

Alerts & Publications

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Judicial Enforcement of the AML

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Chinese emerging competition policy under the Antimonopoly Law of the People's Republic of China ("AML"), like other areas of Chinese law, emphasizes administrative enforcement over judicial enforcement.^[1] However, the AML does also permit judicial enforcement by People's Courts through private actions for damages. Article 50 of the AML provides that "undertakings that cause loss to others as a result of their Monopolistic Conduct shall be liable for civil liabilities in accordance with the laws." People's Courts across China have reportedly received numerous complaints under Article 50. With the release in late 2009 of the first judicial decisions under Article 50 of the AML, Chinese courts have cautiously assumed a greater role in the evolution of Chinese antitrust law.

China's judicial leaders appear to appreciate the complexity of competition issues and the risks of inconsistent or misguided enforcement. The Supreme People's Court (SPC) issued a notice on July 31, 2008 exhorting People's Courts at all levels to study the new AML and stressing the complicated blend of legal and economic issues in competition cases.^[2] That notice assigned actions involving claims under the AML to intellectual property tribunals in the view that AML cases are generally closely related to intellectual property rights, and cases under the Anti-Unfair Competition Law had historically been assigned to the same courts responsible for intellectual property matters.^[3] The SPC has not, however, determined which *level* of court should hear AML cases. The chief judge of the SPC and several scholars have suggested that jurisdiction over AML cases should initially lie in the Intermediate People's Courts.^[4] The Beijing High People's Court has issued regulations placing initial jurisdiction over AML actions in the Beijing Intermediate People's Court.^[5] In December 2008, the Shanghai Second Intermediate People's Court has reportedly established China's first Anti-Monopoly Special Collegiate Bench. The Anti-Monopoly Special Collegiate Bench is unique in that is designed to hear both civil cases under Article 50 and judicial challenges to the enforcement decisions of

administrative agencies under the AML.^[6] Although the SPC is expected to issue “judicial interpretations” of the AML addressing standing, measures of damages, and similar issues, such judicial interpretations have not yet been released.

Sursen v. Shanda

The first substantial judicial decision under the AML involved a dispute between plaintiff Beijing Sursen Electronic Technology Co., Ltd. (“Sursen”) and defendants Shanda Interactive Entertainment Limited (“Shanda”) and Shanghai Xuanting Entertainment Information Technology Co., Ltd. (“Xuanting”).^[7] Sursen contended that Shanda, a leading Chinese operator of on-line games and publisher of other on-line entertainment material, had abused its dominance in the “on-line literature” market by causing two authors to cease writing material for publication on the plaintiff’s website. The material in question was written as a sequel to an on-line novel previously published by other authors on the defendant’s website. On October 23, 2009, the Shanghai First Intermediate People’s Court dismissed Sursen’s claim. The court ruled that the plaintiff had failed to establish that Shanda possessed a dominant position in the market for online literature, noting in part that the plaintiff proclaimed itself to be the world’s largest online book website. Foreign commentators noted that the court did not address the more controversial question of whether Shanda’s conduct might in any event be covered by Article 55 of the AML, which provides that the AML shall “not apply” to the “exercise of intellectual property rights pursuant to the stipulations in laws and administrative regulations relating to intellectual property” but “shall apply to actions taken . . . to eliminate or restrict competition by abusing intellectual property rights.”

Zhou v. China Mobile

Also on October 23, 2009, the Beijing Second Intermediate People’s Court announced the settlement of another abuse of dominance complaint filed by a Chinese lawyer, Zhou Ze, against China Mobile Group Corporation (“China Mobile”) and its subsidiary China Mobile Group Beijing Co., Ltd. (“China Mobile Beijing”) before the Beijing Dongcheng District People’s Court in March 2009.^[8] In China, mobile phone service is controlled by a duopoly of two state-owned companies, China Mobile and China Unicom. Zhou complained that the defendants abused their dominant market position by imposing unreasonable trading conditions and applying differential treatment in violation of Articles 17(5) and 17(6) of the AML. Zhou alleged that China Mobile possessed a 70% market share in China’s mobile phone service market, exercising joint dominance with China Unicom. Zhou complained that China Mobile had abused its dominance by charging him a “monthly rental fee” of RMB 50 as part of the “Go-Tone” plan, even though he owned his own mobile phone.^[9] Zhou also alleged that China Mobile Beijing charged “Go-Tone” users a monthly fee of RMB 50 while charging users of the service brands of “Easy own” and “M-zone” a much lower monthly fee or no monthly fee at all. Zhou challenged these practices as price discrimination in violation of the AML and the Price Law.

