



May 21, 2012

Antitrust Law

China's Supreme People's Court Released Judicial Interpretations on the Application of Law in Hearing Civil Dispute Cases Caused by Monopoly

Eric LIU | Haoze LI

On May 8, 2012, China's Supreme People's Court published *Provisions on Certain Issues Concerning the Application of Law in Hearing Civil Dispute Cases Caused by Monopoly* ("the Judicial Interpretations on Anti-Monopoly Law") and held a press conference addressing the background, basic principles and main content of the Judicial Interpretations. In this article, we will set forth, in detail, major provisions of and provide in-depth analysis on these Judicial Interpretations.

1. Anti-Monopoly Civil Lawsuit Accepted by People's Court

1.1 Monopolistic Conducts Defined by Anti-Monopoly Law

According to Article 3 and Article 32 of *the Anti-Monopoly Law of the People's Republic of China* ("Anti-Monopoly Law"), monopolistic conducts include:

- (a) Monopoly agreements reached among business operators;
- (b) Abuse of dominant market position by business operators;
- (c) Concentration of business operators that lead, or may lead to elimination or restriction of competition; and
- (d) Abuse administrative power to eliminate or restrict competition administrative by departments and other organizations authorized by laws or regulations to perform the function of administering public affairs.

1.2 Anti-Monopoly Civil Lawsuit Accepted by the Court

According to Articles 7, 8 and 9 of the Judicial Interpretations on Anti-Monopoly Law, the court may accept the anti-monopoly civil lawsuits arising out of the following monopolistic conducts:

- (a) Monopoly agreements reached among business operators;
- (b) Abuse of dominant market position by business operators; and
- (c) Abuse administrative power to eliminate or restrict competition by administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs.

Compared with the Anti-Monopoly Law, the provisions of the Judicial Interpretations on Anti-Monopoly Law exclude concentration of business operators that lead, or may lead to elimination or restriction of competition from the monopolistic conducts accepted by the courts.

Thus, according to Anti-Monopoly Law, supervision on concentration of business operators shall first be carried out through investigations by the Anti-monopoly Bureau of Ministry of Commerce, and in case an interested party refuses to accept the decision of the Anti-monopoly Bureau of the Ministry of Commerce, it shall first apply for administrative reconsideration; if it refuses to accept the decision made after administrative reconsideration, it may bring an administrative lawsuit before a court.

2. Requirements for A Lawsuit Brought by the Plaintiff

2.1 Standing to Sue

According to Article 1 of the Judicial Interpretations on Anti-Monopoly Law, the plaintiff may be a natural person, a legal persons or other organizations.

2.2 Pre-conditions for Bringing a Lawsuit

Article 53 of the Anti-Monopoly Law sets forth the pre-conditions for an interested party to bring an administrative lawsuit, i.e. that a decision was made by the authority for enforcement of anti-monopoly related laws. However, according to Article 2 of the Judicial Interpretations on Anti-Monopoly Law, a plaintiff may file a civil lawsuit to the court either after the decision made by authority for enforcement of the anti-monopoly related laws which announced that a monopolistic conduct has occurred took effect or directly before such administrative decision is made. In other words, it is not a pre-requirement for bringing civil lawsuit by the plaintiff that the authority for enforcement of the anti-monopoly related laws has made a decision on a monopolistic conduct.

2.3 Causes of Action

According to Article 1 of the Judicial Interpretations on Anti-Monopoly Law, a plaintiff may bring an anti-monopoly civil lawsuit under the following two circumstances:

- (a) The plaintiff suffered damages due to the monopolistic conduct;
- (b) Disputes arising from contracts or charters of industrial associations in violation of the Anti-Monopoly Law.

It is important to note, according to Article 50 of the Anti-Monopoly Law, an operator conducting monopolistic conducts shall only bear civil liabilities when the monopolistic conduct of the operator has caused losses to another person. However, according to the abovementioned provision of the Judicial Interpretations on Anti-Monopoly Law, no matter whether or not the plaintiff has suffered losses , it may file a lawsuit related to any disputes arising from the fact that contracts or charters of industrial associations are in violation of the Anti-Monopoly Law. Compared with Article 50 of the Anti-Monopoly Law, the abovementioned provision of the Judicial Interpretations on Anti-Monopoly Law is more helpful for the public through public lawsuits to supervise the business operators who may carry out monopolistic conducts.

3. Jurisdiction

3.1 Grade Jurisdiction

According to Article 3 of the Judicial Interpretations on Anti-Monopoly Law, the intermediate people's courts shall mainly responsible for the first trial involving monopoly and the primary people's courts serve as a supplement. The first trial involving monopoly shall be under the jurisdiction of the intermediate people's court of a city where the people's government of province or autonomous region is located or of a city specifically designated in the State plan, the intermediate people's court within the jurisdiction of a municipality directly under the Central Government, or the intermediate people's court designated by the Supreme People's Court, or the primary people's court with the approval of the Supreme People's Court.

