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China's Top Court Says No to Arbitrability of Private Antitrust Actions

Kai-chieh Chan (International University of Rabat) · Thursday, January 23rd, 2020

Private antitrust actions were long thought to be non-arbitrable due to the public law character of antitrust law, though the scope of non-arbitrability has been reduced to varying extents in different jurisdictions.

For instance, US courts had long adhered to the so-called "*American Safety* doctrine", which limited the arbitrability of domestic antirust disputes.[1)] The scope of this doctrine was subsequently undermined by the US Supreme Court in *Mitsubishi Motors v Soler*, 473 US 614 (1985) (for a previous analysis on the Kluwer Arbitration Blog, *see* here and here).

In China, arbitrability of antitrust actions was largely un-elucidated by the courts. This blog post reports and analyzes the Supreme People's Court's first-ever take on the matter. In it, the Court effectively said no to arbitrability of antitrust actions, at least for those arising out of vertical restraints in the domestic context.

Arbitrability of Antitrust Claims before the Supreme People's Court's Decision: A Tale of Two Cities

The general issue of arbitrability of disputes in China is governed by Articles 2 and 3 of the Arbitration Law of the People's Republic of China ("**Arbitration Law**"). Article 2 states that "equal subjects of law" may arbitrate "contractual disputes and other disputes"; Article 3, in turn, expressly excludes the arbitrability of family law and administrative disputes. The Anti-Monopoly Law of China ("Anti-Monopoly Law") contains no mention of arbitration.

The first significant decision concerning the arbitrability of antitrust claims in China was Nanjing Songxu Technology Co., Ltd. v Samsung China Investment Co., Ltd., issued by the High Court of Jiangsu on August 29, 2016 ([2015] Su Zhi Min Xia Zhong No. 00072) ("***Songxu Case***"). The case concerned a contract to distribute Samsung's products in Jiangsu province. During the performance of the contract, the distributor, Songxu Technology, filed a tort claim against Samsung China, on the basis that the latter abused its dominant market position by tied selling, price fixing and implementing market allocation schemes. Samsung China, on the other hand, raised a jurisdictional objection based on the arbitration clause contained in the agreement.

Referring to Article 2 of the Arbitration Law, the court of first instance ruled that the matter is arbitrable since the parties are "equal subjects of law". However, on appeal, the High Court of Jiangsu overturned the lower court's ruling on three grounds: firstly, the Anti-Monopoly Law and other related rules do not mention the possibility of arbitration as a way of settling antitrust claims; secondly, there was no judicial precedent accepting arbitrability of antitrust claims in China; and thirdly, antitrust claims cannot be arbitrated since antitrust laws aim to protect interests of the public and third parties.

The High Court of Jiangsu's decision has been criticized (see here for one available in English). These criticisms were largely based on the trend that an increasing number of jurisdictions permit antitrust claims to be arbitrated. It was also pointed out that, although China's antitrust laws do not explicitly allow these claims to be arbitrated, they do not exclude such possibility either.

The next significant decision was issued in June 2019. In Shell China Co. Ltd. v Shanxi Changlin Co., Ltd ([2019] Jing Min Xia Zhong No. 44), dated June 28, 2019 ("***Changlin Case*")**, the High Court of Beijing held that an antitrust claim was arbitrable. Shanxi Changlin, a distributor of Shell's engine oil in northern Shanxi province, brought a tort claim against Shell China based on the alleged vertical restraints imposed by the latter. The court of first instance supported the view of the High Court of Jiangsu, finding that it has exclusive jurisdiction over the antitrust claims.

But the decision was reversed on appeal. The High Court of Beijing, pointing to a valid arbitration clause that covers "any disputes relating to the contract", held that Shanxi Changlin, whose claims are "closely associated with the rights and duties stipulated in the distribution contract", must be compelled to arbitrate. The court did not address the reasoning invoked by its counterpart in Jiangsu.