According to Zhou, the Beijing Dongcheng District People’s Court accepted the case on March 30, 2009 and conducted a hearing on May 7, 2009. On June 5,

2009, Beijing Dongcheng District People's Court informed the plaintiff that the case had been transferred to Beijing Second Intermediate People's Court, the proper court of competent jurisdiction.^[10] The Beijing Second Intermediate People's Court accepted the case on July 30, 2009, and heard arguments on September 7, 2009 and October 19, 2009.

Under Chinese judicial procedure, courts routinely seek to mediate disputes and recommend settlements before proceeding to judgment.^[11] In this case, both parties accepted a settlement through which China Mobile agreed to permit Zhou to switch to an alternative mobile phone service plan without a monthly fee and to make a one-time payment of RMB 1,000 characterized as a "premium" to Zhou. Accordingly, this highly-publicized litigation did not result in any formal judicial decision entailing the interpretation or application of the AML.

Renren v. Baidu

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The most detailed judicial ruling under Article 50 of the AML emerged on December 18, 2009, when the first Intermediate People's Court of Beijing dismissed claims that Baidu, a leading Chinese language search engine, had abused its dominant market position in violation of the AML.^[12]

The plaintiff, Tangshan Renren Information Service Co. Ltd. ("Renren"), provides information of pharmaceuticals and other medical issues through its website qmyyw.com. Renren's allegations focused on Baidu's "bid ranking" practices. Baidu enters "bid ranking agreements" with website operators through which website operators "bid" for keywords. When an internet user searches for one of the keywords through the search engine, the companies which have bid on the ranking of those keywords will be listed among the top results. The bidding company is charged whenever an internet user clicks its link and enters the web page of the ranked company. To promote traffic to its website, Renren entered a "bid ranking agreement" with Baidu for the period from March 2008 to September 2008. In May 2008, Renren began lowering its bids. According to Renren, it subsequently determined that the number of its pages which could be found through Baidu (regardless of bidding) dropped substantially.^[13] Renren alleged that Baidu had blocked its webpages in response to Renren's reduced participation in bid-ranking, noting that it could find 6690 pages of its website through Google but find only four of its website pages through Baidu.

In October 2008, Renren filed an administrative complaint with the SAIC alleging that Baidu had abused its dominant position.^[14]^[15] On December 25, 2008, Renren filed a complaint with the First Intermediate People's Court of Beijing. Renren alleged that Baidu's conduct constituted an abuse of dominance, and sought compensation of 1.106 million RMB and the unblocking of its website pages.

The court formally accepted the complaint on January 6, 2009.^[16] On April 22, 2009, the court conducted a hearing involving testimony from technical experts from both parties.^[17] On December 18, 2009, the court announced the judgment.

First, the court agreed with the plaintiff that the relevant market was the market

for “that the “search engine services in China,” rejecting Baidu’s claim that services provided to consumers for free could not be considered a “market.” Second, the court ruled that the plaintiff had failed to prove that Baidu was dominant in this mark. Although the plaintiff had submitted articles from business periodicals estimating Baidu’s market share between 65% and 70%, the court considered such evidence insufficient to “to assure the court that the market share is determined based on scientific and objective analysis” because the underlying data and methodology was not provided. Third, the court accepted Baidu’s argument that any reduction in the ranking of Renren’s pages was pursuant to Baidu’s published policy of downranking websites affected by “hyperlink cheating,” a practice whereby website operators embed hidden or irrelevant contents in their pages to manipulate page rankings. Baidu submitted notarized reports indicating that Renren’s pages contained many “junk hyperlinks.” Accordingly, the court concluded that such measures would be “justified” under Chapter III of the AML, and hence should not be considered an “abuse of dominance.” Accordingly, the court dismissed all charges against Baidu.

