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Insights

ARBITRABILITY OF ANTITRUST DISPUTES IN PRC AND HONG KONG SAR

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SUMMARY

What should you do when an antitrust dispute arises between the parties and your contract is governed by PRC law or Hong Kong law? Can you resolve the dispute by arbitration? If your contract is governed by PRC law, as suggested by a recent Supreme People's Court case on the arbitrability of an antitrust dispute, the answer is probably no. Whereas if your contract is governed by Hong Kong law, the answer is a firm "no" under the Competition Ordinance, at least if the dispute relates to a statutory claim for compensation under the HK legislation.

INTRODUCTION

Many jurisdictions, including the EU and the US, have accepted the arbitrability of antitrust issues. However, parties involved in antitrust disputes under the laws of PRC or Hong Kong SAR, which are jurisdictions with a shorter history of regulating antitrust issues, may wonder whether they can resolve their antitrust dispute by arbitration? This blogpost briefly will discuss the recent developments under the law of Hong Kong and the law of PRC in relation to the arbitrability of antitrust disputes.

PRC POSITION

The PRC Arbitration Law and the Anti-Monopoly Law do not provide expressly whether monopoly disputes may be resolved by arbitration. However, the Supreme People's Court ("SPC") has provided important guidance in the recent case of *Shell (China) Limited v. Hohhot Huili Material Co., Ltd., Supreme Court Civil Decision, [Zui Gao Fa Zhi Min Xia Zhong (2019) No. 47]* ("*Shell China v Hohhot Huili*") (only available in Chinese), the judgment was handed down on 21 August 2019.

The issue in *Shell China v Hohhot Huili* was whether Huili's claim concerning horizontal monopoly of distribution agreements allegedly organised by Shell fell within the scope of the arbitration clause contained in a distribution agreement made between Shell and Huili. The clause stipulated

that all disputes were to be resolved by arbitration. The case was first heard by the Hohhot Intermediate People's Court and was appealed to the SPC by Shell.

In its appeal, Shell argued that, because there is no express preclusion of arbitration of monopoly disputes under the Arbitration Law, the People's Court should honour the contractually agreed arbitration clause as being valid and binding. After reviewing various provisions in the Anti-Monopoly Law and the Arbitration Law, Shell's appeal was dismissed by the SPC.

The SPC ruled that Articles 10 and 50 of the Anti-Monopoly Law stipulate expressly that monopoly-related cases are to be resolved by administrative sanctions carried out by the State-Council-designated enforcement authority or by civil litigation. These articles make no reference to arbitration. The SPC also held that the effect of Article 2 of the Arbitration Law (which stipulates that disputes over contractual rights and other property rights between citizens, legal persons and other organisations which are equal parties may be arbitrated) is that if a dispute is unrelated to contractual rights or other property rights, and one of the parties already has filed its claim in a People's Court, the People's Court has jurisdiction over the dispute.

The SPC held that the case between Shell and Hohhot Huili was a monopoly-related civil dispute rather than a contractual dispute. Although there was in place a contractually agreed arbitration clause, the issue of whether horizontal monopoly of distribution agreements had in fact been organised was an issue of public interest governed by the Anti-Monopoly Law and should not be regulated by the contractual rights and obligations as stated in the distribution agreement. Therefore, Article 2 of the Arbitration Law was not applicable.

Further, the SPC pointed out that pursuant to Article 2, *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct* (which is a judicial interpretation issued by the SPC taking effect on 1 June 2012), *"[w]here a plaintiff directly files a civil lawsuit with the people's court or files a civil lawsuit with the people's court after a decision of the anti-monopoly law enforcement authority affirming the existence of monopolistic conduct comes into force, if the lawsuit satisfies other conditions for lawsuit acceptance as prescribed by law, the people's court shall accept the lawsuit*". As such, the SPC ruled that PRC law does not provide expressly that monopoly disputes may be resolved by arbitration, and that the arbitration clause in the distribution agreement could not exclude the jurisdiction of the Hohhot Intermediate People's Court to deal with dispute regarding the alleged horizontal monopoly arrangements.

HONG KONG SAR POSITION

In Hong Kong SAR, competition law issues are governed primarily by the Competition Ordinance (Cap 619) ("Ordinance") and related subsidiary legislation. The Competition Commission was established under the Ordinance. The Competition Commission is responsible for investigating, prosecuting and enforcing sanctions in cases which involve arrangements having the object or

effect of preventing, restricting or distorting competition in Hong Kong SAR, in breach of the provisions in the Ordinance. The Competition Commission may institute proceedings before the Competition Tribunal, which was established under the Ordinance as a superior court of record to deal with legal proceedings concerning competition matters. The Competition Commission may make applications regarding alleged contraventions of the competition rules to the Competition Tribunal. The Competition Tribunal has the same jurisdiction to grant remedies and relief, equitable or legal, as the Court of First Instance in Hong Kong SAR.

