

Private Antitrust Damage Actions in China: An Emerging Force?

China has emerged as a global power in merger review with surprising speed. Does the surge in private antitrust litigation suggest a similar pattern?

Introduction

This *Client Alert* provides a general description of the private antitrust litigation regime in China, now coming to life pursuant to Article 50 of the Chinese Antimonopoly Law (AML),¹ and other related Chinese laws. We identify a variety of issues already encountered and others that have yet to be raised in the private antitrust litigation process. Antitrust actions are generally subject to the same procedural rules that apply to other types of civil litigation in China, although antitrust proceedings have some unique aspects as well. These include the identity of the courts having jurisdiction to hear such suits, the use of experts, the interaction between court litigation and administrative enforcement procedures, relationship to intellectual property (IP) litigation, and the possibility for private claimants to obtain injunctions or forms of collective redress through “public interest” litigation.

As might be expected, answers to the broader questions about the future character and impact of private antitrust litigation in China have yet to emerge. But clearly the raw materials for an active legal arena are in place, an idea Chinese companies, customers, consumers and their counsel are beginning to discover. Local interest in the AML is developing in parallel with a global movement to bring American-style enforcement devices — including criminal enforcement, leniency programs and collective private damage actions — to the 100-plus jurisdictions that have joined the global antitrust community in the last quarter-century. So China now stands on the threshold of a new era of private enforcement, with many issues yet to resolve and various paths yet to explore. The possibility that private antitrust litigation will emerge as a significant phenomenon of the Chinese legal system is distinctly evident.

Background

The use of private treble-damage actions as an antitrust remedy dates at least to the English Statute of Monopolies (1623).² The United States’ first federal antitrust statute, the Sherman Act of 1890, also adopted the device. After World War II, US federal courts became increasingly receptive to numerous forms of private civil litigation with the adoption of notice pleading, liberal pre-trial discovery and opt-out class actions, among other plaintiff-friendly features. In addition, thanks to mandatory treble-damage awards, one-way fee-shifting in favor of successful plaintiffs, and ultra-low standards for proof of damages, private antitrust litigation eventually assumed unique importance in the federal system. This type of litigation is still a mainstay of US civil litigation practice, despite some mollifying reforms in recent decades.

Major substantive and procedural reforms of US antitrust began in the mid-1970s and continued until the start of the present Administration. Complaints must now pass a “plausibility” test, experts must pass through pseudo-science detectors before appearing at trial, and *per se* short-cuts to assessing competitive effect — which had become pervasive by 1972 — are now virtually abolished aside from naked hard-core cartels. Although these extensive reforms may somewhat soften the impact of private antitrust litigation, treble-damage antitrust cases (including class actions) still feature multi-year legal tournaments involving scores of lawyers on each side and nine- and even 10-figure damage awards. Such litigation remains an everyday feature of American antitrust practice.

Will private antitrust litigation assume any such role in the still-young antitrust regime that is emerging in China? The Chinese Antimonopoly Law (AML),³ which entered into force less than 10 years ago (on August 1, 2008), has already made a noteworthy impact on global commerce. The mandatory pre-merger review system has become a formidable hurdle for numerous global structural transactions that trigger Chinese notification. The AML is now being applied with increasing frequency to suspected cartel activity and other anti-competitive agreements, as well as dominance-abusing unilateral action — the same full range of business conduct usually addressed under other antitrust systems. The AML also has a limited, but potentially broad-ranging, set of enforcement provisions whose practical impact is just beginning to emerge. Among these is Article 50 of the AML, providing civil liability for those whose conduct in violation of the AML causes others to suffer losses. Reflecting the AML’s broadening reach, the number of private antitrust cases has surged from just 10 between 2008 and 2009, to 156 in 2015.⁴

General Legal Framework

The People’s Court System in China

Understanding China’s court system is an important step toward obtaining a basic grasp of private antitrust litigation in China. Chinese courts (generally referred to as the People’s Courts) are created to parallel the structure of China’s administrative regions and are organized at four hierarchical levels. Starting from the lowest level, these include:

- The Basic People’s Courts (districts, counties and townships)
- The Intermediate People’s Courts (medium and large cities and autonomous prefectures)
- The High People’s Courts (for 22 provinces, five autonomous regions, and four municipalities directly under the control of the Central Government)
- The Supreme People’s Court (SPC) in Beijing.⁵

There are also special courts which handle maritime, military, railway transportation and IP rights matters. All courts, including the SPC, have first instance jurisdiction depending on the amount of money in dispute or the nature of the case.

There are typically several divisions within each People’s Court, such as civil, economic, criminal, administrative and enforcement divisions. Each People’s Court has one president and several vice-presidents, while a division has one chief and several associate chiefs. Each People’s Court also has a judicial committee comprised of the president, division chiefs and experienced judges. The judicial committee is responsible for discussing important or difficult cases, and providing direction concerning

other judicial matters. The judges and panels of a People's Court follow the direction of its judicial committee.

Unlike the district courts in the United States, where proceedings are almost always conducted under the supervision of a single judge, Chinese courts function through judicial panels containing at least three members. Moreover, the judicial panels frequently interact with other members of the court, especially the judicial committee. Chinese judicial proceedings are therefore imbued with a degree of collective authority.

Laws Governing Private Antitrust Litigation in China

China is a civil law jurisdiction, in which the primary source of law include the legal codes specifying matters that can be brought before a court and the applicable procedures. The legal basis for private antitrust litigation is Article 50 of the AML. Article 50 provides that a party that engages in monopolistic conduct causing others to suffer losses therefrom shall assume civil liability pursuant to the law.⁶ This is the only provision of the AML that explicitly addresses private antitrust litigation.