3.2 Territorial Jurisdiction

According to Article 4 of the Judicial Interpretations on Anti-Monopoly Law, the territorial jurisdiction for civil dispute cases involving monopoly shall be determined in accordance with the Civil Procedure Law and the provisions of relevant juridical interpretations in relation to the jurisdiction over cases involving tort disputes and contract disputes based on the specific conditions of the cases.

3.3 Transfer and Designation of Jurisdiction

Two circumstances for transfer and designation of jurisdiction are provided by Article 5 of the Judicial Interpretations on Anti-Monopoly Law, i.e. where the cause of action at the time of initiation of a civil dispute case is not a monopoly dispute, however, (i) the defendant files any defense or counterclaim on the ground that the plaintiff has committed some monopolistic behavior and there is evidence supporting it, or (ii) the case needs to be ruled in accordance with the Anti-Monopoly Law, but if the court does not have the jurisdiction over civil dispute cases involving monopoly, the case shall be transferred to a people's court with jurisdiction.

4. Burden of Proof

As explained in Section 1.2 hereof, the monopolistic conducts accepted by the courts include: (i) monopoly agreements have been reached among operators; (ii) abuse of dominant market position by operators; and (iii) that administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs abuse their administrative power to eliminate or restrict competition. Article 7, Article 8 and Article 9 of the Judicial Interpretations on Anti-Monopoly Law provide separate rules for burden of proof in respect of the abovementioned three monopolistic conducts, as follows:

4.1 Burden of Proof in Respect of Monopoly Agreements Reached Among Business Operators

Article 7 of the Judicial Interpretations on Anti-Monopoly Law provides that where the alleged monopolistic conduct arose from the fact that monopoly agreements have been reached among operators, the defendant shall bear the burden of proof to prove that the alleged monopoly agreement doesn't have the effect of eliminating or restricting competition.

According to Article 13 of the Anti-Monopoly Law, monopoly agreements refer to agreements, decisions and other concerted conducts designed to eliminate or restrict competition. In other words, "the effect of eliminating or restricting competition" is an essential condition for constituting a monopoly agreement rather than a justified reason for a monopoly agreement. Thus, the burden of proof in Article 7 of the Judicial Interpretations on Anti-Monopoly Law is the rule of inversion of burden of proof that is in favor of protecting the litigation rights of the plaintiff.

4.2 Burden of Proof in Respect of Abuse of Dominant Market Position by Business Operators

Article 17 of the Anti-Monopoly Law prohibits business operators holding dominant market positions from seven kinds of conducts by abusing their dominant market positions.¹

Despite of the abovementioned seven conducts, the Judicial Interpretations on Anti-Monopoly Law only sets forth rules for the burden of proof under the circumstance that commodities are sold at unfairly high prices or bought at unfairly low prices, i.e. "a plaintiff shall bear the burden of proof in respect of allegation that the defendant has the dominant position in the relevant market and has abused its dominant market position. However, the defendant shall bear the

¹ These conducts include: (1) selling commodities at unfairly high prices or buying commodities at unfairly low prices; (2) without justifiable reasons, selling commodities at prices below cost; (3) without justifiable reasons, refusing to enter into transactions with their trading counterparts; (4) without justifiable reasons, demanding their trading counterparts to make transactions exclusively with themselves or with the business operators designated by them; (5) without justifiable reasons, conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions; (6) without justifiable reasons, applying differential prices and other transaction terms among their trading counterparts who are on an equal footing; or (7) other acts of abuse of dominant market positions confirmed as such by the authority for enforcement of the anti-monopoly related laws under the State Council.

burden of proof if such defendant makes a defense to allege the justification of his conduct.” This regulation is the same as the basic principle of burden of proof in civil litigation, “the burden of proof lies upon him who alleges”, and is not a special rule for burden of proof.

Obviously, the Judicial Interpretations on Anti-Monopoly Law makes no efforts to change the situation in practice that it is easy for a plaintiff to lose the case due to difficulties in presenting evidence. Thus, within a certain period, the situations that a plaintiff loses the case as he hardly proves the dominant position by the defendant in the relevant market will continue.

4.3 Burden of Proof in respect of That Administrative Departments and Other Organizations Authorized by Laws or Regulations to Perform the Function of Administering Public Affairs Abuse Their Administrative Power to Eliminate or Restrict Competition

According to Article 9 of the Judicial Interpretations on Anti-Monopoly Law, where the alleged monopolistic conduct belongs to abuse of dominant market position by a public utility enterprise or an business operator that has an exclusive position according to the laws, the People’s Court may, in accordance with the specific conditions of market structure and competition environment, determine that the defendant has the dominant market position unless otherwise reversed by sufficient contrary evidence. The above provision of the Judicial Interpretations on Anti-Monopoly Law authorizes the People’s Courts with the power to assign the burden of proof based on specific cases. Where the People’s Court determines that the defendant doesn’t have the dominant market position, the basic principle of burden of proof, “the burden of proof lies upon him who alleges”, shall apply. Where the People’s Court determines that the defendant has the dominant market position, the rule of inversion of burden of proof shall apply.