There is no reference in the Ordinance to compensation claims by a party aggrieved by a competition-law-related dispute being resolved by way of arbitration. In fact, s.108 of the Ordinance provides that no independent proceedings can be brought where the cause of action involves a contravention of a conduct rule. Likewise, only the Commission can bring proceedings in the Tribunal to seek a declaration or finding that there has been a contravention of a conduct rule. This position was confirmed by the Hong Kong Court of First Instance in the case of *Loyal Profit International Development Ltd v Travel Industry Council of Hong Kong* [2016] HCMP 256/2016.

Under s.110 of the Ordinance, there is a statutory right to compensation. S.110(1) provides that one who has suffered loss or damage as a result of a contravention of a conduct rule has a right of action against any person contravening the rule or involved in the contravention. However, s.110(2) provides that such proceedings can only be brought in the Competition Tribunal ("Tribunal"). This is known as a "follow-on" action. It seems therefore that the Tribunal (or the Court of First Instance, if transferred there) has exclusive jurisdiction to deal with such compensation claims.

Other than this statutory right to compensation, parties may seek other remedies for anti-competitive acts, including:-

- Common law economic torts, e.g. inducing breach of contract or causing loss by unlawful means.
- Contractual provisions on restraint of trade. Note, however, that under common law, restraint of trade clauses are regarded as void and unenforceable unless they are (1) designed to protect a legitimate business interest, (2) no wider than reasonably necessary to protect that interest, and (3) not contrary to the public interest. The English courts take a more liberal approach to restraint of trade clauses in the business context (e.g. restrictions on sellers in sale and purchase agreements) than in the employment context (e.g. non-compete and non-solicitation clauses). Under Hong Kong law specifically, a covenant in restraint of trade between an employer and an employee is prima facie unenforceable unless the employer seeking to rely on it can show that the clause is reasonable with reference to a legitimate business interest to be protected and to the public interest – see *Winta Investment (Hong Kong) Ltd v Ng Kam Chit* [2018] HKEC 890. The burden of demonstrating reasonableness is on the party seeking to enforce it.

- Breach of other legislation, e.g. Securities and Futures Ordinance, and the Prevention of Bribery Ordinance.

BCLP PERSPECTIVE

In the PRC, the *Shell China v Hohhot Huili* case on one view seems to have provided important guidance to practitioners that antitrust issues might only be able to be resolved by civil litigation or administrative sanctions. There are, however, two points to consider:

- It must be remembered that PRC primarily is a civil law jurisdiction, which does not uphold the common law doctrine of *stare decisis* (binding nature of precedents). The position of the arbitrability of antitrust issues might not have therefore been settled, although no doubt the recent decision in Shell will be very persuasive in future cases.

- For arbitrations involving PRC parties but seated in a jurisdiction which allows arbitration of antitrust issue, the ruling in *Shell China v Hohhot Huili* also raises the question of whether a foreign arbitral award related to antitrust issues will be recognised and enforced by PRC courts or whether would it be considered unenforceable due to the SPC's recent ruling that antitrust issues are not arbitrable in PRC?

On 2 January 2020, the State Administration for Market Regulation (the "SAMR") issued the "*Announcement of the State Administration for Market Regulation to Seek Public Comment on the Revised Draft of the Anti-Monopoly Law (Draft for Public Comment)*" (市场监管总局就《<反垄断法>修订草案（公开征求意见稿）》公开征求意见的公告) (only available in Chinese). Interestingly, this revised draft of the Anti-Monopoly Law remained silent on whether antitrust issues may be resolved by arbitration, but clarified that the SAMR will be designated by the State Council to enforce the Anti-Monopoly Law (see Article 11 in the revised draft). In other words, while under the proposed amendments of the Anti-Monopoly Law, administrative enforcement by SAMR appears to be the express enforcement agency, it does not totally exclude the possibility of arbitration of antitrust issues. While we will have to wait and see whether more clarity on the arbitrability of antitrust issues will be provided in the final version of the amended Anti-Monopoly Law, such silence might indicate that the SMAR does not consider it appropriate to prohibit expressly the arbitration of antitrust issues, despite the SPC's recent decision of *Shell China v Hohhot Huili*.

In Hong Kong, the position of the non-arbitrability of antitrust issues seems to have more clarity, following codification of the antitrust legal principles into the Competition Ordinance which took effect in December 2015. Nevertheless, an aggrieved contractual party may invoke its statutory right to compensation following on from a decision made by the Competition Tribunal. We are yet to see such a follow-on private action being brought before the Competition Tribunal.

RELATED PRACTICE AREAS

- International Arbitration
- Antitrust

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