The People's Court adjudicates cases according to:

- Statutes promulgated by China's Congress or its Standing Committee
- Regulations issued by the State Council or by the People's Congresses at provincial levels
- Judicial interpretations issued by the SPC

Currently, the two sets of substantive antitrust laws binding on the People's Court are the AML and Provisions of the State Council on the Standard for Declaration of Concentration of Business Operators. The People's Court will also, at its own discretion, refer to the various antitrust guidelines issued by the State Council and the regulations issued by ministry-level antitrust agencies, such as the National Development and Reform Commission (NDRC), the State Administration for Industry & Commerce (SAIC), and the Ministry of Commerce (MOFCOM). Other substantive laws and regulations may also be relevant to antitrust disputes.⁷

The procedural laws governing private antitrust litigation include the Civil Procedure Law of the People's Republic of China (Civil Procedure Law)⁸ and relevant judicial interpretations issued by the SPC, including the Anti-Monopoly Judicial Interpretation issued in 2012 (Anti-Monopoly Interpretation)⁹, Civil Procedure Law Judicial Interpretation, and other judicial interpretations on procedural matters such as evidence, settlement and trial supervision.¹⁰

In addition, People's Courts throughout the country must adjudicate cases consistent with certain cases the SPC has designated as "guiding cases." Since 2011, the SPC has designated more than 50 cases to be guiding cases.¹¹ Courts must include guiding cases in their legal analysis and explain whether and how the applicable guiding case is relevant to the case at hand, particularly if a party in litigation refers to a guiding case in its legal argument.¹² As of June 2016, the courts have not designated any antitrust matters as guiding cases. Nevertheless, the issuance of guiding cases suggests that precedents, particularly those issued by higher courts, play an important role in civil litigation in China, despite the fact that China is a civil law jurisdiction.

Substantive Scope of Private Antitrust Litigation

The AML defines three distinct categories of illegal “monopolistic conduct”: (i) monopoly agreements between business operators, (ii) abuse of dominant market position by a business operator, or (iii) concentration of business operators that has had or may have the effect of eliminating or restricting competition.¹³ According to the Anti-Monopoly Interpretation, private antitrust litigation may be based on any of these forms of monopolistic conduct.¹⁴

Most private antitrust lawsuits brought in China involve claims of abuse of dominant position. There have been fewer cases regarding monopoly agreements or concentration of business operators.

A large percentage of cases regarding abuse of dominant position were brought by individual consumers or private enterprises against large state-owned companies in the telecommunication, transportation, energy or public utility industries. These cases sometimes involved abuse of administrative power claims pursuant to Chapter 5 of the AML.¹⁵ Only a few cases were brought against private companies, including *Huawei v. IDC*¹⁶ and *Qihoo 360 v. Tencent*.¹⁷ In some cases, plaintiffs have also filed a lawsuit to confirm the legitimacy of their conduct. For example, in June 2016, Qualcomm filed a complaint against Meizu in the Beijing IPC, requesting a ruling that the terms of a patent license that Qualcomm offered to Meizu, comply with the AML and with Qualcomm’s fair, reasonable and non-discriminatory licensing obligations.¹⁸

A limited number of cases have involved cartel agreements. These cases may involve unlawful behavior of industry associations or bid-rigging. Private antitrust cases involving vertical agreements are rare in China — *Beijing Ruibang Yonghe Technology & Trade Co., Ltd. v. Johnson & Johnson* is the most well-known and thoroughly reviewed antitrust litigation based on vertical agreements to date.¹⁹

Private antitrust cases can also be categorized into tort or contract cases based on the plaintiffs’ choice of claims at the time of initiating their lawsuits.²⁰ In addition, defendants in contract litigation may use the AML as a defense or counterclaim, alleging that the contracts have violated the AML and are therefore not enforceable.

Procedural Aspects of Private antitrust Litigation in China

Jurisdiction over Private Antitrust Litigation

Intermediate People’s Courts (ICs), which handle relevant important local cases in the first instance and hear appeal cases from the Basic People’s Courts, have first instance jurisdiction in private antitrust matters. The rationale for giving first instance jurisdiction to appellate level courts was that many private antitrust cases are highly specialized and complex in nature. ICs with first instance jurisdiction over private antitrust cases include those in capital cities of provinces and autonomous regions, as well as municipalities directly under the central government. The SPC may also grant first instance jurisdiction to other ICs it chooses.

Separately, in 2014, China established Intellectual Property Courts (IPCs) in Beijing, Shanghai and Guangzhou. These three IPCs are responsible at first instance for private antitrust litigation within their respective geographic jurisdictions.²¹ Theoretically, the SPC may also grant permission for a Basic People’s Court to hear private antitrust litigation. To date, however, the SPC has not done so. In practice, some private antitrust litigation may originally be accepted by a Basic People’s Court, and then moved to an IC that has jurisdiction.

Jurisdiction Over Concurrent Torts and Contracts Claims

The Anti-Monopoly Interpretation provides that private antitrust disputes include both tort and contract claims.²² As a result, private antitrust lawsuits are subject to the territorial jurisdiction in accordance with the Civil Procedure Law, and parties are often unable to contract around that jurisdiction.²³

Under the Civil Procedure Law, a lawsuit based on a contract claim is subject to the jurisdiction of the People's Court in the place where the defendant has its domicile or where the contract is performed.²⁴ The Civil Procedure Law further provides that the parties to a contract may agree to the jurisdiction of the People's Court in the place where either party is domiciled, where the contract is performed or signed, or where the object of the action is located, if the agreed-upon jurisdiction is consistent with the level of court designated by law, and with any exclusive jurisdiction that may exist.²⁵

