoly dispute in a 10 million yuan ($1.5 million) case brought by a distributor against a manufacturer. This is the first time a Chinese court has ruled on the validity of an arbitration clause in an anti-monopoly dispute.[1] The court held that anti-monopoly cases involve the public interest and, in the absence of an express rule allowing arbitration of such private disputes, an arbitration clause may not serve as a basis for jurisdiction in a dispute between private parties.

In this case, the plaintiff, a distributor for a Fortune 500 manufacturer, entered into Distribution Agreements in 2012 and 2013 with the manufacturer, each of which stipulated that all disputes arising out of or in connection with the Distribution Agreement shall be resolved through arbitration. The award rendered by the arbitral tribunal is final and binding on both parties.[2]

The plaintiff filed an anti-monopoly lawsuit in the Nanjing Intermediate People's Court in 2014 accusing the defendant of abuse of market dominance, price monopoly conduct, tying, and market allocation by vertical restraint agreements and restriction of competition, and demanded compensation in an amount of more than 10 million yuan.[3]

Subsequently, the defendant filed a jurisdictional objection arguing that the court lacked jurisdiction because the Distribution Agreements included an arbitration clause.[4]

The Nanjing Intermediate Court, the court of first instance, held that the parties had not excluded anti-monopoly disputes from the arbitration clause, and under the Arbitration Law contract disputes and other property right disputes between citizens, legal persons and other organizations of equal status may be arbitrated. The court of first instance therefore rejected the jurisdictional objection. It also rejected the request for arbitration, however, on the grounds that the Distribution Agreements did not designate a single arbitration institution but instead provided for different arbitration institutions, which rendered the arbitration clause invalid.[5]

The Jiangsu Provincial Higher Court affirmed the Intermediate Court's ruling on appeal and held that there are three reasons why an anti-monopoly case may not be arbitrated:

(i) at present, relevant laws and judicial interpretations expressly provide for civil litigation as a

means to resolve civil monopoly disputes;

(ii) public policy considerations favor litigation over arbitration; and

(iii) the particular case involves the public interest, third-party interests and consumer interests and therefore overrides the preference of the parties for private dispute resolution under the arbitration clause.[6]

The decision by the Jiangsu Provincial Higher Court may have significant impact on business operators in China, including multinationals. Until now, it had been common practice both internationally and domestically for civil and commercial contract parties to submit their disputes arising out of contract to arbitration. The US and major European countries have also gradually included antitrust disputes in the arbitral domain.[7,8] However, this case shows that such arbitration agreements may be trumped by public interest considerations, i.e., even though the parties have expressly agreed to resolve monopoly disputes through arbitration, the litigation through the courts will prevail over arbitration.

When such disputes between distributors and manufacturers are adjudicated on the merits under Article 14 of the Anti-Monopoly Law (AML) which prohibits vertical agreements between businesses and their trading parties, they will be decided on the basis of the rule of reason.[9]

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[1] *See* MLex, Antitrust disputes take precedence over arbitration agreements, Jiangsu court rules in 10 million yuan lawsuit (Sept. 5, 2016).

[2] *Id*.

[3] *See* Huang Wei and Dong Jian, The arbitrability of Chinese anti-monopoly cases (Dec. 8, 2015), *available at* http://opinion.caixin.com/2015-12-08/100883075.html.

[4] See Tianyuan Lawyers, Jiangsu Higher Court, antitrust cases are not arbitrable (Sept. 5, 2016), *available at* http://www.360doc.com/content/16/0905/01/31662682_588463314.shtml.

[5] *Id*.

[6] *Id*.

[7] In *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), the United States Supreme Court ruled that the Federal Arbitration Act was broad enough to require arbitration of statutory claims as well as contractual ones, extending a recent line of court decisions favorable to arbitration. In *Hough v. Merrill Lynch*, 757 F. Supp. 283 (S.D.N.Y., 1991), J. William C. Conner in the Southern District of New York held that along with the later cases, *Mitsubishi* should be read to make domestic antitrust claims arbitrable, and the Second Circuit affirmed without issuing an opinion.

[8] In *Eco Swiss* (ECJ, June 1, 1999, Eco Swiss, Case C-126/97, [1999] ECRI-3055), the European Court of Justice accepts the arbitrability of EU competition law. Courts in various EU Member States have pronounced their respective competition law to be arbitrable, including France, Italy, England

and Wales, and Sweden. Under Swiss law, competition law is also arbitrable. *See* Phillip Landolt, "Arbitration and Antitrust: An overview of EU and national case law" (Apr. 13, 2012), *available at* http://www.landoltandkoch.com/wp-content/uploads/2012/07/Landolt_ArbitrationAntitrust_e-Competitions.pdf.

[9] *See* AML, Art. 14. Vertical agreements include monopoly agreements on fixing the prices of commodities resold to a third party, restricting the lowest prices for commodities resold to a third party, and other monopoly agreements confirmed as such by the relevant anti-monopoly enforcement authority. *See* Ding Liang, "After Many Twists and Turns China's First Vertical Monopoly Agreement Dispute Has Ended – Comments on *Rainbow v. Johnson & Johnson*," Wolters Kluwer (Aug. 5, 2013). The Supreme People's Court has yet to rule on a resale price maintenance case and has not cited *Rainbow v. Johnson & Johnson* as a model case.

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