5. Source of Evidence

Besides the regular source of evidence provided by *the PRC Civil Procedure Law*, the Judicial Interpretations on Anti-Monopoly Law has special regulations for source of evidence as follows:

5.1 Information Published by Defendant

According to Article 10 of the Judicial Interpretations on Anti-Monopoly Law, the information published by the defendant to the public may be used by a plaintiff to prove that the defendant has the dominant market position in relevant market. Where the information published by the defendant to the public is sufficient to prove that the defendant has the dominant market position, the People’s Court may make a decision based on it, unless otherwise reversed by sufficient contrary evidence. Usually, many monopolizers publish information in public area to promote their dominant market position. This Article of the Judicial Interpretations on Anti-Monopoly Law provides an easy way for a plaintiff to prove.

5.2 Expert Witnesses

Article 12 of the Judicial Interpretations on Anti-Monopoly Law provides that a party may file an application with the people's court for requesting one or two professionals with expertise to appear in court to explain specialized issues of the case.

5.3 Market Research or Economic Analysis Report

According to Article 13 of the Judicial Interpretations on Anti-Monopoly Law, a party may file an application with the people's court for entrusting any special agency or professionals to make a market research or economic analysis report on the specialized issues of the case. The market research or economic analysis report is an expert conclusion in nature. With the approval of the people's court, both parties may determine a qualified institution or expert through consultation; in the event of an unsuccessful consultation, the people's court shall designate.

6. Legal Consequences Suffered by Defendant if He Loses the Case

Section 2.3 of this article introduces two causes of action by a plaintiff. In respect of the two causes, the defendant shall suffer different legal consequences correspondingly if he loses the case:

- (a) In respect of the cause of action that "the plaintiff suffered damages due to the monopolistic conduct", according to Article 14 of the Judicial Interpretations on Anti-Monopoly Law, the defendant shall cease the infringement, to compensate for losses and etc if he loses the case.
- (b) In respect of the cause of action that "disputes arising from contracts or charters of industrial associations that are in violation of the Anti-Monopoly Law", according to Article 15 of the Judicial Interpretations on Anti-Monopoly Law, the People's Court shall determine that the contracts or article of association of an industrial association that is in violation of Anti-Monopoly Law are invalid.

7. Statutory Limitation Period

According to Article 16 of the Judicial Interpretations on Anti-Monopoly Law, the statutory limitation period for right to damages arising from monopolistic behavior is two years, commencing from the date when the plaintiff is aware or should have been aware that his rights were infringed.

Where the plaintiff reports any suspected monopolistic behavior to the authority for enforcement of the anti-monopoly related laws, the statutory limitation period shall be ceased from the date when such reporting is made. And a new statutory limitation period shall be counted from the date when (i) the plaintiff is aware or should have been aware of the decision

not to initiate the case, to withdraw the case or to terminate the investigation, or (ii) the plaintiff is aware or should have been aware that the effectiveness of a decision that the authority for enforcement of the anti-monopoly related laws finds that the said behavior constitutes a monopolistic behavior.

It's important to note, where the monopolistic behavior has already continued for over two years when the plaintiff brings a lawsuit, the plaintiff brings the lawsuit within the statutory limitation period, and the defendant files a defense on the statutory limitation period, the amount of damages shall be calculated based on a period starting from two years before the date when the plaintiff brought the lawsuit to the people's court.

If you have any questions regarding this article, please feel free to contact us.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this publication, please contact any of the following Han Kun lawyers:

Contact Us

Beijing Office

Tel.: +86-10-8525 5500
Suite 906, Office Tower C1, Oriental Plaza
No. 1 East Chang An Ave.
Beijing 100738, P. R. China

Estella CHEN Attorney-at-law

Tel.: +86-10-8525 5541
Email: estella.chen@hankunlaw.com

Shanghai Office

Tel.: +86-21-6080 0909
Suite 5709, Tower 1, Plaza 66, 1266 Nanjing
West Road,
Shanghai 200040, P. R. China

Yinshi CAO Attorney-at-law

Tel.: +86-21-6080 0980
Email: yinshi.cao@hankunlaw.com

Shenzhen Office

Tel.: +86-755-3680 6500
Suite 4709, Excellence Times Plaza, 4068
Yitian Road, Futian District,
Shenzhen 518048, P. R. China

Jason WANG Attorney-at-law

Tel.: +86-755-3680 6518
Email: jason.wang@hankunlaw.com