A litigation brought on a tortious act is subject to the jurisdiction of the People's Court in the place where the tort is committed or where the defendant has its domicile.²⁶ If a private antitrust lawsuit is based on a tort claim that arises in a particular region, the court in that region has jurisdiction even if the contract between the parties designates another regional court, or a court outside of China, for dispute resolution. For example, the SPC recently intervened in *Shenzhen Mindray v. US Masimo Corporation*. In *Shenzhen Mindray*, the purchasing and licensing agreement between the parties provided that any dispute arising from their agreement was subject to the jurisdiction of a California court. However, Shenzhen Intermediate Court ruled that Chinese courts had jurisdiction over the tort aspects of the antitrust litigation. The Guangdong High Court reversed, but the SPC reversed again, confirming the lower court's ruling. The SPC held that the AML provides jurisdiction for Chinese courts if the alleged torts could affect the Chinese market. Similarly, in *ZTE Corporation v. Vringo*, the Guangdong High Court ruled that the plaintiff's domicile (Shenzhen) was the proper venue and rejected the defendant's attempt to dismiss the case or move the case to Beijing.²⁷

Transfer Jurisdiction

According to the Anti-Monopoly Interpretation, if a civil dispute did not include antitrust claims when it was docketed, but evidence of monopolistic conduct surfaces in the course of the litigation, and the court does not have jurisdiction over antitrust cases (*i.e.*, Basic People's Courts), the court must transfer the case to another court that has jurisdiction over antitrust matters.²⁸ In order to prevent parties from abusing the system by presenting an antitrust defense or counterclaim for delay, the People's Court reviews the case to see whether there is evidence to support the antitrust allegation.²⁹ In general, the cause of the litigation as alleged by the plaintiff determines the nature of such litigation. For instance, in a case brought by a consumer named Jiao Jing against China Unicom's Beijing branch, the consumer relied on the Consumer Protection Law as the basis for calculating damages. China Unicom argued that the case had to be moved to a different court because the proper legal basis for calculating damages was the AML. The People's Court found, however, that using another law for the damages calculation did not change the nature of the cause of this litigation, and rejected the defendant's objection to jurisdiction.³⁰

If two or more plaintiffs have respectively filed lawsuits for the same monopolistic conduct with different People's Courts with jurisdiction, the court in which the case was docketed earliest has jurisdiction.³¹

Plaintiff's Standing to Sue

According to the Civil Procedure Law, plaintiffs must satisfy the following conditions in order to bring a civil litigation (including antitrust litigation):

- Plaintiff has a direct interest in the case

- There is a definite defendant
- There are specific claims, facts, and causes for the litigation
- The litigation is within the scope of acceptance for civil actions by the People's Court and under the jurisdiction of the People's Court where the litigation is brought³²

Whether the plaintiff has a direct interest is the primary standard for standing to sue. Article 50 of the AML imposes civil liability on business operators that engage in monopolistic conduct causing others to suffer losses therefrom. Thus, the key factors for standing are whether the plaintiff has suffered losses and whether such losses were caused by the defendant. For instance, if a cartel agreement among manufacturers resulted in a price increase, and retailers passed the mark-up to consumers, the consumers suffered harm caused by the cartel and therefore may initiate private antitrust litigation against the manufacturers.

In contrast, under US federal antitrust laws, only the retailers would be able to bring a claim for damages in this scenario. The standing requirements under US antitrust laws are also narrower — a plaintiff must not only show losses caused by an antitrust violation, but also that the losses were an “antitrust injury,” *i.e.*, an injury of the type antitrust laws were intended to prevent.³³ With certain exceptions, the indirect purchaser is not considered to have suffered an antitrust injury and therefore may only seek injunctive relief, even where the retailer passed on the full amount of the overcharge to the consumer.³⁴

Although the Civil Procedure Law provides for a collective litigation mechanism similar to the class actions commonly seen in the United States,³⁵ the use of the Chinese collective lawsuits (or class actions) is an exceptional rather than a generally accessible legal action.³⁶ China did not have any laws regulating or addressing public interest litigation until 2012, when the revised Civil Procedure Law came into effect. The Civil Procedure Law provides that if environmental pollution occurs or other acts impairing the public interests are committed, “relevant organizations” may bring actions to the People's Court on behalf of consumers.³⁷ Thus, if a group of consumers suffered losses caused by monopolistic conduct, China Consumers Association³⁸ may bring private antitrust litigation on behalf of the consumers. To date, there has not been an antitrust class action or a public interest litigation in China.

Interaction Between Administrative Investigation And Civil Litigation

The AML establishes parallel law enforcement mechanisms: administrative enforcement and civil litigation. Under the Anti-Monopoly Interpretation, courts are required to accept private antitrust cases even if no administrative investigation has commenced or after the investigation is complete, so long as other requirements for jurisdiction are satisfied.³⁹ However, the Anti-Monopoly Interpretation does not explain whether the People's Courts are required to accept a case *during* an ongoing administrative investigation, and no case has considered this point. As a result, whether a People's Court would accept cases under such circumstances remains unclear. In practice, it would not be surprising if the People's Court consulted the administrative agency to get more information before accepting the case, or, if the court has already accepted the case, consulted the agency before rendering its decision.

Huawei v. IDC provides an example of how IP litigation, antitrust litigation and administrative investigation may affect or trigger one another. In July 2011, IDC brought an action against Huawei for alleged IP infringement before the United States International Trade Commission (ITC) and the United States District Court for Delaware. A few months later, Huawei filed two lawsuits against IDC in the Shenzhen Intermediate People's Court, alleging abuse of dominant position by IDC. In February 2013, Shenzhen Intermediate Court decided in Huawei's favor. Four months later, the NDRC started to investigate IDC

based on Huawei's complaint, while the parties' appeal to the Guangdong High Court was pending. The NDRC eventually concluded its investigation by entering into a settlement.