The Supreme People's Court's Decision in *Huili Case*

Shell China was involved in a third and unrelated case on appeal before the Supreme People's Court.

On August 21, 2019, the Supreme People's Court ruled that antitrust claims were non-arbitrable in the case of *Shell China Co. Ltd. v Huili Hohhot Co., Ltd*. ([2019] Zhi Min Xia Zhong No. 47) ("***Huili Case***"). (While the decision is yet to be officially published online, a copy of it has been disclosed by Huili Hohhot's legal team here.) The court of first instance held the antitrust claim to be non-arbitrable on the same ground as that of Jiangsu High Court.

On appeal, the Supreme People's Court agreed with the High Court of Jiangsu's reasoning and added that private antitrust actions are distinct from claims based on contract. The court's reasoning resembles that of the *American Safety* case decided by the US Second Circuit Court of Appeals half a century ago. It seems that the absence of a clear mention of arbitration in the relevant agreements played a crucial role in the court's decision.

The court also seemed to suggest that, unless explicitly provided otherwise, claims concerning "public interest" are non-arbitrable under Article 2 of the Arbitration Law.[2)] This entails significant enforcement risks not only to tribunals seated in China, but also for those seated internationally.

Beyond *Huili Case*: One Step Forward, Two Steps Back?

As the first and only decision of the Supreme People's Court on the matter, the *Huili Case* is arguably the leading authority on the arbitrability of antitrust claims in China. It is submitted, nevertheless, that the jurisprudential value of the case must be taken with a grain of salt.

Firstly, both decisions of the Supreme Court and High Court of Jiangsu invoke the absence of previous domestic precedent admitting the arbitrability of antitrust claims. However, it is regrettable that the Supreme Court could not take the High Court of Beijing's decision into account, since its hearings were held one month prior to the publication of the latter.

Secondly, the common law doctrine of *stare decisis* arguably does not exist in China *stricto sensu*. Under the current "case guidance" system established since 2010, the Supreme People's Court publishes dozens of cases that it regards as constituting *jurisprudence constante*, which possess "factual binding effect". (This is the view held by Judge Zheng Liu of the Supreme People's Court (see here).) As such, nothing will be settled unless *Huili Case* is officially listed as one of them. Considering the criticisms surrounding the Supreme People's Court's approach and the increasingly pro-arbitration stance of the Chinese judiciary (as previously reported on the Blog here), one may wonder if this will ever happen.

Lastly, the jurisprudence on this is likely to evolve with the anticipated amendment of the Arbitration Law and the future judicial interpretations of private antitrust actions.

One way to get around the current jurisprudential chaos is to adopt a principles-based method rather than a rules-based one. Instead of categorically choosing between different approaches, the tribunal may refer to the Supreme People's Court's decision that, while antitrust claims may be non-arbitrable, the Supreme People's Court also leaves room for distinguishing between contract claims and antitrust claims. The tribunal may then decide, on a case-by-case basis, on the proximity between the claim at hand and purely antitrust claims. The more the claim is related to contractual performance, the more it is arbitrable.

The Supreme People's Court's decision can also be distinguished on the basis that it only concerns vertical restraints. In such cases, public authorities may be more willing to step in to protect domestic distributors with less bargaining power against local subsidiaries of multinational corporations. By contrast, antitrust disputes between more "equal" bodies may still be arbitrable: this possibility would include other forms of monopolistic activities ranging from horizontal agreements to the concentration between undertakings.

With the dominance of international trade and commerce involving China, future developments on the arbitrability of antitrust related claims in China will be followed closely.

References

?1 *American Safety Equipment v J.P. Maguire & Co.*, 391 F. 2d 821 (2nd Cir., 1968).

?2 See *e.g.* the case of Hemofarm DD et al. v Jinan Yongning Pharmaceutical Co. Ltd. ([2008] Min Si Ta Zi No. 11), where Article 2 was applied to decide on issues of arbitrability (per Article V(2) of the New York Convention) concerning an ICC award seated in Paris.

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