These decisions represent the first steps in Chinese antitrust jurisprudence. Although China’s quasi-civil system does not treat precedents as binding, judicial rulings in high-profile cases often reflect informal consultation among courts at different levels and careful consideration of government policies. These rulings may signal the judiciary’s wariness of inviting frivolous abuse of dominance claims or undermining critical industrial policies or economic reforms with a liberal approach to abuse of dominance claims. Decisions on more provocative issues--ranging from complaints of abusive IP licensing practices by allegedly dominant foreign firms or challenges to alleged cartels among former or current SOE’s--lie ahead, and it remains to be seen whether the SPC will confront novel issues with a sweeping judicial interpretation or leave these questions to the lower courts. In any event, the Peoples’ Courts are now active players in the development of antitrust with Chinese characteristics.

[1] See Zhonghua Renmin Gongheguo Fanlongduan Fa [Antimonopoly Law of the People's Republic of China], (promulgated by the Standing Committee of the National People's Congress on Aug. 30, 2007 and effective on Aug. 1, 2008), available at <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371229&pdmc=11006> (visited Oct. 7, 2007). An unofficial English translation is available as an appendix to Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, Antitrust Source, Oct. 2007, <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf>. References and quotations herein are based on this English translation.

[2] See Zuigao Renmin Fayuan Tongzhi Yao Qieshi Yifa Shenlihao Gelei Fanlongduan Anjian [Notice of Supreme People’s Court on Hearing Antimonopoly Cases According to Law], July 31, 2008, available at <http://www.chinacourt.org/html/article/200807/31/314776.shtml> (visited November 6, 2009); Zuigao Renmin Fayuan Minshi Anjian Anyou Guiding [Supreme People’s Court Regulations on the Cause of Civil Action] was issued on March 3, 2008, available at http://www.2008red.com/member_pic_538/files/xnhbs/html/article_723_1.shtml (visited November 6, 2009).

[3] See Gaofa Zhichanting Fuzeren Kong Xiangjun Tan Zhongguo Zhishi Chanquan Sifa Baohu Xianzhuang [Chief of Intellectual Tribunal of the Supreme People's Court Kong Xiangjun Talks About Current Status of China's Intellectual

Property Rights Protection], March 9, 2009, *available at* <http://www.court.gov.cn/html/article/200903/09/632.shtml> (visited November 18, 2009).

[4] See Zuigao Renmin Fayuan Xingzhengting Fuzeren Tan Fanlongduan Fa Shiyong Wenti [Chief of Administrative Tribunal of the Supreme People's Court Talks about Issues Related to Application of Anti-Monopoly Law], November 3, 2008, *available at* http://www.legaldaily.com.cn/2008fjdt/2008-11/03/content_973516.htm (visited November 18, 2009); Also See Fanlongduan Minshi Guansi Mianlin Zhongduo Shuobuqing Zhuanjia Xiance [Anti-Monopoly Civil Actions Facing Many Unclear Issues Experts Propose Ideas], October 28, 2008, *available at* http://www.shanghang.gov.cn/dzsw/qysw/flfw/qyal/200907/t20090707_20265.htm (visited November 18, 2009).

[5] See Article 2.2.3 and 4.1 of Guanyu Beijingshi Geji Renmin Fayuan Shouli Diyishen Zhishi Chanquan Minshi Jiufen Anjian Jibie Guanxia De Guiding [Regulations on the Hierarchical Jurisdiction of the People's Courts of Beijing at All Levels in Cases of the First Instance of Civil Disputes over Intellectual Property Rights], issued by Beijing High People's Court on June 3, 2008 and effective on the same date, *available at* <http://bjgy.chinacourt.org/public/detail.php?id=34321> (visited November 16, 2009).