In the United States, government enforcement actions also influence private civil actions, albeit in different ways than what is observed in the Chinese system. The Federal Trade Commission (FTC) enforces federal antitrust law through administrative and civil judicial proceedings, while the Department of Justice (DOJ)'s Antitrust Division has authority to seek criminal and civil remedies.⁴⁰ It has become typical for the announcement of an investigation by either agency to trigger an immediate barrage of private antitrust claims (characteristically styled as class actions) seeking treble damages. Private actions may run parallel to government proceedings, although a private litigant may benefit from waiting to pursue claims until government proceedings have progressed. Although files and documents collected during government investigations are generally protected from disclosure, public trial records can be used as a roadmap for plaintiffs to locate evidence that can be obtained through discovery. Further, a final judgment entered against a defendant in either a criminal or civil government proceeding constitutes prima facie evidence against the defendant in a subsequent civil proceeding.⁴¹ So far, similar patterns have rarely been observed in China.

One of the rare examples of an administrative enforcement action triggering civil litigation in China is the *Junwei Tian v. Beijing Carrefour Shuangjing Store and Abbott Shanghai* case. After the NDRC issued its decision finding unlawful vertical agreements by several infant formula suppliers, a consumer brought a litigation against one of those suppliers, including Abbott, for damages. A dispute regarding the defendants' objection to jurisdiction lasted nearly one year and the litigation is still pending.⁴² One likely explanation for the rarity of "piggy-back" civil litigation in China is the lack of either well-established class action mechanisms, treble damages or the one-way fee-shifting rule.⁴³ All of these mechanisms are, of course, typical of US treble-damage litigation. These mechanisms were provided in the US antitrust laws in a conscious attempt to supplement government enforcement through the actions of "private attorneys general," but no such similar concept exists in the history of the AML.

Remedies: Monetary Damages vs. Injunctions

The damages allowed in antitrust actions are limited to actual loss, and multiple damages are not available under the AML. In addition to damages, the People's Court may order a defendant to pay the plaintiff reasonable costs for investigating and stopping the infringement, including attorney's fees. However, under the Anti-Monopoly Interpretation, the period of limitation of actions for claiming the damages arising from monopolistic practice is limited to two years, commencing from the date on which the plaintiff knows or should know that its rights and interests were infringed. If the monopolistic practice continued for more than two years by the time the plaintiff filed an action in court and the defendant raised the limitation period in the defense, the damages are limited to two years from the date the plaintiff filed the action.

US federal law entitles both government enforcement agencies and private plaintiffs to seek injunctive relief.⁴⁴ Courts sometimes grant creative and novel injunctive remedies, which can include both structural and behavioral remedies. Most private plaintiffs, however, are focused on obtaining treble damages.

To date, injunctions have not been widely used in China outside the context of intellectual property litigation. Under a recently added provision in the Civil Procedure Law, a People's Court may grant an injunction with or without the request of a party if the execution of a judgment becomes difficult, damage has been caused because of the acts of one party, or for other reasons the court deems appropriate.⁴⁵ Article 50 of the AML does not limit the types of remedies for injuries arising out of monopolistic conduct.⁴⁶ Similarly, the Anti-Monopoly Interpretation allows the People's Court to order the defendant to

cease infringement, compensate for losses, or otherwise assume civil liability in accordance with laws.⁴⁷ Thus, the various kinds of civil damages provided in the General Principles of Civil Law,⁴⁸ the Tort Liability Law and the Contract Law are all applicable in private antitrust litigations.

While not a traditional civil remedy in China, injunctions have been seen in the antitrust context. For example, ruling on an abuse of dominance case that YingDing brought against Sinopec, the first instance court, Kunming Intermediate Court, ordered Sinopec to accept YingDing's biofuel products into Sinopec's distribution network within 30 days of the decision.⁴⁹

Discovery

Although China has a mechanism of exchanging evidence before trial, this process is not comparable to discovery in the United States, which is often a "sprawling, costly, and hugely time-consuming undertaking" particularly in the context of antitrust litigation.⁵⁰ First, exchanging evidence before trial is not a commonly adopted procedure in all cases. According to the SPC's Interpretation on Evidence, only complicated and important cases need to go through the process of exchanging evidence. In other cases, per request by the parties, the People's Court may arrange the evidence exchange meetings (normally only one or two) for the parties before trial.⁵¹ Second, the judge, rather than the parties, controls the various aspects of the exchange process.

If a party cannot submit evidence within the time period specified by the People's Court, the party must submit a request for late submission of evidence to the court based on reasonable grounds. The Civil Procedure Law allows evidence to be preserved at the request of a party when there is a likelihood that evidence may cease to exist or be lost or difficult to obtain later on. The People's Court can also take measures to preserve such evidence on its own initiative or require parties to appear in person for questioning on the relevant facts of a case.

Whether documents provided to administrative agencies in the course of an investigation are admissible evidence in a private antitrust lawsuit remains unclear. The Draft Guideline on Leniency Policies in Horizontal Monopoly Agreement Cases issued by the NDRC (Draft Leniency Guidelines)⁵² provides that administrative agencies maintain the confidentiality of all documents or information received in the course of the leniency program, except as otherwise required by law.⁵³ However, the Draft Leniency Guidelines, issued by the State Council, are not binding on the People's Court. In practice, the administrative agencies may be required to coordinate with the SPC or ask the SPC to issue a judicial interpretation on the confidentiality of leniency-related documents.

Burden of Proof

As in the United States, the Civil Procedural Law of China also places the burden of proof upon the claimant, and the same applies in antitrust cases. The plaintiff must prove all the substantive elements of the alleged violation (*e.g.*, the market dominant position of the defendant, the defendant's monopolistic conduct, the anticompetitive effects, the causal connection between the violation and the injury to the plaintiff, and any other elements required by the AML). Although the AML provides a rebuttable presumption that an enterprise with 50% or greater market share would be in a dominant position, it is still difficult for the plaintiff to win an abuse of dominance case if the relevant markets are difficult to identify, or to challenge successfully the defendant's justifications for its conduct.⁵⁴

In certain cases, market dominant position may be presumed until rebutted when a party is alleged to hold particular patents (such as a standard essential patent) or other exclusive rights. The defendant would want to affirmatively prove its asserted defense, such as smaller market share and lack of effect on competition. Each party in the litigation generally needs to prepare and present a significant amount of

evidence, even though there are no discovery proceedings similar to those available in the United States that would allow a party to obtain such evidence from the opposing party before trial.

Use of Dispositive Motions

Because trials in the United States characteristically require enormous expenditures of resources, defendants in civil litigation frequently challenge the plaintiffs' claims by filing dispositive motions, such as motions to dismiss or motions for summary judgment. This strategy is particularly common in the context of antitrust cases, the vast majority of which are filed as purported class actions. Many cases settle following disposition of such motions before trial. In this regard, China is very different from the United States: the Civil Procedure Law of China does not recognize the use of dispositive motions, and as a result such motions are not used in Chinese civil litigation.

All civil litigation in China is governed by the general procedure as provided in the Civil Procedure Law of China, with the exception of certain simple cases which can be reviewed by summary procedure at the Basic People's Court. As Basic People's Courts typically do not have jurisdiction over private antitrust litigations (unless approved by the SPC) and because private antitrust litigations are not considered as "simple cases," no summary procedure applies in private antitrust cases.⁵⁵ As a result, all private antitrust cases which are not settled proceed to trial.

Use of Experts

In the United States, nearly all civil antitrust litigation involves economic experts on both sides — often resulting in a "battle of the experts." Parties wishing to use expert testimony in a case must first establish the testimony's admissibility by meeting the *Daubert* standard.⁵⁶ Under *Daubert*, the court must find expert opinion to be relevant and reliable before it can be admitted.⁵⁷

Similar to the United States, the judge and the parties in private antitrust litigation in China may examine the experts who appear before the court.⁵⁸ Each party may move the court for the use of experts and examine the experts on the issues involved in the case. An expert witness must be authoritative and independent in his or her area of expertise, but there is no *Daubert*-like screen that an expert must pass through before testifying to the subject matter.

In addition, according to the Anti-Monopoly Interpretation, the parties may request the appearance of one or two persons with professional knowledge to provide explanations in certain specialized areas in the court.⁵⁹ Unlike experts, persons with professional knowledge face no requirements regarding their qualifications. In *Qihoo 360 v. Tencent*, both parties presented persons with professional knowledge to assist the court in forensic investigation. Since then, the use of persons with knowledge (mostly law professors and economists, either Chinese or foreign) in private antitrust cases is becoming increasingly common in China.

Expert Reports

The Anti-Monopoly Interpretation provides that a party may employ a professional institution or professionals to produce market investigation or economic analysis reports on specific issues of a case.⁶⁰ With the permission of the People's Court, both parties may jointly select the professional institution or professionals. If the parties cannot agree, the People's Court designates the professional institution or professionals to generate analysis reports for the case. Parties may not challenge the authority or independence of the institution or professional selected to conduct an analysis of the case as the institutions or professionals are either chosen by the parties' agreement or appointed by the court. The contents of the report, however, may be examined.

Trial and Settlement

Early Stages of a Trial

Prior to the opening of the court session, the People's Court gives notice to the parties and other participants⁶¹ in the proceedings three days in advance. If a case is public, the names of the parties, the cause of action, and the time and location of the court session is announced publicly. Additional claims by the plaintiff, counterclaims by the defendant or third-party claims related to the case may be tried within the same proceeding.

Trial Procedures

In most cases, trials are conducted by a panel of judges, referred to as a collegial panel. Collegial panels are the basic units in each People's Court. They are not permanent bodies, but rather are organized to adjudicate individual cases. A collegial panel is composed of three or more judges. If there are more than three judges on a panel, the number of judges must be odd.

Presentation and Examination of Facts

Following the opening given by the presiding judge, the presentation and examination of facts are normally conducted in the following order:

- Statements by the parties
- Testimony by the witnesses
- Presentation of evidence
- Expert conclusions
- Economic analysis report

Parties may present evidence which had not previously been exchanged, including expert evaluation or inspection reports, subject to the court's approval.

Exchange of Argument

A trial for a complicated private antitrust case may last for days, depending on how many issues are in dispute. Parties' arguments are normally presented to the court in the following order: statements of plaintiff, defense and third party (if any), debate between the parties and final arguments.

Trial courts must generally conclude a case within six months of accepting it. This time frame may be extended by six months, subject to the approval of the President of the Court. Any additional extension is subject to the approval of the higher court. The time used in document transfer, review of any objection to jurisdiction (which alone may take several months or even longer), investigation seeking evidence or judicial identifications are not counted toward the time limit of the trial proceedings. As most private antitrust cases involve circumstances warranting further investigation into various matters, trials commonly last one to two years. The appellate court may extend the time limit at its own discretion when hearing complicated cases, which may take another one to two years.

The Constitution and the Organic Law of Courts allow the People's Courts to exercise judicial power independently, free from interference from any organizations or individuals. In certain cases, if a case is considered complicated or important, the final decision may be concluded by the judicial committee of a

court rather than the designated collegial panel. This mechanism is said to be designed to safeguard correct and impartial exercise of judicial power, but in practice, it may also be used as a device by some committee members to interfere with the collegial panel's function. The People's Courts in China are conducting reforms to enhance the independence of individual judges.

Resolution by Settlement

While there is no publicly available information on what percentage of private antitrust cases are resolved through settlement, settlement during civil litigation, as in the United States, is very common. Under the Civil Procedural Law, if civil disputes are suitable for mediation, the People's Court must conduct mediation first, unless the parties refuse to do so.⁶² The SPC has also issued a judicial interpretation on settlement in order to facilitate the process and to encourage settlements. Chinese judges often prefer mediation because a settlement agreement cannot be appealed in the Chinese legal system. A valid settlement may only be challenged under certain exceptional circumstances under a procedure called "trial supervision," which is discussed below.