[[6]] See Xitan Fanlongduan Zhuanxiang Heyiting Sheli Zhi Youlai [Discuss in Details the Origin of the Establishment of the Anti-Monopoly Special Collegiate Bench], *available at* <http://www.chinaipmagazine.com/journal-show.asp?id=375> (visited December 16, 2009).

[7] See Quanguo Shouli Wangluo Yunying Longduan An Yishen Xuanpan Shengda Shengsu [First Instance of China's First Anti-Monopoly Case on Network Operation Determined, Shanda Won], October 26, 2009, *available at* <http://www.ipr.gov.cn/bzpx/iprzs/jjzn/zzq/gajx/562068.shtml> (visited November 16, 2009); Also see Zhongguo Shouli Fanlongduan Wangluo An Yishen Xuanpan [First Instance of China's First Network Anti-Monopoly Case Determined], October 23, 2009, *available at* <http://www.caijing.com.cn/templates/inc/webcontent.jsp?id=110291885&time=2009-10-23&cl=100&page=all> (visited November 16, 2009).

[8] See "Zhong Yidong Bei Su Longduan An Hejie Jiangli Yuangao Yiqian Yuan" [Anti-Monopoly Case Against China Mobile Settled, Plaintiff Got One Thousand RMB as Premium], October 27, 2009, *available at* http://news.xinhuanet.com/tech/2009-10/27/content_12336944_1.htm (visited November 17, 2009); The plaintiff has disclosed a summary of the case and the court claim he submitted on his blog, *available at* <http://zhouze.blog.sohu.com/134885568.html> (visited November 17, 2009).

[9] "Go-Tone" is high-end service brand of China Mobile that can support international roaming service. China Mobile also has low-end brands such as "Easy own" and "M-zone". Generally it has been difficult or cumbersome to switch to other brands of a mobile phone service provider while keeping the same phone number in some regions of China, e.g. See Beijing Yidong Xiehao Huan Taocan Qidong [China Mobile Launches Services Permitting Plan Changes with the Same Phone Number], March 17, 2009, *available at* http://news.china-b.com/itdt/20090317/977846_1.html (visited November 16, 2009); Xiehao Huan Taocan Xiaofeizhe Reng Bu Ziyou [Changing Plans with the Same Phone Number Consumers's Hands Are Still Tied], March 20, 2009, *available at* <http://news.cnfol.com/090320/101,1587,5620516,00.shtml> (visited November 16, 2009).

[10] See Article 2.2.3 and 4.1 of Guanyu Beijingshi Geji Renmin Fayuan Shouli Diyishen Zhishi Chanquan Minshi Jiufen Anjian Jibie Guanxia De Guiding [Regulations on the Hierarchical Jurisdiction of the People's Courts of Beijing at All Levels in Cases of the First Instance of Civil Disputes over Intellectual Property Rights], issued by Beijing High People's Court on June 3, 2008 and effective on the same date, *available at* <http://bjgy.chinacourt.org/public/detail.php?id=34321> (visited November 16, 2009).

[11] See Article 9 of Zhonghua Renmin Gongheguo Minshi Susong Fa (2007)

[Civil Procedure Law of People's Republic of China (2007)], amendment promulgated by the National People's Congress on October 28, 2007 and effective on the same date, *available at*

http://www.chinacourt.org/flwk/show.php?file_id=122225 (visited November 18, 2009).

[12] See corporate introduction of Baidu, *available at*

<http://home.baidu.com/about/about.html> (visited December 21, 2009).

[13] See Baidu Zaoyu Zhongguo Wangluo Fanlongduan Diaocha Diyi An [Baidu Facing China's First Internet Anti-Monopoly Case], Legaldaily.com.cn, *available at* <http://www.sdrdlf.gov.cn/html/ggtz/zyxx/1554.html> (visited December 21, 2009).

[14] See Baidu Zaoyu Guonei Fanlongduan Diaocha, Shenqingren Jianyi Fakuan 1.7 Yi Yuan [Baidu Facing Domestic Anti-Monopoly Investigation, the Applicant Requested a Fine of 170 Million Yuan], Chinanews.com, Nov. 10, 2008,

available at <http://www.chinanews.com.cn/08/11/10/15000144>