Mediation is still a developing area of legal practice in China, and currently there are no professional mediators or mediation agencies. Rather, the judge conducts or coordinates mediation during litigation proceedings. According to the SPC's interpretation on settlement, a judge may invite relevant governmental agencies, organizations, experts or other individuals to assist with mediation. Upon agreement between the parties, third parties may also mediate the case on behalf of the judge.

Appeal and Review

China follows the principle of two instances of trials for final adjudication; the first instance of adjudication is trial, and the second instance of adjudication is appeal. Appeals are heard by the next higher level of the People's Court. As ICs or IPCs typically are the first instance courts for private antitrust litigations, appeals are often heard by the High People's Courts.

A party may appeal within 30 days following receipt of judgment. Appeals can be decided with or without a trial, depending on the complexity of the case. The appellate court will review documents prepared by both sides. The appellate court will also review the lower court's written decision, along with any other relevant written evidence. Appellate courts generally defer to the lower court's decision. If the appeals court finds error in the lower court's decision, it will either reverse or remand. If the court reverses, it is changing the decision entirely. If the appeals court remands the case, the matter is remitted or sent back to the lower court with instructions on how to correct the original defect in legal reasoning.

The judgment of the second trial is final and cannot be appealed. However, the parties to litigation may challenge the final decision or the effective decision through a procedure called "trial supervision." Trial supervision can be initiated when there is new evidence sufficient to set aside the original judgment or a lack of evidence establishing the basic facts ascertained in the original judgment. In addition, parties may move for trial supervision when the main evidence for the facts established in the original judgment were falsified or not cross-examined, or if there was a clear error in the application of law in the original judgment.

Trial supervision is most similar to a motion for new trial in the United States, in that the previous judgment is vacated and the evidence is re-examined. However, one main difference is that trial supervision is conducted by the appellate court or the higher court. The retrial initiated by the trial supervision procedure does not suspend enforcement of the judgment under challenge, if the parties requested such trial supervision.⁶³ The parties must apply for trial supervision within six months after the judgment becomes legally binding.⁶⁴ The court then decides whether to accept the application for trial

supervision within three months.⁶⁵ The court that issued the original ruling or a higher-level court can also initiate trial supervision on its own authority. Under such circumstances the court generally suspends enforcement of the challenged judgment.⁶⁶

Historically, the People's Courts were cautious in using trial supervision because the original decision was often reversed or remanded once a trial supervision was initiated. Nowadays, courts have become more liberal in their use of trial supervision, but less likely to overturn the original decision. As trial supervision is becoming prevalent, it is often considered a "third instance trial." The time limit for concluding trial supervision depends on whether the judgement in question was made by the first instance or the second instance court.

Many private antitrust cases have gone through trial supervision proceedings, including the *Johnson & Johnson* case, *Qihoo 360 v. Tencent*, and *Shenzhen Mindray v. Masimo Corporation*. As antitrust laws are still developing in China, the losing party is often able to get the original decision reversed or changed, especially when new regulations or new precedents support the losing party's arguments. Parties seeking trial supervision also recognize that doing so shows the company's confidence in its business model and helps protect the company's reputation.

Although rarely seen, there is another circumstance of trial supervision. The People's Procuratorate⁶⁷ may object to the People's Court at the next higher level and ask the People's Court to retry the case.

Lastly, while valid settlement agreements typically may not be challenged in an appeal, parties may apply for trial supervision and seek to set aside the settlement agreement if evidence proves that the settlement was involuntary or against public interest.

Conclusion

China's antitrust regime is still young, and the substantive antitrust law, including the AML and the existing precedent, often does not provide a complete answer to antitrust disputes. In some cases, judges may even look into cases in other jurisdictions, such as those from the European Union and the United States. For instance, Dr. Li Zhu, an SPC judge, recently discussed his view on when injunctive relief would be problematic under the AML by referring to EU and US practices, including the European Court of Justice's ruling in *Huawei v. ZTE*.⁶⁸

However, more lawyers, companies and consumers are realizing the importance of using the AML to protect their rights. In addition, many ongoing reforms within the People's Court system may affect the substantive or procedural aspects of civil litigation, including private antitrust litigation. Those reforms include the issuance of more guiding cases, the Central Political and Legal Affairs Commission's new regulation on hiring experienced lawyers as judges⁶⁹ and the increasing specialization of IPCs. As China's Court becomes more efficient, transparent and professional, potential plaintiffs may come to prefer bringing private antitrust actions than reporting their cases to the administrative agencies. On the other hand, the lack of a meaningful class action regime may prevent private antitrust litigation in China from reaching a scale comparable to that in the United States.

One thing is clear: private antitrust litigation is a growing field of law in China, and more and more private actors are utilizing Chinese courtrooms for resolving antitrust disputes.⁷⁰ We encourage businesses with a presence in Chinese and their legal counsel to keep a close eye on the development of private antitrust litigation in China.

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Endnotes

- ¹ The Antimonopoly Law of the People's Republic of China [hereinafter AML] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), translation available at http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm.
- ² Donald I. Baker, Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?, 16 *Loyola Consumer L. Rev.* 379, 379 (2004).
- ³ The Antimonopoly Law of the People's Republic of China [hereinafter AML] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), translation available at http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm.
- ⁴ New antitrust cases surge 80 percent as Chinese courts hear 156 antitrust cases in 2015, *Mlex Market Insight*, Apr. 22, 2016.
- ⁵ Directly beneath China's national government, the top-level units of government include twenty-three provinces, four municipalities, five autonomous regions and two "Special Administrative Regions" (Hong Kong and Macau). The Chinese Constitution establishes a three-level hierarchy with those top-level units, consisting of counties and townships. As a practical matter, however, provinces are further subdivided into prefectures, while townships are further subdivided into villages.

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- ⁶ The AML, *supra* note 2, art. 50.
- ⁷ Potentially applicable statutes include the Anti-Unfair Competition Law, the Price Law, the Telecommunications Regulations, and the Measures for the Administration of Fair Trading for Retailers and Suppliers of the People's Republic of China.
- ⁸ Civil Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong. Apr. 9, 1991, effective Apr. 9, 1991, amended Oct. 28, 2007 and Aug. 31, 2012), translation available at <http://www.inchinalaw.com/wp-content/uploads/2013/09/PRC-Civil-Procedure-Law-2012.pdf>.
- ⁹ Provisions Regarding Applying the Law to Certain Questions when Trying Civil Monopolistic Conduct Cases [hereinafter Anti-Monopoly Interpretation] (promulgated by the Sup. People's Ct. May 8, 2012, effective June 1, 2012), translation available at <http://www.chinaiplawyer.com/full-text-judicial-interpretation-anti-monopoly-law-china-supreme-court/>.
- ¹⁰ "Trial supervision" is a particular form of judicial review practiced in the Chinese system. Please see pages 11-12 for further explanation on trial supervision.
- ¹¹ The list of guiding cases, The Supreme People's Court of the People's Republic of China, <http://www.court.gov.cn/shenpan-gengduo-77.html>.
- ¹² Arts. 9, 10, 11 of the Detailed Implementing Rules on the Provisions of the Supreme People's Court Concerning Work on Case Guidance (promulgated by the Adjudication Comm. of the Sup. People's Ct., Apr. 27, 2015, effective May. 13, 2015), translation available at <https://cgc.law.stanford.edu/home/guiding-cases-rules/20150513-english/>.
- ¹³ The AML, *supra* note 1, art. 3.
- ¹⁴ Anti-Monopoly Interpretation, *supra* note 8, art. 1.
- ¹⁵ The AML, *supra* note 2, ch. 5.
- ¹⁶ *Huawei Technology Ltd. v. InterDigital Technology Corporation, Yue Gao Fa Min San Zhong Zi 306* (Guangdong Higher People's Court, 2013).
- ¹⁷ *Beijing Qihoo Technology Co. Ltd. v. Tencent Technology (Shenzhen) Co. Ltd. & Shenzhen Tencent Computer System Co., Ltd., Min San Zhong 4* (Sup. People's Ct. 2014).
- ¹⁸ Qualcomm Incorporated, Qualcomm Files Complaint Against Meizu in China, (June 24, 2016, 12:29 AM), <http://www.prnewswire.com/news-releases/qualcomm-files-complaint-against-meizu-in-china-300289806.html>.
- ¹⁹ See, e.g., Chunfai Lui, A Landmark Court Ruling in China: Resale Price Maintenance as Examined in the Johnson & Johnson Case, *COMPETITION POL'Y INT'L J.* (Oct. 28, 2013) <https://www.competitionpolicyinternational.com/assets/Uploads/LuiOct-132.pdf>.
- ²⁰ See Part III.A.1, Jurisdiction over Concurrent Torts and Contracts Claims.
- ²¹ More specifically, the People's Courts with first instance jurisdiction over private antitrust litigations of first instance include:
- ICs in the capital cities of 21 provinces: Harbin, Changchun, Shenyang, Shijiazhuang, Lanzhou, Xining, Xi'an, Zhengzhou, Jinan, Taiyuan, Hefei, Wuhan, Changsha, Nanjing, Chengdu, Guiyang, Kunming, Hangzhou, Nanchang, Fuzhou and Haikou
 - ICs in the capital cities of five autonomous regions: Urumqi, Hohhot, Yinchuan, Nanning, Lhasa
 - ICs in two municipalities: Tianjin, Chongqing
 - ICs in five cities under separate state planning: Dalian, Qingdao, Ningbo, Xiamen, Shenzhen
 - ICs designated by the SPC at its discretion
 - IPCs in Beijing, Shanghai and Guangzhou. Guangzhou's IPC is responsible for private antitrust litigations of the first instance within Guangdong province (except Shenzhen).
- ²² Anti-Monopoly Interpretation, *supra* note 8, art. 4.
- ²³ *Id.*
- ²⁴ Civil Procedure Law, *supra* note 7, art. 23.
- ²⁵ *Id.* at art. 34.
- ²⁶ *Id.* at art. 28.
- ²⁷ *ZTE Corporation v. Vringo Inc.*, opinion in Mandarin available at <http://wenshu.court.gov.cn/content/content?DocID=8703a1e5-0cc5-4bf4-929b-1d004e991f9e&KeyWord=反垄断>.
- ²⁸ Anti-Monopoly Interpretation, *supra* note 8, art. 5.
- ²⁹ *Id.*
- ³⁰ *Jing Jiao v. China Unicom (Beijing Branch)*, opinion in Mandarin available at <http://wenshu.court.gov.cn/content/content?DocID=3ac66695-e781-4a48-a6c1-814768b019c4&KeyWord=反垄断>.
- ³¹ Anti-Monopoly Interpretation, *supra* note 8, art. 6.
- ³² Civil Procedure Law, *supra* note 7, art. 119.
- ³³ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

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- ³⁴ See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). A majority of states have enacted statutes allowing indirect purchasers to sue for damages under state law.
- ³⁵ Civil Procedure Law, supra note 7, art. 54.
- ³⁶ Jing-Huey Shao, *Class Action Mechanisms in Chinese and Taiwanese Contexts—A Mixture of Private and Public Law*, 28 *Emory Int'l L. Rev.* 237, 261 (2014).
- ³⁷ Civil Procedure Law, supra note 7, art. 55.
- ³⁸ China Consumers Association (CCA) was established in December 1984 upon the approval of the State Council. As of October 2015, altogether 3,193 sub-associations were established at county-level or above nationwide. CCA provides guidance for sub-associations nationwide on setting up complaint handling offices at the local fields, announcing hotline and mailbox information. By Q1 2015, the CCA nationwide had processed 15.09 million consumer complaints cases since it was established, and has recovered RMB13.8 billion worth of economic loss for consumers. See *China Consumers Association, About Us*, <http://www.cca.cn/En/AboutUs.html> (last visited June 30, 2016).
- ³⁹ Anti-Monopoly Interpretation, supra note 8, art. 2.
- ⁴⁰ The DOJ does not have authority to impose liability, but rather can only make allegations, which must be proven in court if not admitted by the defendant. By contrast, the FTC can and does adjudicate liability in most of its cases, and only in rare types of litigation does it need to go to court (*i.e.*, to enjoin impending mergers to allow administrative adjudication of the FTC's Clayton Act Section 7 complaints).
- ⁴¹ 15 U.S.C. § 16(a).
- ⁴² *Junwei Tian v. Beijing Carrefour Shuangjing Store and Abbott Shanghai*, opinion in Mandarin available at <http://wenshu.court.gov.cn/content/content?DocID=eb0ba701-ece3-4408-90c3-954c5e5b45f3&KeyWord=反垄断>.
- ⁴³ Another reason may be that a class action mechanism is a fairly new addition to China's legal system.
- ⁴⁴ 15 U.S.C.A. § 4; 15 U.S.C.A. § 26.
- ⁴⁵ Civil Procedure Law, supra note 7, art. 100.
- ⁴⁶ The AML, supra note 2, art. 50.
- ⁴⁷ Anti-Monopoly Interpretation, supra note 8, art. 14.
- ⁴⁸ General Principles of Civil Law of the People's Republic of China [hereinafter GPCL] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), translation available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3990&context=lcp>, chap. 6. The GPCL was intended to create a consistent framework for civil law interpretation in China, and is heavily influenced by the German Civil Code. Unlike most civil law jurisdictions, the PRC does not have a comprehensive civil code, and attempts to create one have proven difficult and controversial.
- ⁴⁹ The appellate court sent the case back to the first instance court for retrial due to unclear facts and incorrect application of laws. The case is still pending at the Kunming Intermediate Court. See <http://www.ynxb.com/Content/2016-6/16/N203624082485>.
- ⁵⁰ *Bell Atlantic v. Twombly*, 550 U.S. 544, 559 (2007).
- ⁵¹ Provisions of the Supreme People's Court on Evidence in Civil Proceedings (promulgated by the Judicial Comm. of the Sup. People's Ct., Dec. 6, 2001, effective Apr. 1, 2001), translation available at http://seafarersrights.org/wp/wp-content/uploads/2014/11/CHN_LEGISLATION_EVIDENCE-IN-CIVIL-PROCEDURES_2001_ENG.pdf.
- ⁵² Draft Guideline on Leniency Policies in Horizontal Monopoly Agreement Cases [hereinafter Draft Leniency Guidelines], National Development and Reform Commission, http://www.ndrc.gov.cn/fzgggz/jqjdyfld/fjgld/201602/t20160203_774288.html (February 2, 2016).
- ⁵³ Article 16 of the Draft Leniency Guidelines.
- ⁵⁴ Many Plaintiffs Lose Civil Antitrust Cases, People.com.cn (May 8, 2012), <http://legal.people.com.cn/GB/17836541.html>.
- ⁵⁵ In simple cases, such as family cases, the judge may use simplified and less formal procedures to solve the case. Simple civil cases are often tried by a single judge, and the time limit of the proceeding is shorter than that of the ordinary procedure. See Civil Procedure Law, supra note 7, art. 39; art. 161. Even in cases under summary procedure, however, dispositive motions are not used.
- ⁵⁶ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993).
- ⁵⁷ *Id.* at 584-587.
- ⁵⁸ See Civil Procedure Law, supra note 7, at art. 157.
- ⁵⁹ Anti-Monopoly Interpretation, supra note 8, art. 12.
- ⁶⁰ *Id.* at art. 14.
- ⁶¹ These include experts, witnesses, translators or other persons who need to participate in the litigation.
- ⁶² Civil Procedure Law, supra note 7, art. 9.
- ⁶³ Civil Procedure Law, supra note 7, art. 199.

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- ⁶⁴ Id. at art. 205.
- ⁶⁵ Id. at art. 204. This time limit is not applied to foreign-related civil cases. See Civil Procedure Interpretation, *supra* note 56, art. 539.
- ⁶⁶ Civil Procedure Law, *supra* note 7, art. 206.
- ⁶⁷ The People's Procuratorate is the state organ with the authority to prosecute and oversee the public security agencies. See The National People's Congress of the People's Republic of China, State Structure of the People's Republic of China, http://www.npc.gov.cn/englishnpc/stateStructure/2007-12/06/content_1382077.htm.
- ⁶⁸ Li Zhu, Anti-competition Analysis on Injunctive Relief Regarding Standard Essential Patents (April 20, 2016), http://blog.sina.com.cn/s/blog_5a81db850102w6vf.html.
- ⁶⁹ Legislators, Judges, and Prosecutors to be Selected from Lawyers and Legal Scholars, *Xinhuanet* (June 26, 2016), http://news.xinhuanet.com/2016-06/26/c_1119114239.htm.
- ⁷⁰ See China's Courtrooms Becoming Battleground for Antitrust Disputes, *Mlex Market Insight* (Jan. 6, 2015), <http://mlexmarketinsight.com/editors-picks/comment-chinas-courtrooms-becoming-battleground-antitrust-disputes/>.